This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and section number under which the point will eventually appear in the American Digest System. The lawyer is led from that syllabus to the exact place in the Digest where we, as digest makers, have placed the other cases on the same point —***This is the Key-Number Annotation***

National Reporter System—United States Series

THE

FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 190

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE

CIRCUIT COURTS OF APPEALS, CIRCUIT AND DISTRICT COURTS, AND COMMERCE COURT OF THE UNITED STATES

NOVEMBER—DECEMBER, 1911

ST. PAUL
WEST PUBLISHING CO.
1912

(190 FED.)

JURISPRUDENCE

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE CIRCUIT AND DISTRICT COURTS, AND THE COMMERCE COURT

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. WILLIAM SCHOFIELD, Circuit Judge.....Malden, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. WALTER C. NOYES, Circuit Judge.....New Haven, Conn.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York[1].....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....Washington, D. C.
Hon. WILLIAM M. LANNING, Circuit Judge.....Trenton, N. J.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

[1] Died October 9, 1911.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Charleston, W. Va.

FIFTH CIRCUIT

Hon. JOSEFH R. LAMAR, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT

Hon. JOHN M. HARLAN, Circuit Justice[2].....Washington, D. C.
Hon. HENRY F. SEVERENS, Circuit Judge[3].....Kalamazoo, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge[4].....Kalamazoo, Mich.
Hon. JOHN W. WARRINGTON, Circuit Judge.....Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. ALEXIS C. ANGELL, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. ARTHUR C. DENISON, District Judge, W. D. Michigan[4].....Grand Rapids, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan[5].....Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....Toledo, Ohio.
Hon. WM. L. DAY, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee....Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[2] Died October 14, 1911.
[3] Resigned to take effect October 3, 1911.
[4] Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.
[5] Appointment effective October 3, 1911, in place of Arthur C. Denison, District Judge.

SEVENTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPRHEY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin[*].....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
Hon. CHAS. A. WILLARD, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri..Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. Oklahoma.....Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington..Seattle, Wash.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, Or.
Hon. GEORGE DONWORTH, District Judge, W. D. Washington.....Seattle, Wash.

[*] Died October 7, 1911.

COMMERCE COURT

Hon. MARTIN A. KNAPP, Presiding Judge.....Washington, D. C.
Hon. ROBERT W. ARCHBALD, Associate Judge.....Washington, D. C.
Hon. WILLIAM H. HUNT, Associate Judge.....Washington, D. C.
Hon. JOHN E. CARLAND, Associate Judge.....Washington, D. C.
Hon. JULIAN W. MACK, Associate Judge.....Washington, D. C.

CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE CIRCUIT AND DISTRICT COURTS AND THE COMMERCE COURT

WILLIAMSON v. BERLIN MILLS CO.

(Circuit Court of Appeals, First Circuit. September 5, 1911.)

No. 908.

1. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE.

On an issue as to a master's alleged negligence in using a particular vibration collar on a shaft in a paper mill, it was not error, as a matter of law, to refuse to permit a witness to state whether a specimen collar shown him was in general use, and what kind of collars were in general use; he having testified that his knowledge was limited to the practice in three mills where he had worked, and there being nothing otherwise to show that he possessed knowledge regarding the general practice called for.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80–87; Dec. Dig. § 37.*]

2. MASTER AND SERVANT (§ 284*)—DEATH OF SERVANT—ACTS—QUESTION FOR JURY.

In an action for the death of a servant by his clothing becoming caught by a revolving shaft or vibration collar thereon, evidence *held* to justify submission to the jury of the question whether decedent was in the line of his duty when injured or was attending to matters of his own concern.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.*]

3. MASTER AND SERVANT (§ 89*)—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT—PLACE.

A servant, though in a place where his duty requires him to be, may nevertheless so conduct himself at the time of injury as to be outside of the scope of his employment, so as to relieve the master from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153–156; Dec. Dig. § 89.*]

4. TRIAL (§ 296*)—MISLEADING INSTRUCTIONS.

Instructions that if decedent went down into or towards the vat, near which he received injuries from which he died, and stepped on the edge of a storage tank to discuss the result of the decision in a certain case, and in going there went where it was not his duty to go and for a purpose not contemplated as part of, nor incidental to, the discharge of his duty, he went at his own risk, and could not recover, and if he was through with his work, and went down to the place where he was injured for a purpose in no sense connected with his duty, he went there at his own risk, and, if injured, his administratrix could not recover, were not objectionable, as misleading the jury to believe that decedent,

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in order to have been in the line of his duty, must have been actually performing some service at the very time of the accident; the court having further charged that if he was going along by the vat in the performance of his duty, and incidentally stepped or momentarily halted to talk about the trial in question, it would not be such a complete departure as would prevent a recovery as a matter of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713; Dec. Dig. § 296.*]

In Error to the Circuit Court of the United States for the District of New Hampshire.

Action by Maria Williamson, as administratrix of the estate of William Williamson, deceased, against the Berlin Mills Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Jesse F. Libby and Herbert I. Goss, for plaintiff in error.

George F. Rich (Rich & Marble and Drew, Shurtleff & Morris, on the brief), for defendant in error.

Before COLT, Circuit Judge, and BROWN and DODGE, District Judges.

DODGE, District Judge. The jury found for the defendant, and the plaintiff excepted to certain instructions in the charge. The plaintiff also excepted to the exclusion of certain evidence on her behalf at the trial. We consider first the exception which relates to the exclusion of evidence.

Plaintiff's intestate, William Williamson, was killed on February 11, 1908, in a paper mill at Gorham, N. H., belonging to the defendant, wherein he was at the time employed as an oiler. During the period of his employment, and during the hours within which he was expected to be performing his duties, his clothing became in some way entangled by a revolving shaft or the vibration collar thereon. He was thereby carried around the shaft and fatally injured.

The declaration alleged, among other things, that the defendant's machinery, tools, and appliances were unsafe, unguarded, and defective, "by reason of certain set screws and bolts projecting from an iron collar attached and fastened to the revolving shaft," and that by reason of the defendant's negligence in providing and using such defective shaft, collar, projecting bolts, and set screws unguarded her intestate was caught by said screws and bolts projecting from the iron collar and thereby injured as above. The alleged defects and negligence were denied by the defendant.

Upon the questions whether the vibration collar referred to was unsafe, or whether it was negligence to use such a collar, the plaintiff called as a witness one McLaughlin, who testified that he had worked for a considerable time in the mill where the accident occurred, had also worked in other paper or sulphite mills in Livermore Falls, Me., and in Lincoln and Portsmouth, N. H., for various lengths of time, and that at the Portsmouth mill he had been superintendent from 1903 to 1905, having the duty of overseeing the whole plant and reporting anything unsafe. He further testified that in the places where he had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

worked he had had occasion to observe machinery, shafting, etc., and been apt to notice shafting in nearly all forms. Asked if he knew what kind of vibration collars were in general use on shafting, his answer was that he did, so far as his experience had been, in mills which he had been in; i. e., two mills in New Hampshire and one in Maine, within the previous five or six years. He stated that in paper and pulp mills there were different systems of machinery, shafting and the like, that the same kind of system would be similarly located, and that the general arrangement of machinery in regard to the shafting driving it, the kind of machinery used, and the place where it was located was similar in all the mills referred to.

[1] The plaintiff asked this witness to state whether a specimen collar shown him was in general use, and what kind of collars were in general use. The court excluded these questions, ruling that the witness was not shown to be qualified to state what was in general use.

The plaintiff contends that, although the witness could only have stated what collars were used in the particular mills wherein he had worked, he ought to have been allowed to answer the question, because his answer would have tended to show the kind of safety collars which other men of ordinary prudence and caution, engaged in a similar business, were accustomed to use, and would thus have been some evidence of what could have been and ought to have been done by the defendant. For the purpose suggested the general practice of other employers in similar lines might no doubt have been shown, so far as it related to shafting situated as this was, not out of reach, but where persons moving about the mill might get too near it. A witness, however, who professed knowledge only of the practice in certain mills where he had worked, and was not otherwise shown to possess knowledge regarding the general practice referred to, was not manifestly competent to testify regarding it. We cannot say that the ruling upon the preliminary question as to the witness' qualification was clearly erroneous as matter of law. And, if not, we must regard it as conclusive, according to the ordinary rule. Stillwell, etc., Co. v. Phelps, 130 U. S. 520, 527, 9 Sup. Ct. 601, 32 L. Ed. 1035. A vibration collar produced by this witness, claimed to be safer than the vibration collar which caused the accident, was said by him to have been in use where he had worked, and to have been available, and this part of his evidence the jury were permitted to consider. We are unable to sustain the exception whereon the first assignment of error is based.

[2] The instructions claimed to have been erroneous related to the question whether Williamson was in the line of his duty when injured. The plaintiff, in her second assignment, asserts that it was error to submit this question to the jury at all, because there was no evidence to justify a finding in the negative.

The case went to the jury upon the plaintiff's evidence, at the close whereof the defendant rested without calling witnesses. There was thus no conflict of evidence as to the facts.

There was no dispute that the relation of master and servant existed between the defendant and Williamson; that his place of service

was in the ground woodroom of the defendant's mill; that he went to the mill at the appointed time on the day he was killed, and entered upon the performance of his duties there in the usual manner; that when not otherwise employed it was his duty to be "around the filters" in the room above mentioned; or that he was "around" those filters at the time of his death. The plaintiff contended that, if all this was true, Williamson must be regarded as in the line of his duty when injured, however he may have happened to be occupied at the particular moment. The defendant contended that certain further facts in evidence showed him not to have been in the line of his duty at the time.

The facts in evidence here material may be stated as follows: Williamson's duties were to oil the machinery of certain grinders on the floor of the room above mentioned whenever necessary, and when not engaged in that work to be in a part of the same room elevated some 15 feet above its floor, where certain filters were located, in order to watch their operation, regulate the flow of water into and out of them from storage tanks below them, and oil the machinery connected with them as required. There were five of these filters in line, 5 feet or more apart, each consisting of a vat wherein a cylinder was rotated by machinery placed between it and the next vat. Power was communicated to this machinery by means of five belts, connecting the rotating apparatus of each vat with a long countershaft revolved by other machinery and running parallel with the line of vats at a level somewhat above them and at a distance from them, measured horizontally, of about 25 inches. The countershaft was 58 feet long, and at one end, opposite the filter at that end of the row known as "No. 5," it carried the vibration collar said to have caused Williamson's injury.

Williamson's oversight and regulation of the filters and their operation involved cleaning the rotating cylinders in them, as required, by using appliances connected with them for the purpose. His duties regarding the filters required him to be at them or near enough to them to watch what went on in or about them, when he was not oiling the grinders, or going down to or coming up from them. Stairs from the floor on which they were gave access to the elevated part of the room where the filters were, at the end of the line of filters, and nearest the No. 5 filter above mentioned. From them a walk or platform ran along the line of filters on the side furthest from the countershaft, and across from it at each end of the line to a parallel walk beyond the countershaft. This platform ran at a level some 18 inches or 2 feet below the tops of the filter vats and 42 inches below the level of the countershaft. In the space inclosed by the platform were contained the filters with the machinery which rotated their cylinders, the connecting belts, and the countershaft itself, together with other machinery or appliances not requiring special mention. There was no platform or walk within this space. It could be entered from the platform on one side by stooping under the countershaft, from the platform on the opposite side by getting between the filter vats, or from the platform at either end by going between the countershaft and the filter vat at that end. It was sometimes thus entered by men perform-

ing Williamson's duties. Passage along it between the filters and countershaft was obstructed by the connecting belts referred to, when in operation. Most of the duties required of Williamson at the filters were performed from the platform described.

On the day of the accident there were only four of the five filters requiring any care or attention from him. The No. 5 filter was out of operation, and the belt connecting its machinery with the countershaft had been removed. Repairs were being made on the cylinder in its vat by two millwrights. Williamson had no duties in connection with their work.

There was no witness who actually saw the accident happen, but immediately before it happened, and when he was last seen uninjured, Williamson was in the space between the No. 5 filter and the revolving countershaft, where there was no platform, and only a few boards put there temporarily by the millwrights, having no implement of work in his hands, and engaged in conversation with the millwrights then working on that filter. He was leaning as he talked on the vat belonging to the filter and standing on the edge of the storage tank below it, which edge was three or four inches wide. In this position the revolving countershaft and collar were only a few inches behind his back and not far above the level of his shoulders, so that he would be likely, unless he were careful, to get against them when he stood or straightened up. His conversation with the millwrights, so far as appeared, had no relation to his duties or anything connected with the mill, but was about the then recent "Thaw trial." When last seen before getting into the position described, he was on the walk or platform beyond the countershaft, wiping oil from an oil can in his hands. It would have been possible to go between the filters and the countershaft from where he stood while leaning on the No. 5 tank to the No. 4 filter, which, being in operation, was one of those which it was part of his duty to watch.

Men performing Williamson's duties had no particular place provided for them to sit or remain in, and were not required to stay in any particular place while "around the filters." Nor were any instructions given them as to the method of doing their work. Each was left to select the time for doing the various things called for by his duties and the manner of approach to the particular places which his duties made it necessary for him to visit from time to time.

There was no direct evidence as to Williamson's purpose in leaving the platform, stepping down into this position between the No. 5 filter and the countershaft, and remaining there as stated. It may therefore be conceded, as the plaintiff urges, that the jury might have found that he went there either to proceed on his rounds of oiling, or to ascertain the amount of water in the No. 5 tank, or to watch the work on the No. 5 vat, and thus learn when he could use that filter. They could so have found only by inference from the circumstances shown. We think it clear that they might equally well have found, by the like process, that he did not go to or remain in the position described for any of the purposes suggested, or any purpose connected with his duties, but was, for the time being, interrupting

the performance of those duties and staying in a place of danger merely for a purpose of his own, not contemplated as part of his duties and not incidental to them.

The question was rightly left to the jury, unless it can be said, as matter of law, that there was no evidence upon which the latter finding could have been made. The instruction to that effect, which the plaintiff requested, could have been justified only upon the plaintiff's theory that Williamson could not have been outside the line of his duty so long as he was "around the filters" with which his duties in that part of the room were concerned.

[3] We cannot accept this theory as sound. Though in a place where his duty requires him to be, a servant may nevertheless so conduct himself as to be outside the scope of his employment, as, for example, if he undertakes, while there, work different from that which he is hired to do, without orders or permission from his employer. It may be admitted that actual performance of work at the given moment need not be shown, and that, had nothing else appeared, except that Williamson was "around the filters" subject to orders and ready for any work incumbent upon him at any time, there would have been nothing tending to show him outside the line of his duties. Harvey v. Texas, etc., Co., 166 Fed. 385, 398, 92 C. C. A. 237. We think, however, that what did further appear as to his position and occupation at the given moment forbade the instruction requested by the plaintiff and required the course taken by the learned presiding judge. The question is one for the jury in most cases. Labatt, Master and Servant, § 634.

[4] The third and fourth assignments of error relate to the instructions which were given in submitting the question to the jury. In substance these instructions were that, if Williamson went down into or toward the vat and stepped on the edge of the storage tank to discuss the result of the decision in the Thaw case, and in going there went where it was not his duty to go, and for a purpose not contemplated as part of nor incidental to the discharge of his duty, he went at his own risk and could not recover, and that if Williamson was through with his work, and went down into this place for a purpose in no sense connected with his duty, he went there at his own risk, and, if injured, his administratrix could not recover, because he was not injured while in the line of his duty.

These instructions are objected to on the alleged ground that they amounted to laying down the doctrine that in order to be in the line of his duty a servant must at the very time of the accident be actively performing some service. But the jury were also instructed that if Williamson was going along by the vat in the performance of his duty, and if his stop at the vat was an incidental side step or momentary halt for the purpose of making a little talk about the Thaw trial, it would not be such a complete departure as to prevent recovery as matter of law. In view of this instruction, we cannot suppose the jury to have been misled in the direction suggested.

The same instructions are further objected to on the alleged ground that, instead of the question submitted, the jury should have been re-

quired to say whether or not the master, in the exercise of ordinary care, ought to have anticipated that the servant would go to the place of injury—if yes, whether or not that place was reasonably safe. But these were questions which the jury could have been required to determine only upon the assumption that the servant was in the line of his duties when injured. We have already held that they were rightly left to decide whether he was so or not.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

SEATTLE ELECTRIC CO. v. HOVDEN.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

No. 1,920.

1. NEGLIGENCE (§ 87*) — CONTRIBUTORY NEGLIGENCE — CARE REQUIRED AS AGAINST NEGLIGENCE OF ANOTHER—MENTAL CAPACITY.

In determining the question of the contributory negligence of a plaintiff injured, primarily, through the negligence of defendant, plaintiff's want of mental capacity may be shown and considered, and he can only be held to the exercise of such faculties as he is endowed with by nature to appreciate and guard against the danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 118; Dec. Dig. § 87.*]

2. STREET RAILROADS (§§ 98, 117*)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

Plaintiff, crossing a street on which there were two street railroad tracks near the middle of a block, after passing around a car standing on the track nearest to her, was struck and injured by a car on the other track moving in the opposite direction. She had seen the car approaching, but at a distance of about 400 feet, and there was evidence tending to show that it was running at twice its lawful speed, which fact she did not know. *Held*, that she had the right to assume that it was not running at an unlawful speed and could not be held chargeable with contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204–208, 239–257; Dec. Dig. §§ 98, 117.*]

3. STREET RAILROADS (§ 98*)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

A pedestrian in crossing a street railway track is not a trespasser on the right of way of the street railroad company, nor bound by any strict rule of law, as when he approaches a steam railroad crossing, to stop, look, and listen, nor to take special precautions to determine whether there is danger in going upon the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204–208; Dec. Dig. § 98.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action at law by Lena Hovden against the Seattle Electric Company. Judgment (180 Fed. 487) for plaintiff, and defendant brings error. Affirmed.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

James B. Howe, Hugh A. Tait, and E. M. Carr, for plaintiff in error.

Martin J. Lund, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. While attempting to cross a street, not at a regular crossing, but near the middle of a block, the defendant in error was struck and injured by a passing street car. She had seen the car coming in her direction, but distant, according to her testimony, about 475 feet from where she stood. A car going in the opposite direction and on the side of the street nearest to her had stopped in front of her. She passed around the rear end of it, and came in contact with the car which injured her. In her complaint she alleged negligence, in that the car was running at a dangerous rate of speed, to wit, at a rate of 30 miles an hour, and without warning or signals of any kind. There was evidence tending to show that the car was run at a speed of from 20 to 25 miles per hour, and greatly in excess of the lawful speed, which was 12 miles per hour, and that no warning was given by ringing the bell, or otherwise. At the close of the testimony the plaintiff in error moved for an instructed verdict in its favor on the ground that the contributory negligence of the defendant in error had been conclusively proven. The motion was denied. A verdict for damages was returned in favor of the defendant in error. The plaintiff in error moved for a judgment notwithstanding the verdict, which was overruled by the court. Thereupon judgment was entered upon the verdict.

There was evidence tending to show that the defendant in error, although she was of mature age and had lived in Seattle two years, and was acquainted with the running of the street cars, lacked the intelligence and capacity to care for herself which is possessed by the average adult person of ordinary understanding and intelligence. On that ground the court below denied the motion for nonsuit and, after the submission of all the evidence, denied the motion for a peremptory instruction to the jury to return a verdict for the plaintiff in error.

The plaintiff in error contends that there was no evidence to warrant the jury in finding negligence on its part. This contention is not sustained by the record. We are not called upon to deal with the weight of the evidence. It is sufficient to point to the fact that there was testimony tending to show the high rate of speed of the car, already mentioned, and the failure to give warning or signals.

But it is said that the court erred in denying an instructed verdict on the ground of the contributory negligence of the defendant in error, and it is urged that, the defendant in error having seen the car before attempting to cross the street, it was her duty to look out for it, and that in crossing as she did she was negligent as matter of law. Ordinarily the question of contributory negligence is to be determined by the jury from all the facts and circumstances of the

particular case; but there are cases where the standard of duty is fixed, and is defined by law, or where but one inference is deducible from the admitted or proven facts. In such a case it is the court's duty to withdraw the question of negligence from the jury. We are to inquire whether this is such a case.

[1] On the question of the contributory negligence of the defendant in error as affected by her mental condition, counsel for the plaintiff in error contend that all adult persons possessed of sufficient intelligence to go about the streets without the necessity for guardianship to keep them out of harm's way should be held to a uniform rule of responsibility for contributory negligence, for the reason that it would be impracticable to frame varying rules of responsibility for varying degrees of intelligence, citing Worthington v. Mencer, 96 Ala. 310, 11 South. 72, 17 L. R. A. 407. But in Baltimore & Potomac R. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447, the Supreme Court announced a broader doctrine of limitation of responsibility for contributory negligence in such cases, and said:

"In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. The defendant is primarily liable for his own negligence and can only escape liability for nonobservance of such precaution as his observation or the experience of others teaches him to be necessary, by proving the accident would not have occurred if the plaintiff had taken such precautions as his own observation and experience had taught him to be necessary."

The instruction of the court to the jury to which error is assigned was in harmony with the views thus expressed by the Supreme Court.

[2] But, aside from the question just discussed, an examination of the record in this case does not convince us that under all the facts and circumstances the defendant in error, even if she had been possessed of ordinary capacity and intelligence, in proceeding across the street as she did was so imprudent that her conduct constituted negligence as a matter of law. Before attempting to cross the street she had observed, as she testifies, the car which subsequently injured her approaching, but at a distance of approximately 500 feet. With the car at that distance, she might well have exercised less care and watchfulness without the imputation of negligence than would have been required of her had the car been nearer. She estimated that she would have ample time to cross the street safely before the car could travel the intervening space. Her estimate, according to her testimony, would have been correct if the car had been running at a lawful rate of speed. She testified that she did not observe the speed of the approaching car, and there is no evidence to the contrary. She had the right to assume that it was not proceeding at an unlawful rate of speed.

[3] A pedestrian in crossing a street railway track is not bound to take such precautions as are demanded of one who crosses a railroad track. He is not a trespasser on the right of way of the street

car company. He is not bound by any strict rule of law, as when he approaches a steam railroad crossing, to stop, look, and listen, or to take special precautions to determine whether there is danger in going upon the track. Robbins v. Springfield Street Railway, 165 Mass. 30, 42 N. E. 334; Finnick v. Boston & N. C. St. Ry., 190 Mass. 382, 77 N. E. 500; Detroit United Ry. v. Nichols, 165 Fed. 289, 91 C. C. A. 257; Tacoma Street Ry. Co. v. Hays, 110 Fed. 496, 49 C. C. A. 115; Callahan v. Philadelphia Traction Co., 184 Pa. 425, 39 Atl. 222.

The judgment is affirmed.

EXCELSIOR DRUM WORKS et al. v. BORTEL et al.

(Circuit Court, N. D. New York. July 27, 1911.)

1. PATENTS (§ 39*)—INVENTION.

In making a structure having two adhering layers of wood veneer or other material in strips, the placing of the strips so as to break joints does not constitute patentable novelty or invention; such construction being old in the mechanical art generally.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 46; Dec. Dig. § 39.*]

2. PATENTS (§ 328*)—INVENTION—HORNS FOR TALKING MACHINES.

The Ruggiero and Bougiorno patent, No. 770,024, for a horn for phonographic and similar machines, composed of separate layers of fibrous material in longitudinal strips so arranged as to break joints, and the Cunnius patent, No. 784,385, for a trumpet for talking machines similarly constructed, preferably of wood, are both void for lack of patentable invention in view of the prior art; also *held* not infringed, if conceded validity.

In Equity. Suit by the Excelsior Drum Works, Lipman Kaiser, and Alfred R. Cunnius against Albert B. Bortel and Charles I. Bortel, trading as the Wooden Phonograph Horn Company. On final hearing. Decree for defendants.

Martin & Jones (Howard S. Okie and John P. Croasdale, of counsel), for complainants.

Howard P. Denison, for defendants.

RAY, District Judge. The complainant, Lipman Kaiser, owns United States letters patent to Ruggiero et al., No. 770,024, dated September 13, 1904, and the complainants Lipman Kaiser and Alfred R. Cunnius own the patent to Cunnius, No. 784,385, dated March 7, 1905. The complainant Excelsior Drum Works is sole and exclusive licensee under both patents.

The defendants are the makers and sellers of horns at Syracuse, N. Y., for phonographic and other similar machines, and the patents in suit relate to horns used for the same purpose. Claim 1 of the Ruggiero patent is in issue here, and reads as follows:

"1. A horn for phonographic and similar machines, composed of separate layers of fibrous material, each of said layers being composed of separate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

longitudinal strips arranged so as to break joints, substantially as shown and described."

In the specifications the patentees say of their alleged invention:

"This invention relates to horns for phonographic and similar machines and the object thereof is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines and also produce a full, even, and continuous volume of sound, in which the articulation will be clear, full, and distinct. The invention is fully disclosed in the following specification, of which the accompanying drawings form a part, in which the separate parts of our improvement are designated by suitable reference characters in each of the views, and in which Figure 1 is a perspective view of our improved phonographic horn; Fig. 2, an end view thereof, and Fig. 3 a longitudinal section. In the practice of our invention we provide a horn *a*, composed of separate layers of longitudinally-arranged strips, a^2, said strips being preferably composed of wood or similar fibrous material. In the construction shown three of the separate layers are employed, as shown at a^3, and each of said layers is composed of six of the separate and longitudinally-arranged strips a^2. The separate layers a^3, which make up the horn *a*, may be secured together at the edges by glue or in any suitable way, and in practice said layers are preferably formed separately and inserted into each other, or the outer layer is first formed and the second and third layers inserted thereinto, and in this operation the outer surface of the second and third layers are covered with any suitable glue or adhesive material, and the separate parts or layers of the horn are thus securely held together and make up, in effect, a single homogeneous construction. Instead of forming the separate layers separately and inserting one within another, as hereinbefore described, the inner layer may first be formed and the separate longitudinal strips of the second layer secured thereon, after which the separate longitudinal strips of the outer layer may be secured in position, and in either event the separate layers are so connected as to break the joints thereof, as clearly shown in Figs. 1 and 2. In the smaller end of the horn *a* is secured a short tube *b*, which is larger at its outer than its inner end, and this tube is also composed of wood or similar fibrous material and is intended to strengthen the smaller end of the horn, and in practice I secure on the smaller end of the horn a sleeve *c*, which is preferably composed of metal and which is also intended to give strength to the smaller end of the horn and facilitate the attachment of the horn to the machine without injury to the smaller end of the horn. It will be understood that the general form of the horn may be the same as other devices of this class, and the larger end thereof may be bell-shaped, if desired, and the connections of the horn with the machine is made in the usual manner. By means of our improvement we provide a horn for the purpose specified which will produce a constant and continuous volume of sound, in which the articulation will be clear, full, and distinct and which will not produce the mechanical, vibratory, and metallic sound usually produced by instruments of this class as heretofore constructed."

Claim 2 of the Ruggiero patent (not in issue here) reads as follows:

"2. A horn for phonographic and similar machines, composed of separate layers of fibrous material, each of said layers being composed of separate longitudinal strips arranged so as to break joints, and the smaller end of the horn being provided with a tube of fibrous material which is secured therein, substantially as shown and described."

This differs from claim 1, in that the small end of the horn is provided with a tube of fibrous material.

Claims 1 and 2 of the Cunnius patent are in issue, and read as follows:

"1. A trumpet for talking machines, comprising a conically-tapering body composed of a number of layers, the outer layer being composed of tapering strips separated by spaces tapering inwardly from the larger end of said body, a reinforcing-rim surrounding the body at said larger end, and filling-pieces retained by said rim and extending inwardly into said tapering spaces.

"2. A trumpet for talking machines, comprising a conically-tapering body made of layers of tapering strips, the strips of each layer being separated by spaces tapering inwardly from the larger end of the body and breaking joints with the strips of the adjacent layer, an outer reinforcing-rim surrounding the body at the larger end thereof, filling-pieces retained by said rim and extending inwardly into the tapering spaces of the outer layer, and similar filling-pieces inserted in the spaces between the strips of the inner layer."

The patentee says of his invention:

"This invention relates to an improved trumpet for talking machines of all kinds which combines lightness with strength and resistance against injury by being dropped or from other causes, always preserving its original shape and appearance; and the invention consists of a trumpet for talking machines comprising a conically-tapering body composed of a number of layers, the outer layer being composed of tapering strips separated by spaces tapering inwardly from the larger end of said body, a reinforcing-rim surrounding the body at said larger end, and filling-pieces retained by said rim and extending inwardly into said tapering spaces. * * * My improved trumpet is made of conical shape and of thin strips, preferably of wood, which taper from the mouth to the inner small end. The body of the trumpet is made of two superposed layers of tapering strips *aa'* the strips *a* of the inner layer breaking joints with the strips *a'* of the outer layer, as shown clearly in Fig. 2. The tapering strips are diminished in width toward the smaller end of the trumpet, some of them being terminated at some distance from the same, while others run through, so as to form a small tubular end *e*. The small end of the trumpet is surrounded by a layer *d* of waterproof material—such as Japan cloth, hard rubber, or other suitable material—which serves as a handle for the trumpet and also for reinforcing the ends of the tapering strips at the small end of the trumpet. The outer end or mouth of the trumpet is reinforced by an exterior rim *r* of wood or other suitable material, and the spaces between the exterior strips adjacent the rim are ornamented by short rounded-off strips or filling-pieces *p*, that impart a conical edge to said strips, and thereby an ornamental appearance to the outer wider end or mouth of the trumpet. Filling-pieces *p'* are also interposed between the strips of the inner layer in the same manner, as shown in dotted lines in Fig. 1. The rim *r* holds the short filling-pieces *pp'* and the layers of tapering strips *aa'* in position and imparts increased strength and finish to the mouth of the trumpet. The filling-pieces form a uniform continuous support for the reinforcing-rim *r*, serving thereby, in addition to the rim, for strengthening the outer end or mouth of the trumpet. As the trumpet is preferably made throughout of wood, it acts in the nature of a sounding-board and transmits the sounds spoken into the same in a better manner than the hard rubber or other trumpets used heretofore for talking machines and the like. Besides, the trumpet is more durable, as it can be dropped without injury or denting of the same, and it is also cheaper than the usual trumpets of brass and similar material."

It will be noticed that both claims of the Ruggiero patent are confined to a horn composed of separate layers of fibrous material, and that each of the layers is composed of separate longitudinal strips so arranged as to break joints. It will also be noticed that the patentees say:

"It will be understood that the general form of the horn may be the same as other devices of this class, and the larger end thereof may be bell-shaped

if desired and the connections of the horn with the machine is made in the usual manner."

The horns shown in the drawings are made of straight strips made in a triangular form, and, while the specifications say nothing of a round horn, I assume one was intended, as Fig. 2 shows this, and, if not round, it would be difficult for the strips of the one layer to break joints with those of the next layer. With thin strips of wood or other fibrous material this form is easily obtained. It is also easy to see that the patentee had in mind and in fact refers to horns made bell-shaped at the outer end. This shape is easily obtained with such material, as is well known, by simply slitting the outer end of the strip at the large or outer end of the horn, and bending them outwardly. The open spaces thus formed are covered and closed by the next layer made to break joints. Instead of merely slitting, triangular pieces may be cut out and removed if desired, and the opening covered by other strips or by the next layer properly cut.

The quotations from the specifications of the Cunnius patent describe what Ruggiero clearly had in mind, although Cunnius' horn is a conically tapering body, but it is made or formed in the manner already described. He has "a reinforcing-rim surrounding the body at said larger end (of the horn) and filling-pieces retained by said rim and extending inwardly into said tapering spaces." Round peach baskets, common in all markets and groceries, formed of strips of wood coming together at the small end and fastened or held by a reinforcing hoop or rim, and also having a reinforcing rim at the large or flaring end or top of the basket, are so common and well known that, having seen one, a correct idea of the structure of the Cunnius horn is at once in mind. True, in the horn the open spaces of the peach basket structure are closed by other strips, but this is matter of detail merely. The filling strips of the Cunnius patent may overlap the main strips or be inserted in the open spaces and glued. You may have two or more layers, the one structure inserted within the other. Having in mind the old speaking trumpets of metal and its uses, well known, I fail to find anything approaching patentable invention in either of the horns described in these patents, unless it be the putting together of the strips of fibrous material so as to form a horn composed of wood or other fibrous material. But this was clearly shown and described in the prior art, except that one layer was not inserted within another so as to break joints therewith.

Prior Art.

When the application for the Ruggiero patent was filed, it had five claims, viz.:

"1. A horn for phonographs and similar machines, composed of separate layers of fibrous material, substantially as shown and described.

"2. A horn for phonographic and similar machines, composed of separate layers of fibrous material, each of said layers being composed of separate longitudinal strips, substantially as shown and described.

"3. A horn for phonographic and similar machines, composed of separate layers of fibrous materials, each of said layers being composed of separate longitudinal strips, and the smaller end of the horn being provided with a

tube of fibrous material which is secured therein, substantially as shown and described.

"4. A horn for phonographic and similar machines, composed of separate layers of fibrous material, and in the smaller end of which is secured a reinforcing tube of fibrous material substantially as shown and described.

"5. A horn for phonograph and similar machines, composed of separate layers of fibrous material and in the smaller end of which is secured a reinforcing tube of fibrous material, said smaller end being also closed by a metal sleeve, substantially as shown and described."

These claims were rejected July 27, 1904, by a communication as follows:

"This application has been duly examined. It is old in this art to construct a horn or megaphone from a layer of strips of fibrous material. See Meyers, April 10, 1900, 647,147 (181—27), or Villy, Sept. 29, 1903, 739,954 (181—27). It is not believed that it would constitute invention to multiply the layers and to make the horn of two or more layers of strips instead of one layer of strips. The patent of Meyers, cited, and the patents of Merriman April 4, 1899, 622,379 (181—27), and Frost, July 8, 1884, 301,711 (46 Toys sounding), which discloses sleeves for the smaller end of the horn or megaphone and, it is held that it could not constitute invention to make this element of construction from fibrous material, the acoustic properties of fibrous material being of course well known. The claims must be rejected for want of patentable invention and novelty in view of the patents cited above as constructed."

[1] The present claims were then substituted and the idea of and provision for breaking joints was inserted, and then the substituted claims were allowed. So arranging that the two layers of strips break joints seems to have been held a new and novel idea and a structure composed of two layers of wood, the one layer breaking joints with the other, seems to have been deemed patentable. Such structures have been old for more than a century. In the Meyers patent of April 10, 1900, No. 647,147, which invention the specifications say "relates to sound transmitters or disseminators for phonographs, megaphones and similar machines; and the objects of the same are to produce a device designed to be attached to any ordinary sound-producing instrument and which will project or disseminate the sound in all directions radially from the instrument," we are shown both the straight and bell-shaped horn, which are made of a fibrous nonmetallic material, and says Meyers:

"As shown in Figs. 3 and 4, the horn or tube which I may use is made of cardboard or similar light and durable material, and such tubes may be made to occupy but little space in shipping, and at the same time be inexpensive and very efficient in use. When thus made, I take a piece of cardboard and score or crease it at intervals, or a sufficient number of strips *22* of cardboard or similar material and lay them edge to edge and attach to one or both faces thereof a piece of textile fabric *23*, permitting one edge *24* of the fabric to project beyond the outer strip of the series. This edge may be readily gummed, so that the tube can be readily finished by moistening the gummed edge and attaching it to the opposite edge to complete the tube, or I may use other means for securing the edges. These tubes may thus be shipped flat or folded and can be easily made up by the purchaser. To make the tubes easily attachable to the reproducer-nipples any suitable number of spring-fingers *25* may be connected to the small end of the tube, and a wire ring *26* may be inserted into the large end of the tube to give the necessary strength to the device, or I may use a flat or flanged ring for

the end of the tube. Tubes made in this way may have a coating of aluminum paint or bronze to give them a metallic luster. I have found that tubes or horns made of a non-metallic material have a tendency to obviate the screeching sound so common in phonographs, and, besides, their lightness in weight makes them particularly desirable for my purpose."

It thus appears that the objections to the metallic horn were well known, and that it was also taught by Meyers that the use of a fibrous material such as cardboard would do away with these objections. His horns were bell-shaped as well as straight and composed of "a sufficient number of strips *22* of cardboard or similar material" placed edge to edge and united by strips or a covering of some textile fabric. He inserted a wire ring *26* in the large end of the horn to give the necessary strength, or he says, "I may use a flat or flanged ring for the end of the tube"; also, "tubes made in this way have a coating of aluminum paint or bronze to give them a metallic luster." In Meyers, instead of using two or more layers of fibrous material, the one within the other and breaking joints, a layer of textile material was used, glued on, which covered the joints of the cardboard strips. This horn had the advantage of being collapsible, the rings mentioned, when in place, holding the frame rigidly in position. It is obvious that a substitute of wood or other fibrous material would have served the same purpose as the textile fabric, except its use would have made the horn noncollapsible. I do not think the substitution discloses patentable invention.

In patent to Villy, No. 739,954, dated September 29, 1903, he shows and describes a bell-shaped horn in his cut, and says:

"I make the end *a* of trumpet-like or curved configuration with an enlarged outer end and a smaller end at the interior of the conoidal-like form. I make this enlarged and trumpet-like device by employing a series of strips *b* of paper, wood, linen, or other preferably flexible material, the foundations of which I prefer to make of linen or the like," etc.

Also:

"The outer ends of the segmental-like strips I prefer to protect by a bent or turned over edging *d* of metal making the connection rigid by pressing a portion of the strip of metal or other binding material into the edge of the paper or the like foundation."

In the patent to Merriman of April 4, 1899, No. 622,379, he says:

"The body portion of my megaphone consists of a conical tube 2 of the usual or any approved construction it being ordinarily made of leather, board, chemical fiber board or analogous material. * * * At the opposite or large end of the body portion of a megaphone it has been customary to attach a stiffening and strengthening rim of wood or metal."

He also describes his rim. At the small end he has a metallic tube which is made "of such size and taper that it will fit closely around the small end of the body portion *2*." The parts are assembled by slipping the one within the other. The body of this horn is not double its entire length, but there is clearly suggested a horn of more than one layer of material especially when made of strips. The patent to Sheble of May 10, 1904, No. 759,639, describes the objection to metal horns fully, and overcomes, or seeks to overcome, same by

covering the horn of sheet metal with a woven fabric, same being glued to the metal portion.

The patent to Hogan of May 7, 1901, No. 673,396, shows a horn or trumpet for phonographs, the main body of which is made of a sheet of celluloid, ising glass, gelatin, or the like; "the sheet being so cut that when its edges are brought together it takes the required shape." "The outer or layer end of the trumpet thus made is slightly flared. * * * A collar or bell *D*, of sheet metal is employed to form the finish or outer end of the trumpet," and this bell portion has a sleeve or extension, and the body portion is slipped through this so that the one shuts or closes upon the other.

The patent to Smith of March 6, 1900, shows and describes a horn in this art made in tapering sections fitting one within the other successively, and having a flaring bell-shaped end. These sections are made of sheet metal or other hard substance (might be of wood or cardboard), and the elbow of the horn is connected with the tubular end of the reproducer through "a sleeve or lining of fibrous or hard but practically nonresonant material whereby all metallic, foreign, or rattling sounds of the machine are eliminated from the amplifier." He also says the large end section or bell portion may be of metal, in which case he prefers to interpose a tubular lining. The prior art clearly taught the construction of horns of this description made of strips and also of sections of wood, cardboard, and the like material, and also taught the reason for the use of such material. It also taught the construction of same with a bell-shaped end. It taught the double construction, one part within another, and also the reinforcing rings to maintain the strips in place. Prior publications taught the construction of a horn with a series of layers of thin wood or veneer glued together, and this was practiced long before the patents in suit were applied for. The prior art did not point out specifically the construction of the patents in suit, or state that a horn made of thin strips of fibrous material suitably cut and glued together might be reinforced and strengthened by building another on the outside with the strips thereof so arranged as to break joints with those of the first, as we would lay shingles on a house or double board a barn or other structure.

August 17, 1901, one John C. Zeigenborn filed an application for a patent, in which he said:

"As shown in the drawings the horn *A* is preferably composed of an inner layer of veneer *a*, an outer layer *b*, and an intermediate layer *c*, although any desired numbers of layers may be used. In constructing the horn, the sheets of veneer are cut into triangular shape, substantially as shown in Figs. 3, 4, and 5, and wrapped successively around a suitable conical-shaped form (not necessary to be shown), and securely glued together. The meeting edges of each layer are beveled and lapped to effect a tight and firm joint as indicated at *d* in Fig. 2. * * * The inner layer *a* and intermediate layer *c* are composed of comparatively soft wood, preferably white wood, and the outer layer *b* is composed of harder wood, preferably mahogany. The inner and outer layers have their grains extending lengthwise of the horn, and the intermediate layer has its grain extending transversely as will be seen by reference to Figs. 3, 4, and 5."

He made and amended claims accordingly:

"6. As an improved article of manufacture, a horn for phonographs and analogous sound-reproducing machines, consisting of a conical shell composed of an inner and an outer layer of veneer, each disposed with its grain extending lengthwise the horn, and an intermediate layer disposed with its grain extending transverse the horn, the inner and intermediate layers being of one kind of wood and the outer layer being of another kind as set forth. * * *

"10. A horn for phonographs and analogous sound-reproducing machines, comprising a plurality of conically bent sheets of veneer united telescopically and contiguously, said sheets each having its meeting edges beveled and lapped one upon the other and securely united, and bands surrounding the ends of the horn to securely bind the sheets together substantially as described."

This application was denied on the prior art.

[2] With this prior art before me, it is impossible for me to see any patentable invention disclosed by the improvements in this art, if any, by either of the patents in suit. The application was denied until the feature of breaking joints in the successive layers of wood was introduced. That this did not introduce patentable novelty, or even novelty of any kind into this application, has been decided in this circuit. Brunswick-Balke-Collender Co. v. Phelan Billiard Ball Co., 79 Fed. 85, 87, 24 C. C. A. 451. The syllabus is as follows:

"The Collender patent, No. 228,879, for a pool-ball frame with rounded interior and exterior corners, and made of layers of wood bent into triangular shape, and glued or fastened together, the layers preferably breaking joints, is void, as being the result of mere mechanical skill. 76 Fed. 978, affirmed."

The court said:

"The second claim is for a frame of curved or rounded corners, and made of a series of layers or veneers of wood, glued or fastened together, and bent into triangular shape. Preferentially, the ends can be joined together at different places on the frame, so as to break joints and secure greater strength. The novelty, in addition to the rounded corners, consists in the method of construction, whereby additional strength is imparted to the frame. It would hardly be claimed that the described mode of construction by layers of wood joined together is a new method of making any wooden article or structure, but it undoubtedly was a new method of making this article; and it made the frame stronger, and less liable to crack or to be strained at the corners. In like manner, the iron curve of the wagon reach in Hicks v. Kelsey, 18 Wall. 670, made a better, more durable, and more solid wagon reach than the pre-existing reach, which had a wooden curve, with or without strengthening straps of iron. But these advantages, the court thought, resulted from superiority of construction, and were the product of mechanical judgment in regard to the use of materials. The improvement in this case is of the same mere mechanical character. The decree of the Circuit Court is affirmed, with costs."

Within well-known rules of construction these patents, in view of the prior art and publications, are and must be limited to the precise construction shown and described. So limited, this defendant or these defendants do not infringe.

Defendants' Horn.

The defendants' horn proper is made of a single piece of thin wood or cardboard or other like material so cut or slitted at its outer or bell-

shaped end that the slit portions may be bent or curved outwardly to form the bell shaped portion. In so cutting or slitting triangular pieces may be cut out entirely. These open spaces, when the main body is bent into shape, may be filled by triangular sections glued in, or first filled in this way, and then another or added section may be glued on in such position as to break joints thus adding to the strength of the horn. But this is mere mechanical skill well known and, as seen, held by the Circuit Court of Appeals in this circuit, Wallace, Lacombe, and Shipman, to fall short of patentable invention even if a new mode of construction as applied to the particular art as it was in that case. The probability is that those judges had seen a house covered with wooden shingles breaking joints so as to shed water and at the same time bind the roof more firmly as one whole; or a barn boarded in the ordinary manner with batten strips added, covering the cracks between the boards put on side by side, so as to break joints with the foundation boards nailed to the framework; or a brick or stone wall where masons for centuries have so laid the stone and brick as to break joints, and thus bind and prevent the wall from falling to pieces. Fig. 4 of Meyers patent of 1900, No. 647,147, plainly shows this idea of breaking joints, although the one layer was of cardboard and the other of some textile fabric. So to fill in a triangular space with a triangular piece of wood or metal of suitable size is not, to my mind, such a discovery in this century as to entitle one to a patent for so doing and applying it in this particular art. It may have been entirely new to Ruggiero and Cunnius and the examiners in the Patent Office, but was old in this art and old in the mechanical art generally, especially carpentry and cabinet making, so old that an intelligent court should take judicial notice of it. In any event it is so proved in this case.

The application for the Ruggiero patent was filed June 24, 1904, and that for the Cunnius patent October 11, 1904, and there is no proof carrying the date of their discoveries, alleged inventions, back of those dates respectively. From 1900 to 1907 John C. Zeigenhorn was engaged in the manufacture of wooden horns of this description and for use in this art at Syracuse, N. Y., and in 1907 he sold out his business to these defendants. Commencing in 1901, Zeigenhorn, defendants' predecessor in business, made and sold wooden horns for use in this art of three-ply veneer and some of two-ply with the joints of the layers overlapping or broken; that is, the ends of each layer where they came together were beveled so that one beveled end overlapped the other beveled end. The joints of the one layer were at a different point from the joints of the next layer. In other words, the different layers broke joints with each other. He also added to the horn proper veneer strips on the outside and his horn had a bell-shaped end—small to be sure—but this goes to degree only. He also made a horn composed of separate longitudinal strips so arranged as to break joints. (See Exhibit Zeigenhorn No. 3.) The Exhibit Zeigenhorn No. 1 is made of three layers of wood or fibrous material, tapering strips of light and dark wood, and these break joints as an examination of the exhibit shows. He also had a wooden

rim on the outer or large end of these horns. All is plainly shown by the evidence of Zeigenhorn, Andrew S. White, Ross L. Andrews, and horn Exhibits 1, 2, and 3 made by Zeigenhorn as well as by Fig. 2 of Zeigenhorn's application for a patent. To give additional strength, Zeigenhorn so cut his wooden veneer as to have the grain of the wood extend lengthwise in the inner and outer layers and transversely in the intermediate layer. These horns were all round, and had a small tubular end for connecting the horn proper with the machine. The strips of Meyers and Mitchell extending from end to end of the horn and with the overlapping fabric forming the main body of the horn and the strips of Villy extending the entire length of the bell portion of his horn and the construction of Zeigenhorn are substantially identical with that of the patents in suit. There is change of form and degree, but not of principle of construction.

Hence, taking the horn made and sold by the defendants and complained of here, we find that it follows the prior art, excluding Ruggiero and Cunnius, substantially and closely, except that its longitudinal strips do not extend the entire length of the horn as is the case in some of the prior art. In both Ruggiero and Cunnius they describe, show, and claim a horn made of strips which extend the entire length of the body of the horn proper. Ruggiero is a substantial duplication of what Zeigenhorn, defendants' predecessor in business, was making and selling in 1901, 1902, and succeeding years, and long before Ruggiero applied for his patent. The enlargement of the outer end of the horn in the manner shown by Cunnius does not disclose patentable invention in view of the prior art and analogous arts. The horn now made by defendants is not made up of strips running substantially the entire length of the horn, and, even if Ruggiero and Cunnius disclose patentable invention, in view of the prior art, they are confined to what is shown and described, and defendants do not infringe. In view of the prior art, they have the right to make the bell portion by slitting and inserting and making same of two or more layers. And, as we have seen, they do not infringe by making these layers break joints as the ordinary mechanic would do. I have not referred to the ornamental features of either horn. Neither Ruggiero nor Cunnius have a design patent. Naturally they would so cut and shape the strips as to make the horn attractive in appearance if possible. Defendants have the right to do the same thing even if they copy the shape of the Cunnius horn. It is not enough that a thing should be new in the sense that the shape and form in which it is produced or put on the market should not have been known before, and that it should be useful, but it must under the Constitution and patent laws amount to an invention or a discovery. Hill v. Worster, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. Ed. 502; Thompson v. Boisselier, 114 U. S. 1, 5 Sup. Ct. 1042, 29 L. Ed. 76. As stated, we have no new idea or principle or discovery as distinguished from mere mechanical skill in either Ruggiero or Cunnius. No new function performed; no new or improved result. Simply a change of form to an extent perhaps, and to an extent, in some details, a change in mechanical construction (but nothing

new in the mechanical art). This is not invention. Atlantic v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, and numerous cases.

I hold in view of the prior art that the patents in suit are invalid as failing to disclose patentable invention, and that, conceding validity and giving to them the very narrow and limited construction to which they are entitled, defendants do not infringe.

There will be a decree dismissing the bill, with costs.

JOHNSON v. JOHNSON.

(Circuit Court, D. New Jersey. September 11, 1911.)

1. PATENTS (§ 240*)—INFRINGEMENT—IMPROVEMENT PATENTS.
Where a patent sued on and one alleged to infringe are not pioneer patents and do not embody a primary invention, but are both only for improvements on the prior art, and defendant's machine can be differentiated, the charge of infringement cannot be maintained.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. § 240.*]

2. PATENTS (§ 328*)—INFRINGEMENT—TENNIS COURT MARKER.
The Johnson patent, No. 850,936, for an improvement in tennis court markers, is an improvement patent only, and, if conceded invention over prior structures, must be narrowly construed, and is not infringed by the machine of the Johnson patent, No. 929,597.

In Equity. Suit by William A. Johnson against Adolph Johnson for infringement of letters patent No. 850,936, granted April 23, 1907, to complainant, for improvement in tennis court markers. On final hearing. Decree for defendant.

E. W. Marshall, for complainant.
Ewing & Ewing (George H. Gilman, of counsel), for defendant.

RELLSTAB, District Judge. The complainant is the patentee. In his application for such letters patent he declares the object of his invention "is to provide a simple and efficient apparatus for marking lines upon a surface, such as a tennis court, football field, etc." Claims 2, 4, and 6 alone are involved in this suit. They are as follows:

"2. A receptacle, a running-gear therefor, a brush and a flexible connection between the receptacle and the brush."
"4. A wheeled receptacle adapted to be moved across a surface, an outlet pipe, a brush associated with said pipe, the brush being arranged to bear upon said surface, and means for producing a constant pressure of said brush upon the surface."
"6. A wheeled receptacle, a handle therefor, an outlet valve connected with said receptacle, a brush, a hollow flexible connection between the valve and the brush, and means for operating said valve from the handle."

The alleged infringing machine is made under letters patent No. 929,597, issued to defendant July 27, 1909. The applications for both these patents encountered opposition in the Patent Office. The claims of complainant corresponding to those in suit, with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

others, were rejected on Jakob, No. 776,329, November 29, 1904. Subsequently claims 2 and 6, without amendment, and claim 4, after inserting "constant" before "pressure," were allowed. Defendant's claims were rejected on complainant's patent, but after reconsideration were allowed without amendment.

The defenses are the usual ones of invalidity and noninfringement. A number of patents were set up as anticipations. Only two, however, were discussed and relied upon at the argument: British patent No. 14,837, granted to Frank S. Mitchell in 1892; and the Jakob patent, already mentioned. These four devices all employ a tank to hold the marking fluid, mounted on a wheeled carriage easily moved over the surface to be marked; an outlet pipe attached to this tank, which leads to the marking element; and valves in the outlet pipe to control the passage of the fluid. The alleged invention in each of these devices subsequent to Mitchell's is confined to the marking element and the means of carrying the fluid to it from the tank or receptacle.

The prior art showed that the marking was done either by scattering a dry material onto the ground, or, when liquid was used, prior to the advent of the Mitchell patent, impressing it on the ground by rolling a wet tape or wheel rim over it. The Mitchell device—the pioneer, so far as disclosed by the record—introduced the use of a circular or flat brush as the marking element. The marking fluid passed from the tank into the brush through an outlet tap, and on and into the ground to be marked by bringing the extremities of such brush into contact with such surface, and keeping it in regular contact therewith, by the assistance of a spring so placed as to bear downwards upon the stock of such brush. Mitchell, in setting forth the prior art, stated:

"Hitherto in such markers it has been generally customary to lay down the marking liquid by means of a traveling band or revolving wheel."

And in stating his invention, its purpose, and the method of operation, he said:

"This invention consists essentially in constructing the marker with a revolving or other brush which will force the marking liquid well into the ground over which it travels, the brush being held in contact with the ground by a spring or weight. * * * The marking liquid is applied to the periphery of the brush as it rotates by the tap *G*, this tap is provided with a lever *g* attached or connected to the chain or cord *E* so that when the brush is raised out of contact with the ground the tap is at the same time shut off and the flow of the liquid stopped."

Referring to his flat brush, he said:

"Instead of a circular rotary brush, a flat brush *H* may be used, to which the marking liquid is supplied from a tap in the tank or container as before preferably through the center of the brush by it being made hollow. The brush *H* can be formed as part of the tap *G'*, as shown; the raising of the brush serving to close the tap. The brush *H* is held against the ground with the desired pressure by the spring *F* and may be lifted by the chain *E*. The action of the brush in applying the marking liquid is to force it in amongst the roots of the grass or the pores of wood, stone, or other material forming a floor, and so render the marking more durable than when merely laid lightly upon the surface, as is usually the case."

The idea of forcing the liquid well into the ground is also expressed in his first claim, and the means used were well adapted to carry out such idea.

The Jakob device was patented 11 years later, and, judging by the language employed in stating the changes contemplated by such device, seemingly in ignorance of the British patent, employs an elbow discharge pipe to conduct the liquid from the tank to the brush. The patentee in this connection said:

"This elbow pipe is provided with a suitable globe valve *14*, and upon the lower end of said pipe is secured an adjustable telescopic section of pipe *15*, which is held in its adjusted position by screws *16 16*, carried by said pipe *12*. * * * An angular brace *19'* is employed to steady and support the pipe *12*, said brace being connected to the base of the tank and to pipe *12*. * * * The pipe *15* (telescopic) is adapted to be adjusted, whereby the brush will have a sufficient bearing upon the ground to thoroughly apply the marking material thereon, and this marking material is adapted to percolate through the block *19* into the flexible parts of the brush, from where it flows to the ground and is thoroughly applied by said brush."

The record shows that the Jakob machine was used in the marking of lawn tennis courts, and that it worked satisfactorily.

The Mitchell brush, as noted, is held in close contact with the surface by the aid of a spring, while that of Jakob by a telescopic pipe which, though adjustable, is held tight by screws when the marking it to be done. The only flexibility, therefore, in the marking element of either of these devices, consists in such flexing as takes place as the brush contacts with the surface.

This was the state of the art when the complainant patented his device. He was chargeable with knowledge of all that was taught and recognized by the Mitchell and Jakob patents. His claims are to be read in the light of his disclosures in the specifications, and tested and construed by the state of the art. Complainant's device has a valve connecting the outlet pipe with a flexible tube through which the marking fluid is conveyed to a brush. This brush is so mounted that, when the device is in use, it bears on and trails along the surface to be marked, and may be pressed against such surface by means of a supporting arm under spring tension. The patent in this behalf states:

"In the bottom of the tank is an outlet *20*, to which a valve *21* is connected. A flexible tube *22* is connected to the opposite side of this valve. *23* is a lever connected to operate the valve *21*. This valve-lever is connected with an operating-rod *24*, which is carried up to a point near the handle *18*, where it may be bent, as shown at *25*, to facilitate its manipulation. A fixed stop *26* is provided on the frame *11*, in the path of movement of the valve-lever *23*, to limit the movement of the latter lever when it has been pushed over to close the valve *21*. An adjustable stop-piece *27* is shown on the other side of valve-lever *23*, which is arranged to limit the movement of the lever when it has been pulled over to open the valve *21*. Screws *28*, extending through a slot in the stop-piece *27* and into the frame *11*, are provided for the purpose of setting the stop-piece, and thus adjusting the amount of the maximum opening of the valve *21* to a pre-determined degree. *30* designates a bracket, which is attached to the lower part of the frame *11*, and to which a supporting arm *32* is pivoted at *31*. To the under side of one end of the supporting arm *32* an ordinary flat paint brush *33* may be clamped by means of a screw *34*. The flexible outlet tube *22* is led to a point near this end of the support-

ing arm and may be attached thereto. *A* designates a surface upon which this apparatus is to be used. It may be seen that the brush *33* is arranged to rest upon and to be drawn over this surface. It may be arranged to do this by its own weight. I prefer, however, to provide an arrangement which I will now describe for increasing the pressure of the brush *33* upon the surface *A*. A tension-spring *36* may be connected to the supporting arm *32* at the opposite end from that to which the brush is attached. A regulating screw *37* in the arm *32* may be provided to limit the upward movement of this end of the supporting arm, and a lock-nut *38* may be used in conjunction with this screw to hold it in place after it has been set in the desired position. *39* designates a guide which I sometimes use to prevent any lateral movement of the supporting arm *32* and the brush *33*.

"The operation of this apparatus is obvious. A suitable marking fluid is placed in the tank or receptacle *10*. The surface to be marked off may be laid out with strings to act as guides, and the apparatus may be pushed along with its forward wheel following these guide-lines. The valve *21* may be opened by a movement of operating-rod *24*, when the marking fluid will pass down through flexible tube *22* to the brush *33*, which will spread it upon the surface as desired. The lower part *35* of the end of supporting-arm *32* which holds the brush may be suitably grooved to feed the marking fluid evenly to the brush. The brush may be of any desired width. The marks, which I have, according to common practice, called 'lines,' for laying off a lawn tennis court, are two inches in width. A wider or a narrower brush may be used for wider or narrower lines. * * * While means are provided for causing the brush *33* to bear upon the surface to be marked, the flexible outlet pipe *22* and the spring *36* are so arranged that the brush will be raised by any lumps or projections and will not gouge into a surface such as an athletic field. Another of the many advantages of this device is the ease with which the brush may be removed, to be cleansed or to be replaced by another brush. The operator may at will vary the flow of the marking fluid to the brush, and may, of course, shut it off entirely. A hook *40* may be provided to hold the brush off from the ground when the apparatus is not in use, or is being moved about over surfaces which are not to be marked."

Generally stated, Mitchell's device differs from the two patents mentioned in two particulars: First, while the brush of the earlier patents contacts the ground rigidly at right angles thereto, that of complainant's touches the surface slantingly—an oblique angle; and, second, that it trails along the surface as the carriage moves over the ground, rising and falling and adapting itself to such irregularities as are ordinarily found in the surface of the ground. This dissimilarity in structure is not accidental, but purposely to effect such flexibility in complainant's marking element.

Complainant says that the essence of his invention is the embodiment of the principle of "floating" the marking fluid onto the surface over a marking element, as distinguished from "brushing out" or scrubbing such fluid into the ground to be marked, and that the patent discloses the apparatus for doing that. Complainant concedes that the prior art shows devices for "brushing out" or scrubbing, but contends that this was unsatisfactory, as employing the wrong principle, and that floating solved the problem, and that he was the first to discover that it would. The patent in suit does not say anything about floating, nor anything to indicate that the problem intended to be solved was the floating or running on of the liquid, as against the brushing it on or into the ground. His description shows that the fluid passes into a brush which was to contact the surface to be marked. The patent in this behalf states:

"It may be seen that the brush *33* is arranged to rest upon and to be drawn over this surface. It may be arranged to do this by its own weight. I prefer, however, to provide an arrangement * * * for increasing the pressure of the brush *33* upon the surface *A*."

And on referring to the action of the fluid it states:

"The marking fluid will pass down through flexible tube *22* to the brush *33*, which will spread it upon the surface as desired."

And claim 4, consistent with this idea, points out that the brush is to bear upon such surface, and to be kept in contact therewith by constant pressure. In referring to the advantage of his device, patentee makes no reference in his patent to the benefit of floating the material on, as against the "brushing out" over or scrubbing into, the ground, but contents himself in pointing to the flexibility of the means employed by him in marking the surface. It states:

"The flexible outlet pipe *22* and the spring *36* are so arranged that the brush will be raised by any lumps or projections and will not gouge into a surface such as an athletic field."

In his communication to the Commissioner of Patents, asking for a reconsideration of his rejection of certain of the claims, the patentee makes no reference to the principle of "floating" now said to be the essence of his invention, but accentuates such flexibility of his means for marking and its automatic adaptability to any irregularities in the surface, calling attention to the fact that Jakob's device—the cited anticipation—held the brush rigidly against the surface, and that it could not adapt itself to irregularities on the surface, and that it was absolutely worthless, as it plowed into such surface and destroyed it for tennis court purposes.

The record presents no evidence showing that before the patenting of the defendant's device complainant made any claim that floating was the essence of his invention. In the circumstances it would seem as if the contention of complainant was an afterthought, and for the purpose of meeting the teaching of the defendant's device, which is not capable of producing any marking save by floating the material onto the ground. Rigidity in the means employed in the prior art, rather than "brushing out" of the material over or into the ground, was the point of attack in constructing the complainant's device, and overcoming the objectionable plowing or cutting into the surface by such rigid means, rather than the supposed defect arising from such brushing in, seems to have been the object sought by complainant's device. True, the capillary action of the bristles of complainant's brush admits of a floating; but such floating as takes place when they touch the ground will be accompanied with a more or less brushing effect. Complainant's claims, read in the light of his own description and subsequent argument addressed to the Commissioner of Patents to overcome the reference to Jakob, negative the suggestion that the dominant or even prominent idea of the patented device was the floating of the material, as distinguished from the "brushing out" effect. Flexibility in the marking element is the dominant

idea, and that, and not the floating operation, is the principle which must engage our attention as we determine the place complainant's patent has in relation to the prior art, and whether defendant's device is an infringement.

Mitchell being a pioneer in this art, his device would be entitled to a more generous range of equivalents than could be accorded to complainant as against defendant, for at best complainant is but an improver. Mitchell was not cited against complainant in the Patent Office. His invention clearly taught how to conduct a marking liquid from its container to the surface to be marked by the use of outlet pipe, valves, and brushes, and how to keep such brush in contact with the surface by means of a tension spring. True, his purpose was to rub the material into the ground, and his device is designedly constructed to accomplish that purpose. But one who preferred a laying on rather than a brushing in of the material would find all the instruction needed in the Mitchell device. Greater flexibility alone would be required to accomplish this. A brush, according to the texture of the bristles, is more or less flexible, and, to secure a decided rubbing effect, such flexibility would not only have to be minimized, but means provided for keeping the brush constantly in close contact with the surface. Normal flexibility not being desired by Mitchell, who preferred a rubbing into rather than a brushing over, his brush was positioned at right angles to the surface and held rigidly thereto by a tension spring. Where normal or greater flexibility is the desideration, a modifying of the Mitchell device, by changing the position from a right to an oblique angle, would be an obvious first step to an ordinarily skilled mechanic familiar with such device, and the changing of the form or quality of the brush, and whether to trail lengthwise or crosswise on the surface, would be a mere matter of mechanical adjustment.

Complainant concedes that all the elements of his claims are old, and that the claims in suit will read on the Mitchell structure. He contends, however, that the combination is new, and that his structure is so radically different in principle from the Mitchell device that it is not anticipated by the latter, notwithstanding that the general wording of his claims cover the Mitchell structure. To my mind there is no such difference between these structures as to save the anticipation. Assuming, however, that the improvement sought and attained by the complainant in his structure is a sufficient advance on Mitchell to avoid anticipation, I am satisfied that defendant's device does not infringe.

[1] Both complainant and defendant are but improvers, and the presumption arising from the allowance of defendant's patent after rejection on complainant is at least as strong in favor of noninfringement as the presumption that complainant did not infringe on Jakob. The law is well settled that where the patents sued on are not pioneer patents, and do not embody a primary invention, but are only improvements on the prior art, and defendant's machines can be differentiated, the charge of infringement cannot be main-

tained. Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. Defendant's device is substantially different in its mode of operation from complainant's. It employs a rigid vertical pipe projecting from the tank, containing a controlling valve, carrying a horizontal nozzle at its lower end, with holes in its under side. To the forward side of such nozzle a ribbed trough is hinged, which extends rearwardly and downwardly under the nozzle, so that the rear end trails on the ground. By these means the marking fluid is carried from the tank to the trough, and from there run or floated onto the surface of the ground; the ribs and the side elevations of the trough preventing the fluid from running over its sides.

[2] The defendant in his patent explains his device and its operation as follows:

"Depending from the receptacle is a rigid pipe *9* containing a controlling valve *10* and supporting at its lower end a nozzle *11*. A trough *12* is hinged to the forward side of the nozzle and extends rearwardly and downwardly under the nozzle so that the rear end trails on the ground. A series of partitions *13 13* divide the trough into a plurality of channels, and the nozzle is provided with separate orifices *14 14* so located with respect to the channels that each delivers the marking fluid into a different channel. * * * In the operation of marking a tennis court the apparatus is held at about the angle illustrated, and propelled over the line to be marked with the valve open and its controlling rod latched in the gage notch which is found to give the proper flow for the desired strength of mark. In marking where the ground is not level, but is lower at one side than the other, the partitions between the channels in the trough prevent any flow on the downhill side in excess of the flow on the other side. The trough also serves as a shoe to smooth the ground ahead of the deposit, and the fluid does not touch the ground until the trough has entirely passed, so that wet, loose earth under the fresh mark will not be stirred up and the clearness of the mark impaired. When it becomes necessary to back the apparatus, as in bringing it into place to mark a second line, the valve is closed and the trough is lifted clear of the ground without removing either hand from the hand-piece."

In all the complainant's claims the brush is an element; in fact, the important element. It, as well as the connection between it and the tank, presents flexibility. Without the brush his patent would not show an operative combination. Defendant's device does not employ a brush, and there is no capillary action in the function of his marking element. In his device the marking fluid runs rearwardly upon a metal trough, having an impervious bottom with side elevations, preventing the fluid from running over the sides. This trough, pitching downward toward the rear, carries and floats the liquid onto the surface to be marked. It has flexibility, but not because of any spring, or any yielding of any of its parts when it contacts the ground, but because of its being hinged to the outlet pipe. Complainant's claims are all for a brush broadly; but he admits that, in order to obviate the brushing-in effect, a thin brush should be used.

As to claim 2 complainant's expert admits that the only novel feature "is the use of a flexible connection in combination with the brush; the brush being in certain relation to the flexible connection and the surface." This expert's contention that the "flexible

connection between the receptacle and the brush" of claim 2 is not the hollow tube *22*, but the pivoted arm *32*, is not borne out by the specification; but, if it were, it would be void as anticipated by Mitchell. The arm *32* is not such flexible connection, but the means provided for the support of the brush, and through which the constant pressure on the brush is transmitted from the tension spring *36*. The only flexible connection described in the specification is the hollow tube *22* that leads the liquid from the receptacle to the brush. Any other interpretation of this phrase would bring the specification and claims within the denouncement of the patent statute, which commands the inventor to file a written description of his machine and the manner of constructing it in such clear and exact terms as to enable any person skilled in the art to make and use it, and to particularly point out and distinctly claim the part or combination which he claims as his invention, and render the claim void for ambiguity. Defendant's device does not employ a flexible tube or pipe as the connection between the receptacle and its marking element, and the hinged trough is not the equivalent of either complainant's brush or flexible tube connection.

Claim 4 introduces an outlet pipe and means for producing a constant pressure of the brush upon the surface as additional elements of the combination. The latter element is the spring-tensioned arm *32* supporting the brush *33*, and which is pivoted to the bracket *30* attached to the lower part of the frame *11*, and which tension spring *36* is fastened to the under side of frame *11* immediately to the front of the tank, and also to such supporting arm at the end opposite to the brush.

As already noted, the word "constant" was inserted into this claim to overcome the reference to Jakob, but this brings it within Mitchell. A distinction is to be made between the constant pressure, as shown by complainant's specification, and that rigid or unyielding pressure shown in Jakob's; but the pressure produced by complainant's contrivance is identical with that of Mitchell's. This is admitted by complainant's expert, who says that in view of Mitchell it was not new to produce a constant pressure of the brush upon the surface to be marked. In addition, defendant's device does not use any means to produce such a pressure as is to be termed constant within the meaning of complainant's claim.

Complainant's expert's contention that the loosely mounted rod on defendant's device pivoted to the trough, and which runs up from there along one side of the handle, is the equivalent of complainant's tension spring, is too attenuated to require more than passing notice. This rod is designed to raise the trough from the ground when desired, and nowhere in the patent is there any indication that a constant pressure was desired or achieved. True, when this rod is not actually drawn up, it will add its own weight —five ounces—to that of defendant's marking element—trough—and to that extent add to the trough's pressure upon the surface. But that is due to gravitation, which draws the mass downward, and is not an equivalent of a tensed spring designed and adjusted

to force the mass downward and to prevent the bounding upward of the marking element as it encounters an obstruction in its path.

In claim 6 the only additional element necessary to be noticed is the "hollow flexible connection between the valve and the brush." This is the hollow tube *22* referred to in considering claim 2, and what was there said is applicable here. Complainant's expert, in seeking for an equivalent in defendant's device for this element, pointed to the front portion of the trough as performing the function of the hollow flexible connection of this claim. As he admitted, however, that this was neither flexible nor hollow, further discussion of the contention concerning this claim is unnecessary, as without such attributes, because of the slight range of equivalents allowed, neither equivalency of such element nor its infringement is established.

Defendant's device infringes none of the claims in suit. Considered as a whole, the claims are not infringed, because no brush, the essential element in all of them, nor its equivalent, is used in defendant's device. Treated separately, defendant's device does not infringe claims 2 and 6, because it does not employ the element of a flexible tube or hollow flexible connection, or their equivalent; nor claim 4, because it does not use a spring tension to exert a constant pressure, or its equivalent.

The question of the validity of complainant's patent not being necessary for decision, the decree will be limited to a dismissal of the bill on the ground of noninfringement, in compliance with the rule that patents should not be declared invalid unless the case admits of no other disposition, and which, in my judgment, should control the courts of first instance.

HURD et al. v. WOODWARD CO.

(Circuit Court, N. D. New York. September 11, 1911.)

PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—EFFECT OF PREVIOUS CONFLICTING ADJUDICATIONS.

While a decree of a Circuit Court in an infringement suit against the manufacturer of an alleged infringing article, holding the patent invalid, not appealed from, protects the defendant therein from further suits for infringement of such patent, it affords no protection to its customers or purchasers from them of articles subsequently made by such defendant which infringe the patent, if valid, in vending or using the same, where its validity has been adjudicated by other decisions, affirmed by the Supreme Court of the United States.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 327.*

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

In Equity. Suit by James D. Hurd, the Consolidated Rubber Tire Company, and the Rubber Tire Wheel Company against the Wood-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ward Company. On motion for preliminary injunction. Motion granted.

Walter E. Ward, for complainants.
Offield, Towle, Graves & Offield, for defendant.

RAY, District Judge. The complainants, licensees and owners of the Grant patent, No. 554,675, dated February 18, 1896, for rubber-tired wheel, sue the defendant, the Woodward Company, of the city of Albany, N. Y., for infringement of such patent, and pray a preliminary injunction, as it is conceded by the defendant for the purposes of this motion (quoting from defendant's brief) "that the alleged infringing construction complained of—i. e., that upon which the complainants have based their motion—falls within the scope of the claims of the patent in suit."

Assuming the patent to be valid, and its validity has recently been adjudicated and declared by the Supreme Court of the United States in a case wherein the owners of the patent were complainants and the Diamond Rubber Company was defendant, the complainants are therefore entitled to a preliminary injunction, unless the following facts, which are not denied, protect this defendant, the Woodward Company, in using, dealing in, and selling such articles: The patent is for a combination of wheel, metal rim thereon, and rubber tire carried by such rim. The Kokomo Rubber Company, of Kokomo, state of Indiana, makes and sells, and for years has made and sold, the rubber tires within and covered by the claims of the patent, and which are a plain infringement thereof, if the patent is valid as to such company. It makes and sells such rubber tires for use in and on rubber-tired wheels, although it does not make or sell the rims or mount the tires on wheels. The Kokomo Company is therefore, or, but for facts to be stated, would be, what is known as a "contributory infringer."

Some years ago the owner of the patent sued the said Kokomo Company for infringement of the Grant patent in making and selling such tires for the purpose mentioned in the Circuit Court of the United States for the District of Indiana. The Kokomo Company defended the suit, and, it is argued, set up and alleged, in defense, the invalidity of the patent, want of novelty, etc., amounting to patentable invention, and that the said Circuit Court on a full and a fair hearing made and entered a decree in that suit adjudging the patent invalid. That this was so is not satisfactorily shown, as will appear later. The suit was dismissed for want of equity, but whether for noninfringement or invalidity of the patent does not appear from the part of the record presented. An appeal was taken, but same was not prosecuted, and later was dismissed, so that such decree has stood and stands, as between the parties thereto, in full force and effect, not opened, vacated, or appealed from. Since that time the Kokomo Company has continued to make and sell such tires in different parts of the United States, and its vendees thereof have sold and used same.

Other parties made and sold such tires in defiance of the patent, and a suit was brought in the Circuit Court of the United States by the Consolidated Rubber Tire Company and Rubber Tire Wheel Com-

pany, owners of the patent, against the Diamond Rubber Company of New York for infringement of the patent in selling and using, or at least selling, such infringing tires. The Diamond Rubber Company, defendant, defended on the ground that the patent was invalid; but the Circuit Court in the Southern District of New York held the said Grant patent valid and granted an injunction, which decree was affirmed by the Circuit Court of Appeals, Second Circuit, but that court modified the injunction directed, so it should not embrace rubber tires made by the Kokomo Company (and two other companies, as to which the patent had been held invalid). A writ of certiorari was granted by the Supreme Court of the United States, and that court, as stated, affirmed the decree of the Circuit Court of Appeals, Second Circuit, and in its opinion, speaking of the exception of the Kokomo and other companies from the operation of the injunction, said that the Circuit Court of Appeals in effect had reserved the question whether or not the decree of the Circuit Court in the District of Indiana (and other circuits), holding the patent invalid, protected purchasers and users of such tires made by the Kokomo Company from the charge of infringement of the Grant patent. The Kokomo Company is not a licensee, but makes and sells the tires covered by and within the claims of the Grant patent under the protection of the decree of the Circuit Court, District of Indiana, referred to.

The said Diamond Rubber Company of New York is a dealer in such tires, and now purchases them of the said Kokomo Company and sells them to the defendant company. The Woodward Company purchases from the Diamond Rubber Company, not from the Kokomo Company direct. In any event the tires sold and used by this defendant, and complained of, are made by the said Kokomo Company in Indiana, and shipped to New York, and sold to the said Diamond Rubber Company, and then sold by it to the Woodward Company in this state, which company uses and sells same.

Defendant claims that, as the said decree of the Circuit Court of the United States in the District of Indiana in the suit referred to frees all tires made by the Kokomo Company from the monopoly of the Grant patent, when made, such tires cannot be brought under the monopoly of the patent in New York by being brought and sold here, and when sold to and in the hands of users and dealers here in New York; that, once free from the monopoly of the patent, they remain free therefrom in whose hands soever they come or are found. These tires complained of were not made at the time the Indiana decree was pronounced. Neither the Diamond Rubber Company nor the defendant, the Woodward Company, were parties to that suit. The Diamond Rubber Company is not purchasing and selling to the defendant company tires made by the Kokomo Company and complained of in the Indiana suit. The question is, therefore: Can and do dealers in and users of rubber tires anywhere and everywhere in the United States escape the charge and consequences of infringement of the Grant patent by purchasing, using, and selling tires now made by the Kokomo Company? If so, then, as said by this court in Hurd et al. v. Seim et al. (recently decided) 189 Fed. 591, the Kokomo Com-

pany, aside from granting licenses, has the same right and privilege to make and sell these tires, covered by the Grant patent, that owners of the patent possess, and may confer the same right of use and sale on all who purchase rubber tires of its make from it.

I do not think this contention can be sustained. Concede that the Kokomo Company is fully protected by the Indiana decree in continuing to make these tires, and even in selling them, it by no means follows that purchasers from it and purchasers from those purchasers are protected; that dealers throughout the United States may purchase from the Kokomo Company tires of its make, and flood the markets, and fix the price, and in a great measure destroy the value of the patent to the owners thereof. I think full faith and credit can be given that Indiana decree, within the meaning of the Constitution and laws, without carrying its effect to any such extent. At the time that suit in the Indiana circuit was commenced, the Kokomo Company was engaged in making and selling rubber tires for rubber-tired wheels, which tires were covered by and within the claims of the patent. The complainants alleged that they owned the Grant patent, and that such rubber tires did infringe that patent. Under the statute it was a defense to it, as to such acts, for the Kokomo Company to show, if it could, that the patent was invalid, in which case there would be no infringement. That defense was sustained, I assume, and hence the bill was dismissed. As it was in no way reviewed, that decree, as between the owners of the patent and the Kokomo Company, became a final adjudication that the patent was invalid. So long as that decree stands, no action can be sustained against the Kokomo Company for an infringement of that patent. But it gave no license to the customers of the Kokomo Company to make and sell tires which infringed that patent, assuming its validity, and, if one of the Kokomo's customers had done so, the owner of the patent could have sued him, and to defend successfully he would have been compelled to establish the invalidity of the patent, and proof of the decree in favor of the Kokomo Company would not have established that fact in his favor. I think this demonstrates that the decree referred to in favor of the Kokomo Company has no effect as res adjudicata, or a prior judgment or decree, in favor of the customers of the Kokomo Company, so far as the question of the validity of the patent is concerned.

The Supreme Court of the United States has decreed against the Diamond Rubber Company directly that the patent is valid, and, while other parties may on new or additional evidence contest its validity, it should be held presumptively valid as to all persons and corporations not protected by a decree in their favor declaring its invalidity. In face of the decree of the Supreme Court of the United States, wherein the Diamond Rubber Company was defendant, holding that patent valid, it is clear that company cannot allege its invalidity. The Kokomo Company, if sued for infringement of this patent, can say it has been adjudicated, in a suit by the owner of the patent against us, that the patent is invalid, and therefore we cannot infringe. However, this adjudication of invalidity does not protect the present

customers of the Kokomo Company, as they were not parties to the suit, or in any way privies. They have not succeeded in title to any property or property right which was the subject-matter of that suit. That decree said to the Kokomo Company: You have not infringed, for the reason the patent is invalid. It said to the Kokomo Company: The articles you have made do not infringe the Grant patent, for the reason the patent is invalid. For this reason the articles made by it did not infringe so far as the Kokomo Company was concerned, and probably purchasers from that company of articles then made who succeeded to the property held not to infringe the patent were and are protected against the charge of infringement. But articles made since that time, not then in existence, were not the subject of that suit or in any way in question. This defendant does not own, and is not selling, using, or dealing in, articles which were in question in that suit.

I think I am at liberty to hold, and that it is my duty to hold, that the Grant patent is valid as to the Diamond Rubber Company and the defendant company, the Woodward Company, and that the tires it is selling infringe that patent, and that the decree referred to, dismissing the bill against the Kokomo Company, does not protect the defendant in selling them, even though it appears that they were made by the Kokomo Company. The Diamond Rubber Company, which purchases these tires from the Kokomo Company and sells them to the Woodward Company, was the defendant in the suit decided by the Supreme Court of the United States, and the patent was held valid as to such company. True, the injunction granted, as modified by the Circuit Court of Appeals, said:

"Nothing in this injunction shall prevent, or is intended to prevent or enjoin, this defendant (Diamond Rubber Company) from handling, using, and selling rubber tires and rims covered by the Grant patent, manufactured by the Goodyear Tire & Rubber Company, having a right to manufacture, use, and sell such tires under a judicial decree in the federal courts of the Sixth circuit, or manufactured by the Kokomo Rubber Company, having a right to manufacture, use, and sell such tires under a judicial decree in the district of Indiana, Seventh circuit, or manufactured by the Victor Rubber Tire Company under a judicial decree in a litigation in the federal courts in the Sixth circuit, wherein in such litigation it has been judicially determined that the said Grant patent is invalid and void."

This is far from an adjudication or determination that dealers, who purchase from the Kokomo Company tires of its make, may sell again generally in the trade without being guilty of infringement. The Supreme Court, in its opinion, said this was a mere reservation of the question. The Indiana decree referred to did not grant any right to the Kokomo Company to makes these tires. It simply said that it did not infringe, for the reason the patent was invalid. That decision is a shield to the Kokomo Company against prosecution for its acts, but not a sword which it can use to destroy the rights of the patentees or owners of the patent against others, or the rights of Hurd, a prior licensee. The decree of the court in the Kokomo Case does not show that the court held the patent invalid. The papers before me present the bill of com-

plaint, but not the answer. There is no opinion of the court. The decree, so far as material here, reads:

"And this cause having been submitted to the court upon the pleadings, testimony, and exhibits, and the court having heard the argument of counsel and duly considered the same, and being sufficiently advised in the premises, finds that the equity of this cause is with the defendants. It is therefore ordered, adjudged, and decreed by the court that the bill of complaint herein be and the same is hereby dismissed for want of equity."

There is an affidavit that the court found the patent invalid. This is not the best evidence. It is strange that the answer is not presented with the opinion, or proof that no opinion was filed. I do not see that on the face of the record it appears that the court held the patent invalid. The decree may have gone on the ground of no infringement merely. However, I have assumed the affidavit states correctly the ground on which the court decided the case. This decree on its face, and the record presented, fail to show a judgment or decree of the court that the patent is invalid. It adjudicates no such fact, and the record fails to show that any such fact was ever found by the court. I decline to find it on a simple affidavit, which is but an expression of opinion. If there was any opinion, it should be presented.

Counsel for the defendant bases his whole argument on the proposition that the decree in the Circuit Court of the District of Indiana granted something, some right or privilege, to the Kokomo Company and to its customers, viz., the right to make and sell and deal in these tires made according to and within the claims of the patent. I do not so conclude. If it held the patent invalid, and based its decree on that ground, the record presented does not so show. If it merely held the articles made by the Kokomo Company were not within or covered by the patent, and based its decree on such ground, then only those articles and others like them are protected.

While the Kokomo Company does not infringe, because as to it the patent must be considered invalid, the article made, if made by another, does infringe; that is, it is an infringement of a valid patent. How can the customers of the Kokomo Company be heard to say that the patent is invalid? And how can their customers in turn assert its invalidity? As to the maker of these tires there is no valid patent, but as to the customers of such maker there is a valid patent. The patent confers on the owner thereof the sole right to make, use, and vend—except as to the Kokomo Company, as to whom there is no valid patent. These tires made by it are not licensed, unless the Kokomo decree operates as a license. I think the moment these tires now made by the Kokomo Company come into the hands of a person as to whom the patent is valid, such person violates the rights of the owners of the patent by using or vending same. The Kokomo Company cannot vend its immunity from prosecution or its decree in its favor that the patent is invalid. It is not assignable to any one. Does the immunity pass with articles made by the Kokomo Company—attach itself to them?

The consequences to the owners of patents will be somewhat serious and destructive of their rights, if it is held that such a decree confers on an infringer the right to make and sell, and on all his customers, and on those to whom such customers sell, the absolute right to sell and use the articles so made. If it so happens, and it not infrequently does happen, that a patent is infringed and held invalid in a suit against such infringer, and an appeal is taken to the Circuit Court of Appeals of the circuit, and the decree is affirmed, and certiorari to the Supreme Court is denied, and time for all review is gone, and then the same thing occurs in another circuit, except that the decision is the other way, and certiorari is granted, and the holding that the patent is valid is affirmed, the infringer in the first case mentioned, through no fault of the owner of the patent, will have become possessed, except as to granting licenses to manufacture, of all the rights the owner himself possesses. He can manufacture and sell ad libitum, and supply dealers, who in turn will supply the market, cut prices, and destroy or greatly impair the value of the patent to the owner and Hurd, a prior licensee. I am not prepared to give to such a decree any such effect.

The motion for a preliminary injunction is granted.

GENERAL ELECTRIC CO. v. E. H. FREEMAN ELECTRIC CO.

(Circuit Court, D. New Jersey. May 15, 1911.)

1. PATENTS (§ 167*)—CONSTRUCTION—GENERAL AND SPECIFIC CLAIMS.
   Where a patent contains specific claims for the one form of structure described in the specification and shown in the drawings, and also broad and general claims, the latter are not to be so limited as to make them a mere repetition of the specific claims.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 167.*]

2. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — INCANDESCENT LAMP SOCKET.
   The Sargent patent, No. 665,582, for a lamp socket, which relates to the insulation of the cap of the shell of an incandescent lamp socket, was not anticipated, and discloses invention. Also *held* infringed.

3. PATENTS (§ 27*)—INVENTION—EFFECT OF SIMILAR DEVICES IN OTHER ARTS.
   Invention may exist in a patented device notwithstanding the existence of devices more or less similar in other arts.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

In Equity. Suit by the General Electric Company against the E. H. Freeman Electric Company. On final hearing. Decree for complainant.

Samuel Owen Edmonds, for complainant.
Melville Church and D. P. Wolhaupter, for defendant.

CROSS, District Judge. The bill of complaint filed in this cause originally embraced three patents, two of which, however, have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eliminated, leaving for consideration patent No. 665,582, for a lamp socket, issued January 8, 1901, to Howard P. Sargent, assignor to the complainant. Of the 15 claims therein contained, 1, 11, and 15 only are in issue, and are as follows:

"1. In an article of substantially the character described, the combination with a cap provided with interior retaining means, of an insulating-lining made yieldable so that it can be forced over the retaining means, which lining is held thereby in the interior of the cap.

"11. In an article of substantially the character described, the combination with a cap of projections extending in the interior thereof, and an insulating-lining adapted to be sprung over said projections, said lining being held by said projections within the cap.

"15. In an article of substantially the character described the combination with a cap, having a hole in its crown for the passage of the wires leading to the lamp, of projections extending in the interior of the cap, and an insulating-lining having a hole registering with the hole in the cap, said lining being held by said projections within the cap."

The controversy herein is confined to the validity of the patent. No question is made, or could be made, upon the question of infringement, as the defendant's device is in all respects like that of the patent in suit. The invention has to do with the insulation of the cap of an incandescent lamp socket. It does not relate to the socket casing as a whole, which consists of an inclosing shell for the socket body and a detachable cap closing the upper end of the shell. Nor does it interfere with or effect the insulating base of the socket, but its function is confined, as already stated, to insulating the cap of the shell in what is claimed to be a cheap, effective and durable manner. The patentee describes his patent as follows:

"A lining *A* of insulating material, such as ordinary insulating-fibre, and having an opening *F* registering with the opening in the cap, is interposed between the metallic cap *B* and the upper portion of the insulating base of the socket to prevent current from flowing from any of the interior contacts or wires to and through the metallic cap, whereby danger of fire or of persons receiving shocks therefrom is avoided. The use of this lining *A* does not interfere in any manner with the use of the lining of the shell *V*, well known to those skilled in art. The difficulty of properly securing the lining *A* in position is due to the fact that ordinary securing means would pass through the cap and lining and would defeat the very object for which the lining is interposed."

He then described the particular method by which this is accomplished. The problem which confronted Sargent is well stated by complainant's counsel in the following language:

(1) "Within the limited space inclosed by the socket shell must be arranged a block of solid insulation by the peculiar fashioning of which the metallic parts may be insulated both from each other and from the shell."

(2) "Within that limited space those metallic (and, therefore, conducting) parts must be compactly and permanently mounted and arranged to perform their various functions."

(3) "Provision must be made for access to the interior of the socket shell to enable the wiremen to properly connect the incoming and outgoing conductors to the screws or binding posts through which current is supplied to the filament, also to make repairs to the snap-switch mechanism by which the current is turned on and off."

(4) "Under the rules of the fire underwriters, provision must be made, even in these small sockets, when used as pendants, for sufficient open space

within the socket-casing for a knot in the insulated conductors to bear the weight of the socket, the lamp, and sometimes the shade-holder and shade."

(5) "Despite the limitation as to size, the mountings or supports for the various parts must be so strong and durable as to resist comparatively rough usage, which might otherwise result in bringing together parts of opposite polarity, creating an arc, and either shocking the user or possibly setting fire to nearby objects."

[1] The method described by the patentee in his specification, however, is not the one generally followed in manufacture by the complainant, but which is nevertheless one well within the scope of the claims above set forth. Those claims are broad and general and may not be so limited by other and specific claims as to make the two classes coextensive. Ryder v. Schlichter, 126 Fed. 487, 61 C. C. A. 469. That case was decided by the Circuit Court of Appeals of this circuit, and at page 491 of 126 Fed., page 473 of 61 C. C. A. it uses the following language:

"It is evident that the express terms of the claim do not limit the patentee to a particular device, and therefore the construction adopted by the court below practically rewrote the claim and in effect expunged it from the patent; for to limit it to the one form of structure described in the specification and shown in the drawings necessarily introduced into the claim such modifications of the language used by the inventor as turned it into a substantial, and therefore a superfluous, equivalent of the claims preceding. These three claims are concerned with the particular structure described by the drawings and the specification, and to confine the fourth claim, which is drawn broadly, to such a structure, denies to the claim any effect whatever. This, we think, goes too far. It requires us to suppose that the inventor prepared a claim whose words do not mean what they say, and should be so modified as to make them a mere repetition of other claims, and that the patent office also knew that the words were to be read with limitations that are not stated, and nevertheless, allowed the claim to stand."

The patent called for the use of a lining of a somewhat elastic or "yieldable" substance, which could be sprung into position over projections in the cap, which would conform to its contour and thus constitute with the cap a substantially unitary structure. Such a cap lining is easily and inexpensively made and applied, occupies but little space, is durable and practically fixed and rigid when once in position, and, as stated above, it met the main requirements of the art. Furthermore, the device was proven to be of great utility, and has practically supplanted all others. It may be added that it appears that, when the testimony in this cause was taken, its sales had already amounted to upwards of 2,000,000.

[2] The patents mainly relied upon as anticipations are one to George B. Painter, No. 771,569, issued October 4, 1904, and another to Sigmund Bergmann, No. 484,580, issued October 18, 1892. Considering them in the order above named it may be said of the Painter patent that it was never put to successful use. Moreover, it does not anticipate the complainant's invention. This is, to some extent at least, admitted by the defendant's expert in the following language:

"This cover or insulating lining, however, is not fastened to the cap or retained therein so that it requires special handling. Accordingly, as compared with this Painter patent, the subject-matter of claims 1, 11, and 15, differs, because of the interior projections carried by the cap to hold the cap lining in place. Also, the cover Q of Painter is described as being made

of porcelain instead of 'yieldable' material, as claim 1 of Sargent requires; and hence, it could not be 'sprung' into place as required by claim 11 of Sargent."

The insulating cap lining called for by the Painter patent was of porcelain and necessarily rigid and unyielding, and could not be forced or sprung over the retaining projections like those of the Sargent patent. It is claimed, however, on behalf of the defendant, that in the specifications of the Painter patent, it appears that the porcelain cap lining is held in place therein in such manner that the cap lining forms with the cap, a unitary structure. Admitting this, it is still apparent that the means, which secures the lining to the cap of the patent in suit, could not, for the reasons already given, be applied to a porcelain lining. In Painter's specification, he speaks of the porcelain lining as expanding the spring metal of the cap, whereby the lining is held firmly in position in the cap. But if this were so, it is not the method of Sargent. Moreover, in the only exhibit of the Painter socket which appears in the case, the lining, made of vulcanite rather than porcelain, was not fastened in the cap, but on the contrary was perfectly loose. Again, it should be noted that in the original application for the Painter patent, which was filed prior to that of Sargent, no method of fastening the lining in the cap was specified, and the complainant contends that the means therefor provided by the amended specification was an afterthought and really suggested by Sargent's invention, which was put on the market in March 1900, his invention having been made, according to the evidence, in December 1899. Painter's original application was filed October 9, 1899, and renewed September 22, 1900, and his patent issued, as above stated, October 4, 1904, or nearly three years after Sargent's. This contention seems plausible, but it is unnecessary to determine the fact definitely, since Painter does not, in my judgment, anticipate the salient and controlling features of the patent in suit.

Turning to the Bergmann patent, it appears that the defendant's expert, while admitting that there is a difference between the subject-matter of the Sargent patent and the Bergmann construction, states that the difference is attenuated, although he admits that claims 11 and 1 of Sargent are distinguishable from Bergmann, in that claim 11 requires the insulating lining to be adapted "to be sprung over said projection," and claim 1 that the lining should be "made yieldable so that it can be forced over the retaining means." He insists, nevertheless, that none of the claims discloses any substantial novelty. In making this statement, however, he relies upon the admitted fact that a disc or film of cork or other resilient substance, as a lining for a cap for a bottle or for a thimble, were old in the art, and that the fastening of such linings therein by means of shoulders or projections was also old. This is all quite true, but it by no means establishes that the application of a resilient lining to an electrical lamp-socket cap by like means does not show invention. The arts referred to are not only not analogous, but are as widely separated as they well could be.

The complainant's expert differentiates the Bergmann construction from Sargent's in the following language:

"The Bergmann patent, No. 484,580, does not designate or illustrate any particular material of which its cap insulation is to be made. That insulation is massive; it forms a 'washer' mechanically separate from the insulating block by which the supply wires are supported and insulated from each other and from the metal parts of the socket; but it is designed for mechanical combination with that insulating block and confinement thereto by suitable clamping means, while the socket is assembled and in use. In one of the surfaces of this heavy washer is cut a slot for a circuit-controlling switch or key, held in position for use by the insulating base or block which is placed above it and prevents it from escaping from the slot when pressure is applied to turn it, or from dropping out of the slot of its own weight when the socket is suspended either from a cord or a rigid fixture. The two masses of insulation are then clamped together and to the metal cap by a screw which passes through and makes contact with that cap, and then engages with a threaded metal piece molded into the interior of the block of insulation. This insulating washer is not described as resilient, and there is no occasion for anything but the rigidity which is illustrated in the drawings and indispensable in the parts which furnish the bearing surface for the long key shaft. It is locked from rotation by the perforating clamping screw, and from rotation and vertical motion by the metal shell and its insulating lining, both of which are screwed down upon its upper edge as a necessary step in the process of assembling the socket. Certainly it is not sprung into position, but is placed there as a separate element which accompanies neither the metal cap nor the insulating base. Whenever the socket is taken apart, this heavy insulating washer is necessarily liberated and falls away from the cap and from the insulating base which carries the circuit wire terminals. In short, the Bergmann structure does not anticipate the combination of claim 1 of the patent in suit, for it has no 'interior retaining means,' nor any 'insulating lining' which is 'yieldable so that it can be forced over the retaining means,' nor any locking device in the cap. Neither has it the corresponding elements of claim 11 or claim 15 of the patent in suit."

Sargent's device, as already shown, is manifestly of great utility and commercial value. The Patent Office examiner gave him broad claims without question, and I see no reason why they should be emasculated or destroyed by anything disclosed by Painter and Bergmann. The cap-insulators of those patents could not appropriately be called linings. They are objectionably thick and heavy, occupying considerable space, are absolutely without resiliency and are attached, if attached at all, by different and inferior means. The problem met and overcome by Sargent was by no means so simple as the defendant contends. The space in which he had to install his work was small and had to be economized. The insulation admittedly had to be not only perfect, durable, and inexpensive, but easily and permanently adjusted, and so adjusted, as to form with the cap a unitary structure.

[3] The electrical art did not disclose what he accomplished, and it would be manifestly unfair to defeat his patent by importing from the bottle-stopper or thimble arts or others like them, the devices above mentioned. Invention may exist notwithstanding such anticipations. Cases frequently cited upon this point are Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 Sup. Ct. 670, 35 L. Ed. 294; Potts v Creager, 155 U. S. 597, 607, 15 Sup. Ct. 194, 39 L. Ed. 275. See, also, National Tube Co. v. Aiken, 163 Fed. 254, 259, 91 C. C. A. 114, and General Electric Co. v. Bullock Mfg. Co., 152 Fed. 427, 433, 81 C. C. A. 569, 575.

The complainant is entitled to a decree, with costs.

AMERICAN SULPHITE PULP CO. v. DE GRASSE PAPER CO.

(Circuit Court, N. D. New York. July 11, 1911.)

1. PATENTS (§ 322*)—SUIT FOR INFRINGEMENT—ACCOUNTING BEFORE MASTER.
On an accounting before a master in a patent suit where both parties have been fully heard and the hearing closed, the master may properly refuse to reopen it on motion of a party, where no surprise nor newly discovered evidence is claimed.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 322.*]

2. PATENTS (§ 319*)—DAMAGES FOR INFRINGEMENT—PROOF OF ESTABLISHED LICENSE FEE.
Evidence that a complainant granted licenses under two patents for a fixed sum without any division as between the two does not establish a fixed and uniform license fee under one of the patents by which the damages recoverable from an infringer may be measured.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577-586; Dec. Dig. § 319.*]

In Equity. Suit by the American Sulphite Pulp Company against the De Grasse Paper Company. On exceptions to report of special master. Exceptions overruled, and report confirmed.
See, also, 151 Fed. 47.

Frank T. Benner, for complainant.
W. B. Van Allen and Henry Schreiter, for defendant.

RAY, District Judge. The Circuit Court of Appeals, following and approving American Sulphite Pulp Company v. Howland Falls Pulp Co., 80 Fed. 395, 25 C. C. A. 500, held that defendant, De Grasse Paper Company, had infringed the Russell patent, No. 11,282, dated November 15, 1892 (reissued), the claims of which read as follows:

"1. The improved pulp-digester herein described, having an outer shell *A* and a continuous lining or coat *B* of cement, as described, applied to the interior of the said shell, for the purpose set forth.
"2. The improved pulp-digester herein described, having an outer shell *A*, a continuous lining or coat *B* of cement, substantially as described, applied to the interior of the said shell, and an interior lining of tiles *C*, all substantially as set forth."

[1] Interlocutory judgment accordingly and for an accounting having been entered, the matter went to a special master to take evidence and report as to the complainant's damages. Much time was consumed and much evidence taken; the hearings continuing over a long period of time. It is clear that defendant's position on the accounting was or should have been well understood by the complainant. After the master had submitted his "Draft" report, the complainant moved before the master to open the accounting for the purpose of taking additional testimony. There was no pretence of newly discovered evidence, and clearly there was no surprise. The master was fully justified in refusing to reopen the accounting.

[2] On the accounting, the complainant waived and abandoned all claim to profits, and relied on proving damages based on the claim that it had an established and substantially uniform license fee of $1.10

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

per cubic foot for digester linings made and put in under the patent in suit, which complainant alleged and alleges was the proper measure of damages. The special master has found that the evidence does not establish any uniform or fixed license fee, and that, as complainant has waived all claim to profits and it has not been shown that defendant derived any advantages by reason of the infringement of the patent in suit, the complainant is entitled to recover nominal damages only. This is finding 20, and reads as follows:

"20. From the foregoing facts I find complainant has failed to prove an established license fee for the lining of digesters under the patent in suit at the time defendant commenced to infringe said patent and as the complainant has waived all claim to profits, and as it has not been shown that defendant derived any advantages by reason of said infringement, I therefore report that in my opinion the complainant is entitled to recover nominal damages only."

It appears in the case that the complainant had another patent granted to one Jurschina, assignor of one-half to one Kammann, No. 379,580, dated March 20, 1888, for "self-hardening cement," the claim reading:

"The herein described composition of matter, consisting of silica and water-glass—i.e., sodium or potassium silicate—to which my hydraulic cement may be added, substantially as and for the purpose specified."

The specifications say:

"This invention relates to and consists in a novel self-hardening composition or cement, consisting, essentially, of finely-ground quartz (silica) and water-glass (potassium or sodium silicate), or the said elements combined with Portland or other hydraulic cement. The object of this invention is to produce a self-setting and hardening compound adapted for use in molding, reproducing fac similes of objects of art, and other purposes—as, for instance, for purposes of printing."

The licenses granted by the complainant and paid for by the licensees in nearly every instance, if not in all instances, covered and granted the right to use the processes and products described in both patents, and there was no division of the license fee paid. Hence it was impossible to determine how much was paid in any instance for the license under either patent.

The complainant contended, and contends, that the Jurschina patent is for a mere structural detail in case it is valid, and that it cannot be assumed a license under it in connection with the license for the use, etc., of the Russell patent had any value. There is no proof that the Jurschina patent had no value, or that the use of the patent, etc., was of no value. The right to work under and according to both patents was granted to the several licensees for a single consideration, and I am unable to see that a court or master is justified in holding that that which has been sold for a valuable consideration is worthless. Unless it was, there is no evidence of an established license fee for the Russell patent. It is not contended that defendant infringed the Jurschina patent.

But under the evidence and the finding of the master the complainant's difficulty lies deeper than this. The testimony of the complainant of an established license fee for the Russell patent came in the main from George W. Russell, president of the complainant company and

certain licenses granted by complainant. Prior to the commencement of this suit, the complainant, American Sulphite Pulp Company, filed its bill of complaint against the Hinckley Fibre Company, which was verified by said George W. Russell, and in which the question whether or not said complainant had an established license fee for the Russell patent was directly involved. In that bill we find the following allegation:

"That it has not been possible to establish and that your orator has not established a fixed, certain or uniform license fee for said licenses, for the reason that it appeared to your orator to be inequitable and unjust so to do, but that your orator has sought to obtain and has obtained in every case a license fee satisfactory in amount, both to itself and to its licensee, with reference to the size and character of the work carried on, the particular circumstances of each case determining what was a reasonable fee for the license in question."

I think the evidence shows that Russell was correct when he made and verified that statement. In December, 1900, an agreement was entered into between the complainant and one Stebbins wherein it was agreed that the fixed price to be charged by Stebbins acting for complainant for licenses under the Russell patent should be $1.10 per cubic foot, measured on the inside of the vessel to which the lining was to be applied. But no licenses were sold under that agreement, and those who had occasion to use the invention of the Russell patent did not acquiesce in the reasonableness of the royalty charged. These facts do not fix an established license fee as a measure of damages between these parties.

The infringement by defendant occurred as follows, as found by the master, which finding is fully sustained by the evidence:

"(2) The defendant the De Grasse Paper Company was organized March 12, 1903, and on April 27, 1903, acquired the property of the Pyrites Paper Company, which company was the successor of the High Falls Sulphite Pulp & Mining Company of Pyrites, New York. Included in the assets acquired by the defendant company were four pulp-digesters designated as Nos. 1, 2, 3, and 4. Digesters Nos. 1 and 2 were licensed by complainant to the High Falls Sulphite Pulp & Mining Company, therefore leaving digesters Nos. 3 and 4 only to be considered upon this accounting. The said digesters Nos. 3 and 4 were relined during the year 1900 by the Pyrites Paper Company, and, as heretofore stated, were acquired by defendant company April 27, 1903, upon which date infringement by defendant began. Such infringement by defendant consisted in continuing to use said digesters Nos. 3 and 4 as they were relined by the Pyrites Paper Company in January, 1900, from the date, April 27, 1903, when the defendant purchased the mill until the summer of 1907, when the defendant removed the infringing linings and substituted for them two other linings constructed as described by the witness Swanton and the witness Shultice at pages 51 and 107 testimony before the master."

Prior to March, 1903, the date of defendant's first infringement, the complainant had of over 200 licenses actually granted sold as testified to by Russell 8 licenses to various parties (see master's finding 18), charging and receiving therefor all the way from 86 cents per cubic foot to $1.35 per cubic foot. It is unnecessary to go into the circumstances surrounding the grant of the other licenses, about 200, and the considerations therefor. They tend to show no regular or fixed license

fee had been established. Eight sales of a license from October, 1899, to October, 1902, for the use of two inventions covered by two distinct patents at from 86 cents to $1.35 per cubic foot, no division of consideration for each invention being made, out of over 200 licenses granted for various other considerations having no uniformity whatever in value, and no fixed or stated money value, do not in my judgment prove an established license fee for licenses under this Russell patent. See Rude v. Westcott, 130 U. S. 152, 132, 9 Sup. Ct. 463, 468, 32 L. Ed. 888. In Fox v. Knickerbocker Engraving Co. (C. C.) 158 Fed. 422, 427, affirmed by C. C. A., 165 Fed. 442, 91 C. C. A. 386, this court had occasion to discuss this question of uniform established license fee as a measure of damages, and sees no occasion to repeat. There is no evidence here of an established license fee for one period of time and then a change to another for another fixed period, nor is there evidence to justify a departure from the alleged fixed fee of $1.10 on the eight occasions referred to.

I think the case as it stands demands that the complainant's exceptions be overruled and the master's report confirmed, and that the complainant pay the master's compensation and disbursements which are fixed as follows: Compensation forty days services, $1,000, and disbursements $331.32, total $1,331.32, to the extent of two-thirds thereof or $887.54, and the defendant pay the balance or $443.77.

Ordered accordingly.

COFFIELD MOTOR WASHER CO. v. A. D. HOWE MACH. CO.

(Circuit Court, N. D. West Virginia. June 27, 1911.)

1. PATENTS (§ 35*)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
The widespread commercial success of a patented device should be taken into consideration in determining the question of invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*
Utility, extent of use, and commercial success as evidence of invention. see note to Doig v. Morgan Mach. Co., 59 C. C. A. 620.]

2. PATENTS (§ 16*)—INVENTION—EVIDENCE TO NEGATIVE INVENTION.
A combination patent for an article, which, when constructed in accordance with the specifications, has proved a great commercial success, may not be held devoid of invention because the patentee may not have known all of the forces which he had brought into operation.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 16.*]

3. PATENTS (§ 35*)—EVIDENCE OF UTILITY OF DEVICE.
The utility of a patented device may be attested by the litigation over it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATER MOTOR.
The Coffield reissue patent, No. 12,719 (original No. 806,779), for a water motor, is within the scope of the original patent, was not anticipated, and discloses novelty and invention, the device having achieved immediate and great commercial success, and its utility being attested by numerous suits for its infringement; also *held* infringed.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PATENTS (§ 283*)—REISSUE—INTERVENING RIGHTS.

A corporation organized for the purpose of pirating a patented device of complainant through the knowledge acquired by one of its incorporators while in complainant's service cannot set up intervening rights to invalidate a reissue of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 283.*]

In Equity. Suit by the Coffield Motor Washer Company against the A. D. Howe Machine Company. On final hearing. Decree for complainant.

See, also, 172 Fed. 668.

Richard J. McCarty, for plaintiff.

H. E. Dunlap and John J. Coniff, for defendant.

DAYTON, District Judge. For the fourth time I am now called upon to pass upon the validity of complainant's reissue letters patent No. 12,719. In the case of Peter T. Coffield & Son v. Spears & Riddle (C. C.) 169 Fed. 641, the patent is fully described. In that case I considered the questions of infringement, the state of the prior art, the alleged irregularities in the Patent Office in the issue of the original and reissue patents, and whether the reissue was an unwarranted expansion of the original patent. I there determined that in his motor "Coffield, the patentee, was the first to use, in connection with the elements of the mechanism, springs which complete the stroke of the valve, and that, taken as a whole, the device is new, useful, and patentable." I called attention to the fact that the board of appeals in the Patent Office had twice considered this patent and sustained it. After this case had been so determined by me upon full hearing, this suit was brought, and the validity of this patent has been again very bitterly contested. The complainant filed its bill and the defendant an "answer and cross-bill." Affidavits were filed by both, and on September 8, 1909, I passed upon the motion for preliminary injunction, filing an opinion which will be found in 172 Fed. 668. The defenses set forth in the original answer were the same as those made in the Spears & Riddle Case, and in this second opinion, after careful reconsideration, I confirmed my rulings in the Spears & Riddle Case as to the novelty and patentability of the Coffield device, as to the alleged irregularities in the Patent Office in the issue of the original and reissue patents, and found that the defendant company was infringing such reissue patent. After the preliminary injunction had been granted, by order entered, a time agreed upon by the parties was fixed within which to take proofs and mature the cause for final hearing. After complainant had taken its testimony in chief, the defendant claimed to have discovered for the first time the existence of what is known as the Bergstrom and Hayes patents. Thereupon, without taking any testimony in rebuttal, the defendant appeared before this court with certain affidavits, setting forth the Bergstrom and Hayes patents, and alleging that they were prior anticipations of the Coffield patent, moved this court upon such affidavits to dissolve the preliminary injunction. Upon hearing of this motion it was overruled, I holding that such defense, having arisen after the taking of complain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant's testimony, would have to be presented formally by proper pleading and made out by independent proof by the defendant, and, in order that this might be done, the court allowed the defendant to file an amended answer, setting up in defense these patents. Two exceptions were taken to the amended answer so filed, and leave was asked by defendant to recross-examine one of complainant's witnesses. In passing upon these matters I again considered the case, and filed on June 11, 1910, a memorandum opinion (not published) sustaining the exceptions to the answer and overruling the motion for leave to recross-examine. By this action the issue was finally narrowed down to the question of whether the Bergstrom and Hayes patents were prior anticipations of the Coffield one, rendering it void. In the very recent case of the Diamond Rubber Company of New York v. Consolidated Rubber Tire Company et al., decided April 10, 1911, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, dated May 15, 1911, the Supreme Court has held:

[1] (1) The widespread commercial success of a patented device should be taken into consideration in determining the question of invention.

[2] (2) A combination patent for an article which when constructed in accordance with the specifications has proved a great commercial success may not be held devoid of invention because the inventor may not have known all of the forces which he had brought into operation.

[3] (5) The utility of a patented device may be attested by the litigation over it.

These propositions have been repeatedly maintained and upheld in a vast number of patent cases, among which are: Gandy v. Main Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272; Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; Holmes v. Truman, 14 C. C. A. 517, 67 Fed. 542; Davis v. Parkman, 18 C. C. A. 398, 71 Fed. 961; Strobridge v. Lindsay (C. C.) 2 Fed. 692; Washburn & Moen Mfg. Co. v. Haish (C. C.) 4 Fed. 900; Wilson Packing Co. v. Chicago P. & P. Co. (C. C.) 9 Fed. 547; Lindsay v. Stein (C. C.) 10 Fed. 907; Miller v. Pickering (C. C.) 16 Fed. 540; Washburn & Moen Mfg. Co. v. Grinnell Wire Co. (C. C.) 24 Fed. 23; Hill v. Biddle (C. C.) 27 Fed. 560; Guarantee T. & S. Deposit Co. v. New Haven Gaslight Co. (C. C.) 39 Fed. 268; Chicopee Folding Box Co. v. Nugent (C. C.) 41 Fed. 139, affirmed in American Paper Pail & Box Co. v. National Folding Box & Paper Co., 2 C. C. A. 165, 51 Fed. 229; Stearns v. Phillips (C. C.) 43 Fed. 792; Featherstone v. George R. Bidwell Cycle Co. (C. C.) 53 Fed. 113; Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co. (C. C.) 53 Fed. 375; National Co. v. Belcher (C. C.) 68 Fed. 665; Brownson v. Dodson, etc., Co. (C. C.) 71 Fed. 517; Kalamazoo Ry. Supply Co. v. Duff Mfg. Co., 51 C. C. A. 221, 113 Fed. 264; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 106 Fed. 693; Kinloch Tel. Co. v. Western Electric Co., 51 C. C. A. 369, 113 Fed. 659; O'Rourke Eng. Const. Co. v. McMullen, 88 C. C. A. 115, 160 Fed. 933; Beckwith v. Malleable Iron Range Co. (C. C.) 174 Fed. 1001.

[4] In view of these principles, it is entirely proper in solving the question of whether these Bergstrom and Hayes patents forestalled the Coffield one to consider the situation of the parties as disclosed by this record. It seems that Coffield, after securing his patents for his water motor, applied it in use to the manipulation of washing machines. This application could be very easily and quickly made. Its power could be supplied by attachment by rubber hose to any ordinary water faucet. By reason of its internal mechanism, it mattered not whether the water pressure thus afforded was high or low. This use practically dispensed with, and to a great extent superseded, hand manipulation of these washing machines. It became a great commercial success, and it is stated that several hundred thousand of them have been installed in the homes of this country.

Ornold was a selling agent of the Coffields, and as such became thoroughly familiar with this motor, its mechanism, its achievements, and its popularity. He left their employ and associated himself with Howe, and they two set to work to devise a motor that would perform the same functions as the Coffield one without infringing its patent. They admit two failures in attempts to accomplish this, and their third one, which is charged in this suit to be an infringement, I do not find the least trouble in ascertaining to be so for the reasons set forth in my former opinion in this case. But they were not alone in their effort to secure a share of profit derivable from the manufacture and sale of this popular motor applied to this use of manipulating washing machines. It appears from the record that the Coffield Company and its predecessors have been compelled to prosecute suits for infringement against Hax and Davidson in the Southern District of Ohio, against Spears and Riddle in this district, and against the Blackstone Manufacturing Company in the Western District of New York. It may therefore be conceded that all the presumptions arising in favor of an invention from its widespread commercial success and of its utility, as attested by the litigation over it, attaches to this Coffield motor patent.

How about the Bergstrom and Hayes patents? The Bergstrom issued from the United States Patent Office February 15, 1876, No. 173,579, and was reissued as No. 8,120 on March 12, 1878. The Hayes is an English patent No. 2,644, issued July 10, 1877. The Bergstrom original is therefore 35 years, the reissue 33, and the Hayes 34 years old. The Bergstrom is solely for "Improvement in Piston Water Meters," the Hayes for "Liquid Meter or Water-Power Engine." Bergstrom clearly never contemplated the use of his device as a motor having power to manipulate other machinery, but his clear and sole purpose was to invent an accurate measurer of water as it flowed through the pipes to which it was to be attached. It was not practical and accurate for this purpose, as all the experts substantially agree, and its "double use" as a power motor was not thought of. So, as far as disclosed, it was never accepted or used commercially for any purpose. So, too, the Hayes patent was designed as a liquid meter, although Hayes had a vague and hazy idea of its use as a water power engine, as he says: "And for transmitting power or as a motor the apparatus

thus constructed may sometimes be used." So far as disclosed, it was never accepted or used commercially for any purpose. So completely did these patents sink into oblivion that they were not discovered until after the Coffield patent had been twice approved by the board of appeals in the Patent Office, by this court in the Spears & Riddle Case, and were not pleaded in this case until the time fixed within which to take the testimony had expired. The fact, on the other hand, that the Coffield device received prompt recognition and commercial success raises at least a very strong presumption under the rulings in the cases we have above cited against the contention that these Bergstrom and Hayes patents were prior anticipations of it. Indeed, some of the cases seem to go so far almost as to hold that such evidence is conclusive against such contention. Certain it is that common experience teaches us that very often two mechanical devices are very similar in construction and design, yet one turns out useful, practical, successful, while some defect somewhere in the other quarrels with its other parts, and sends it to the scrap heap. I have compared these patents very many times, and have studied the devices represented by them long and earnestly, and I have been driven to the conclusion that the essential difference between the Bergstrom and Hayes on the one side and the Coffield on the other is that the valves of the two first operate alike in a single movement by the elastic force of the springs, while the Coffield takes the vital "last step beyond," and secures two movements, the initial one which unseats the valves against heavy pressures holding them on their seats, the other accomplished by the elastic pressure of springs acting upon the valves at the moment they are unseated, whereby, after they are relieved of pressure, a final movement is secured by which the valves at each end of the piston stroke are reversed, and the motor continues in operation. The single movement secured by the Bergstrom and Hayes, it seems to me, may be subject to uncertain contingencies. For example, Hayes in his patent says:

"Inclined studs *p* on the piston heads serve as bearings for the ends of latches when the piston reaches either end of its stroke, and by elevating the latches release the valve stems which are then suddenly and forcibly thrown inward, readjusting the valve and reversing the movement of the piston."

Bergstrom accomplishes a single movement by the force of the spring in the same way. Defendant's expert, Coombs, admits this. Does not this "sudden and forcible" throwing inward of these valves imply constant wear upon the valves and their seats? In such operation are not the springs overworked? Under very heavy pressure are they not liable to break? If they are made extra strong, are they not liable under very light pressure to be too unyielding? According to complainant's tests touching these questions, where a water pressure of 150 pounds is used, a spring tension of 49.90 pounds would be produced, and a blow of 49.90 pounds would be inflicted by the valves upon their seats by reason thereof. This would certainly rapidly destroy the valve and weaken the springs, to say nothing of the liability to constant breakage. On the other hand, by the double movement involved in Coffield, the valves are unseated by first a rigid means

such as the cylinder heads which initially unseat the valves against heavy pressures yet holding them on their seats, the heavy pressures thus removed, the elastic spring pressure that moment operates to impart a final movement whereby the valves are reversed. In this case the spring tension, no matter whether the water pressure be 15 or 150 pounds, it is stated by complainant's expert witness Wagner never exceeds 3 pounds, and the valves are protected from the "sudden and forcible" throwing inward against their seats. It is for these reasons very clear to me that the Coffield is an advance in the art far beyond either the Bergstrom and Hayes, and it is reassuring to me that my able brother, Judge Hazel of the Western District of New York, in considering this same question in the Blackstone Case, upon application for preliminary injunction, has arrived at the same conclusion. The other questions so extendedly argued by counsel need but little consideration. The effort to establish fraud in the proceedings in the Patent Office upon the Coffield reissue in my judgment has utterly failed in both proper pleading and proof. As I have in my former opinion herein pointed out, such defense cannot be made upon the ground of mere irregularities, but actual fraud must be clearly shown.

[5] As to defendant's claim of intervening rights accrued between the issue of the original and the reissue patents, I have found nothing to change my former judgment that such claim cannot be upheld, first, because this defendant company, organized by Ornold and Howe, is in no position to set up such a claim, seeking as it did, through Ornold's knowledge of Coffield's invention acquired as a Coffield selling agent, to pirate it, second, because I think complainant's reissue patent, as held by me in the Spears & Riddle Case, comes clearly within the rules laid down in Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, and is fully protected as of the date of the original patent against all intervening rights.

The injunction must be perpetuated and an accounting awarded.

GENERAL KNIT FABRIC CO. et al. v. STEBER MACH. CO. et al.

(Circuit Court, N. D. New York. June 26, 1911.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNITTED FABRIC AND KNITTING MACHINE.

The Scott patents, No. 899,439, claims 2 and 4, for a knitted fabric and mode of producing the same, and No. 925,393, for a knitting machine, both *held* valid and infringed.

In Equity. Suit by the General Knit Fabric Company and Robert W. Scott and L. N. D. Williams against Steber Machine Company and Bernard T. Steber. Decree for complainants.

Howson and Howson, for complainants.

Lewis, Watkins & Titus (Edgar M. Kitchin, of counsel), for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. Claim 2 of patent No. 899,439, is for a knitted fabric, and 4 thereof is for the mode therein described of producing a knitted fabric. They read as follows:

"2. A knitted fabric comprising two ribbed webs with crossed sinker wales, the ribs of one web being disposed in the spaces between the ribs of the other web. * * *"

"4. The mode herein described of producing a knitted fabric, said mode consisting in feeding one yarn to one set of needles drawing stitches first in one direction and then in the opposite direction, to produce a ribbed web, and feeding another yarn to an alternating set of needles likewise drawing stitches first in one direction and then in the other direction and between the stitches drawn by the needles of the first set."

Claim 1 of patent No. 925,393, is for:

"1. The combination in a knitting machine for producing a ribbed fabric, of two needle carriers each having two sets of needles, needle operating mechanism and a yarn supply co-operating with the needles of one set in each carrier to produce one ribbed fabric, and needle operating mechanism and a yarn supply co-operating with the needles of the other set in each carrier to produce another ribbed fabric interlocked with the first."

And claim 4 is for:

"4. The combination in a knitting machine for producing a ribbed fabric, of a cylinder and dial, each having two sets of needles, needle operating mechanism and a yarn supply co-operating with one set of needles of the cylinder and dial to produce one ribbed fabric and needle operating mechanism and a yarn supply co-operating with the other set of needles of the cylinder and dial to produce another ribbed fabric interlocked with the first."

I do not think it would serve any useful purpose to describe here the fabric, mode of producing same, or the combinations of cylinders, needles, dials, etc. These matters are made plain only by diagrams and drawings which are not of general interest. Having gone through the testimony and able briefs of counsel and examined the machines and products, I am constrained to hold with some hesitation that defendants infringe the claims referred to of the two patents in suit, and that such claims are valid.

There will be a decree accordingly, with costs.

In view of the doubts which I entertain as to the accuracy of my conclusions there will be an order suspending the issue and operation of the injunction pending appeal provided same is taken within 60 days after service of a copy of the decree and prosecuted diligently and on filing a bond approved by me in the sum of $2,000, conditioned to pay all costs, profits, and damages finally awarded against defendants, if any.

In re FREEMAN et al.

(District Court, S. D. Georgia, Albany Division. May 13, 1911.)

BANKRUPTCY (§ 482*)—INVOLUNTARY PROCEEDINGS—MORTGAGED PROPERTY.

Where involuntary bankruptcy proceedings were only nominal, the bankrupt having answered, and an adjudication having been rendered the next day after the petition was filed without notice to creditors, mortgaged property of the bankrupt was not liable to contribute to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

payment of fees of attorneys for petitioning creditors; the mortgagee not having participated nor appeared, except to claim the entire fund under priority of his mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

In the matter of bankruptcy proceedings of S. A. & W. T. Freeman. Intervention of Atlanta Woodenware Company, mortgagee. On petition to review a referee's order directing that fees of attorneys for petitioning creditors be paid out of the fund in court arising from the sale of mortgaged property. Order modified.

S. A. & W. T. Freeman were engaged in the furniture business in Albany, Ga. They gave a mortgage to the Atlanta Woodenware Company, which was duly filed and recorded more than two years prior to the bankruptcy proceedings. There was no question as to the validity or bona fides of the mortgage. At the time of bankruptcy the amount due under the mortgage, in round figures, amounted to $5,000. L. W. Nelson, representing claims aggregating in amount only $271, filed a petition against S. A. & W. T. Freeman, and praying that they be adjudicated bankrupts. The next day an answer was filed, admitting bankruptcy, and asking that they be adjudicated bankrupts. Upon this petition and answer the referee passed an order of adjudication. In due course the stock of goods was sold by the trustee for the sum of $1,325. The mortgagee asked that this amount be paid over to it under its mortgage. The referee ordered that there first be paid out of the fund the sum of $355, for certain taxes due upon the property, for the actual costs of the receiver and trustee in preserving and selling the property, for the receiver's, trustee's, and referee's commissions; and that there also be paid out of the fund the filing fees and general costs of administration, amounting to $143.50, and the fees of attorneys for petitioning creditors, and for the bankrupt, as soon as the same should be fixed by the court; and that the balance of the fund then be paid over to the mortgagee. The mortgagee filed no exceptions to the payment of the taxes and the court costs, amounting to $355, for the items above stated, but excepts only to that portion of the order directing that attorney's fees and general costs of administration be paid out of the fund.

I. J. Hofmayer, for Atlanta Woodenware Co.
L. W. Nelson, for petitioning creditors.

SPEER, District Judge (after stating the facts as above). I have no doubt about this question. It seems very clear that, while this was nominally an involuntary proceeding, the prompt action of the alleged bankrupts made it a voluntary proceeding. It looks very much as if there was some, I will not say collusion, but understanding, between the petitioning creditors who filed the bill and the bankrupts. The bill was filed on one day, nominally as an involuntary proceeding, and the bankrupts came in the next day, and the referee, without notice to other creditors, proceeded to adjudicate them bankrupt. That action of the referee, together with the action of the petitioning creditors and the bankrupts, destroyed entirely the involuntary character of the proceedings. Other creditors had the right to be heard. The only effect of involuntary bankruptcy like that by consent would be to saddle the assets with expenses of counsel fees and the like. It is true that the referee went forward and appointed a receiver, and incurred certain expenses in the administration of the estate which probably ought to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paid whether the proceeding was voluntary or involuntary. But the mortgagee, who had a valid lien, existing two or three years before the bankruptcy proceeding, when his security was not increased in any manner by the action of counsel for the petitioning creditors, and when it was jeopardized by that action, ought not, in the opinion of the court, to be obliged to contribute to the expenses of counsel for petitioning creditors. It is wholly unlike the case of Alison Lumber Company (D. C.) 137 Fed. 643, where the mortgage creditors appeared in the bankruptcy court, selected it as their forum, availed themselves of the services of its officers, and utilized its process to collect their claims. There the court held that the mortgaged property should contribute to the payment of attorney's fees which might be fixed under the statute.

It is also wholly unlike the case of Erie Lumber Company (D. C.) 150 Fed. 817. There the business was a continuing business, and the court held:

"A mortgagee of a bankrupt, who has notice of and participates in the bankruptcy proceedings, and makes no objection to the appointment of receivers to continue the bankrupt's business, but does a banking business with the receivers, is thereby precluded from insisting on the priority of his mortgage over the operating expenses or other obligations incurred by the receivers under orders of the court in carrying on the business which was intended to conserve his security."

That is not this case. The lienholder did not participate. He objected all the time, and if he appeared at all he appeared for the purpose of objecting. His claim, as I understand, was never proven in bankruptcy, except to claim the entire fund. I think the cases are clearly distinguishable. Indeed, Mr. Remington, in his work on Bankruptcy (volume 2, p. 1234, par. 1994, and in the notes thereto), draws the distinction here made by the court, and distinguishes the cases of Alison and of the Erie Lumber Company, heretofore decided by this court, from the general rule therein announced; that is, that the general costs of administration, including attorney's fees, cannot be taxed against the mortgaged property.

Take an order modifying the finding of the referee in accordance with the ruling of the court.

THE ETHEL J.

(District Court, W. D. Michigan, N. D. August 8, 1911.)

ADMIRALTY (§ 90*)—DECREE BY DEFAULT—PROCEDURE.

Where, on the filing of a libel in rem and the issuance of attachment, the vessel has been seized and the usual notice duly published, and no person appears as owner or claimant, either formally on the record or by notice to the proctors for the libelant, the default itself may be treated as sufficient basis for a formal decree of condemnation and sale without further proofs.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 90.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. In the matter of libel of the steam tug Ethel J. On question of procedure on default. Decree ordered.

Ball & Ball, for libelant.

DENISON, District Judge. In this case a libel was filed on the 9th of May, 1911, based on a claim for labor and repairs. An attachment was issued, returnable the first Tuesday in June. The vessel was seized and the usual notice was duly published. On June 27th an intervening libel was filed by the master. An attachment was issued, returnable the first Tuesday in August, and notice of this was also published.

No person has appeared in the proceedings, as owner or claimant, and the question now arises, as one of practice, whether, upon this default, the vessel should be condemned without further proofs, or whether a formal hearing should be had. The impossibility of the presence, by the judge, in each of the divisions, upon the regular monthly hearing day in admiralty, contemplated by the rules, led to the necessity, if proofs were to be taken, either of continuing the hearing until some later period, when the judge could be present, or of taking proofs by deposition or affidavit. I am informed that of late years, in this district, the latter practice has been followed, and before a decree of condemnation, proofs, more or less formal, by way of deposition or affidavit, have been required.

Upon consideration, it seems more in analogy with the equity practice on defaults, and more in conformity with what I understand is the general admiralty practice in other districts, to treat the default itself as a sufficient basis for the regular formal decree of condemnation and sale. I do not see that the requiring of a further affidavit from the claimant, which must be merely a repetition of the sworn libel, can be of sufficient value to justify the expense and delay. The question of the amount of libelant's claim remains open until the distribution of the proceeds.

In this case, therefore, the proctors for libelant may file an affidavit showing that there has been no appearance by any owner, claimant, or person interested, either formally upon the record or by way of notice to the proctors for libelant, and upon the filing of such affidavit an order may be entered as of the first Tuesday in August, or reciting continuance from the first Tuesday in August, declaring the default of all owners, claimants, or persons in interest, excepting the libelant and cross-libelant, and thereupon ordering, in the usual form, the condemnation and sale of the vessel.

In re GULICK.

(District Court, S. D. New York. August 16, 1911.)

BANKRUPTCY (§ 407*)—DISCHARGE—JURISDICTION TO GRANT.

A court of bankruptcy is without jurisdiction to grant a discharge to a bankrupt unless there are dischargeable debts, and where the only claims listed by a bankrupt, or filed, are stated in his schedule to be disputed, and are in fact in litigation, which he is contesting, the court has no power to grant him a discharge.

[Ed. Note.— For other cases, see Bankruptcy, Dec. Dig. § 407.*]

In the matter of Herbert Gulick, bankrupt. On motion to confirm referee's report recommending a discharge. Discharge denied.

See, also, 186 Fed. 350.

Olcott, Gruber, Bonynge & McManus, for bankrupt.

Root, Clark & Bird, for opposing creditor.

HOLT, District Judge. This is a motion to confirm a referee's report recommending a discharge. The bankruptcy is voluntary. Three claims only are listed in the schedules, each of which is stated in the schedules to be disputed. In fact, three actions were pending on them when the bankruptcy petition was filed, in which the bankrupt had interposed answers denying liability. These answers have not been withdrawn. The referee has reported in favor of a discharge, to which the creditors object on the ground that, as the bankrupt denies that any debts exist, the court has no jurisdiction.

The point is novel; but, in my opinion, the objection is valid. The discharge authorized by the bankrupt act is a discharge from debts, not from disputed claims. I think that a bankruptcy court has no jurisdiction to grant a discharge, unless there are dischargeable debts to discharge. Thus it has been held that the court has no jurisdiction to grant a discharge when the only claim listed is not provable (In re Yates [D. C.] 114 Fed. 365; In re Schwaninger [D. C.] 144 Fed. 555), or, though provable, is not dischargeable (In re Maples [D. C.] 105 Fed. 919; In re Yates [D. C.] 114 Fed. 365). Two of the claims filed in this case appear to be dischargeable; but the point is that the bankrupt does not admit that they are debts. He may prefer to get a discharge, instead of litigating the claims on the merits; but, until he admits that they are debts, I do not see what power a bankruptcy court has to discharge such contested claims because they may be established as debts.

The referee's report is not confirmed, and the discharge is denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re SCHOENFIELD.

(District Court, N. D. West Virginia. July 27, 1911.)

1. BANKRUPTCY (§ 184*)—CLAIMS BY THIRD PERSONS—DETERMINATION.
A receiver in bankruptcy properly took possession of a stock of goods which remained under the bankrupt's control and was being disposed of, though a bill of sale to claimant had been recorded, it not complying with the bulk sales law of the state; and the bankruptcy court has jurisdiction to determine claimant's rights.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

2. CORPORATIONS (§ 312*)—PRESIDENT—POWERS.
The president of a corporation cannot transfer title to goods to himself without the directors' consent, and one not an innocent purchaser from him takes nothing by his purchase from the president.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376–1386; Dec. Dig. § 312.*]

3. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFER—EVIDENCE.
Evidence on a claim to property taken as belonging to a bankrupt *held* to show that an attempted transfer to claimant was intended to defraud the other creditors.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

4. ESTOPPEL (§ 59*)—WHO MAY ASSERT—PARTIES TO FRAUD.
One party to a scheme to defraud creditors cannot base estoppel upon another's acts under the scheme.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 146, 147; Dec. Dig. § 59.*]

5. BANKRUPTCY (§ 303*)—ASSETS—PROOF.
On a claim of property taken as belonging to a bankrupt, the trustee in bankruptcy need not show insufficient assets in his hands to satisfy creditors when the bankrupt states in his petition that he has no assets.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

In the matter of Herman Schoenfield, bankrupt. On petition by Jacob Salsburg claiming certain property. Petition dismissed.

Upon hearing of petition of Jacob Salsburg, asserting title to property taken possession of by trustee, the following certificate of facts was made by Referee J. W. Cummins:

On June 14, 1910, Herman Schoenfield filed a voluntary petition in bankruptcy, scheduling no assets, but showing a liability of $14,000. On the 15th day of June, 1910, there was an adjudication, and an order of reference to J. W. Cummins, referee. On the 23d day of June, 1910, a petition was filed by S. M. Noyes, asking for the appointment of a receiver, and thereupon George A. Blackford was appointed receiver, and as such took immediate possession of the store and property therein at No. 1128 Market street, in the city of Wheeling, W. Va., known as the "Schoenfield Store." On June 27, 1910, at the first meeting of creditors, the said receiver was duly elected and qualified as trustee, and thereupon he proceeded to Bay City, Mich., and took charge of the store there, most of the goods of which had been shipped from the Wheeling store, after Herman Schoenfield had been adjudicated a bankrupt.

On June 27, 1910, Jacob Salsburg, by his attorneys, filed a petition before the referee, claiming to be the owner and to be in possession of the goods at the store in Wheeling, No. 1128 Market street, and prayed that the receiver and trustee, George A. Blackford, be directed to deliver the possession thereof to the said Jacob Salsburg. The referee decided against the prayer of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petition, and a review of his order was asked by the said Jacob Salsburg. Thereupon the matter was certified to the Honorable Alston G. Dayton, Judge, and by an order entered on the 20th day of July, 1910, he confirmed the order of the said Cummins, referee, and decreed that the petition filed by the said Jacob Salsburg be taken, deemed, and treated as an intervening petition for the purpose of trying the title and the right to the possession of said property, and referred the hearing on said petition and the answer thereto filed by the said George A. Blackford, trustee, to J. W. Cummins, referee. The referee proceeded with said hearing, and after hearing all the testimony introduced by the said Jacob Salsburg, and also by the said George A. Blackford, trustee, and the arguments of counsel, did on September 30, 1910, enter an order, the original of which is annexed to this certificate. On the 30th day of September, 1910, in said proceeding, Jacob Salsburg, feeling aggrieved thereat, asked for a review of aforesaid order, which was granted.

A summary of the evidence on which such order was based is as follows:

That Herman Schoenfield, bankrupt, is 41 years old; was born in Germany; is now a citizen of the United States, and has lived in the United States between 21 and 23 years; is single; has one brother living in this country, Max Phillip Schoenfield, who is now about 30 years of age, who has been here about 10 years. and now lives in Wheeling, and is a salesman at present. When Herman Schoenfield came to this country, he had no means, that Herman Schoenfield went into business with an uncle in Pittsburg. under the name of the "Lion Clothing House," Herman Schoenfield taking the lease in his own name, the rent reserved being $900, conducting this business for about a year, when he broke up and lost every dollar he had. That after Herman lost his money in the Lion Clothing Company in Pittsburg, his uncle had the goods shipped to Johnstown, Pa., where some new goods were added to the old stock, the business being conducted in the name of "Chicago Clothing Bankrupt Sale" for about one year. The lease on the property in Johnstown was taken in Herman's name, the rental being $1,200 a year. The uncle, owner of the store, got into trouble, and the sheriff came and closed the store. The store was advertised under the name of the Chicago Clothing Bankrupt Company to attract people to the store. The goods were advertised by bankrupt sales, as Herman has done right along. Herman Schoenfield had no interest in the business at Johnstown, except his salary, which ranged from not less than $25 to not more than $30 a week. This store at Johnstown was conducted about 18 or 20 years ago.

The stock of goods at Johnstown, when it was sold at sheriff's sale, was bought back by a relative, Israel Schoenfield, an uncle of Herman Schoenfield, and shipped to Shelby, Ohio. Herman was retained as manager of this store at Shelby, Ohio, which lasted about three months; Herman's salary being $40 a week; the store being conducted under the name of the International Clothing Company. A bankrupt sale was had in connection with the store at Shelby, Ohio. At the expiration of about three months, the goods were shipped up to Mansfield, Ohio, and went into a store opened up by Israel Schoenfield, the uncle of Herman Schoenfield. When this store was opened up a bankruptcy sale was advertised. Herman was manager, at a salary of about $30 a week, and lived at the home of the proprietor, his uncle, free. Herman stayed at Mansfield over a year, and left there about 1897, not having a dollar. He then formed a partnership with a cousin, Samuel Steinfeld, who furnished the money, $4,250, to buy a stock of goods at New Castle, Pa., which store was called the "International Clothing Company," Herman's interest being to draw a living and one-half the profit. The store made money. Herman was the man in charge of the store, being connected with it for 11 months, Herman getting out of the store during that time his living and $3,500 worth in goods, and went to Sharon, Pa., and opened a clothing store as Herman Schoenfield, being the first time that he started in business alone. In addition to the $3,500 worth of goods which Herman brought from New Castle, as his share of the profits, a stock of other goods was added. This store continued for about two years, and Herman moved to Youngstown, Ohio. At Sharon, Pa., a fire destroyed the store of Herman Schoenfield. When the store was opened in Youngstown, Ohio, one Seligson

was taken in, the store being under the firm name of Schoenfield & Seligson. In a short time Seligson was bought out. At Youngstown, Herman Schoenfield went into bankruptcy, owing about $50,000. The creditors received 20 per cent. Herman Schoenfield applied for his discharge in the bankruptcy proceedings at Youngstown. Specifications were filed in opposition to the discharge by a number of the creditors, alleging among other grounds that the bankrupt had not kept books of account, and that he had falsely and fraudulently concealed his assets and had not given up all his property. The hearing on the specifications in opposition to the discharge was referred to a referee, who found that Herman Schoenfield had not surrendered all of his property and had made false and fraudulent statements concerning same, finding in favor of every specification, and recommended that the bankrupt be not discharged. This finding was sustained by Justice Wing, then judge of the District Court, and the discharge of Herman refused.

While Herman Schoenfield was in business at Youngstown, his brother, Max Schoenfield, who was then about 20 years of age, came from Germany, and worked in the capacity of clerk in Herman's store. After the bankruptcy of Herman Schoenfield at Youngstown, Herman being an undischarged bankrupt, he went into business at Homestead, Pa., in his brother's (Max Schoenfield's) name. Max had saved about $500 or $600 from his salary, which he earned as a clerk in his brother's store at Youngstown. The store was a success, and was continued in this way for three or four years, when the Pennsylvania corporation of the Schoenfield Company was formed, about 1904, most of the stock appearing in the name of Max Schoenfield, and Phillip Schoenfield, the father of Max and Herman Schoenfield, a small portion of it in the name of Herman. This corporation having taken over the business which Herman was theretofore conducting in the name of Max Phillip Schoenfield, his brother. Max Phillip Schoenfield was president of this corporation, and Herman secretary and treasurer. The first time the board of directors met, they authorized a salary to Herman Schoenfield of $3,000 a year. No one else connected with it was authorized a salary from the stockholders or board of directors. No dividends were ever declared. The minutes of the company are very informal and irregular. Jacob Salsburg was the second man that Herman met when he came to this country. The Schoenfield Company was in business at Homestead, Pa., and continued their business at Wheeling, W. Va., down to about July, 1909, when it went into bankruptcy. The Schoenfield Company opened their store in Wheeling at No. 1128 Market street, in January, 1908. In March or April, 1909, Herman Schoenfield rented a storeroom in Pittsburg, from McCann & Co., and went into business there, his brother Max having charge of the business.

The Schoenfield Company and Herman Schoenfield gave fictitious and fraudulent cognovit notes to Shoeneman & Salsburg, which were used to close up the business, and then re-open and advertise a sheriff's sale, instances of which are at McKeesport and Columbus, Ohio. There is no evidence of any of there false or fraudulent notes ever being given in anybody's name except Shoeneman & Salsburg.

The three creditors who filed the bankruptcy petition in the Schoenfield Company bankruptcy proceedings were Woodbine Children's Clothing Company, a partnership owned by Jacob Salsburg, Joseph Shoeneman, and an individual by the name of ——— Rabinovitch; a partnership by the name of Shoeneman & Salsburg, composed of Joseph Shoeneman and Jacob Salsburg, which was a discontinued business at the time of the bankruptcy proceedings, having gone out of business in 1907; Goorin & Shapira Company —all of those being very close friends of Herman Schoenfield. Herman admits that up until the 26th day of April, 1908, he drew out of the Schoenfield Company, as salary, about $12,000. Most of this money he says he sent to his sisters in the old country. He cites an instance in June or July, of 1909, where he bought a draft from the German National Bank in Allegheny, Pa., giving as a consideration for said draft, a check on his account in that bank, which account was in the name of Max Schoenfield, which he sent to Germany. The liabilities of the Schoenfield Company, when they went into bankruptcy, were about $50,000. Herman Schoenfield and his brother, Max,

got along well socially, but there was some kind of misunderstanding in business, and this was the reason why the Schoenfield Company, part of the time, had more than one store. The Schoenfield Company was not paying its bills promptly, and in February, 1909, there was a meeting of their creditors at Philadelphia. Jacob Salsburg was at this meeting, and Herman Schoenfield, as well as the other creditors of the Schoenfield Company. Max was not at the meeting. The Schoenfield Company was put on an extension list at this meeting, some of the notes not maturing for 30 months from that time. On July 28, 1909, Jacob Salsburg went to Pittsburg, and obtained from Max Schoenfield two agreements, by which he guaranteed to pay the claims which Shoeneman & Salsburg and Woodbine Children's Clothing Company had against the Schoenfield Company, amounting to about $14,000. At this meeting Herman Schoenfield was present. Jacob Salsburg says he does not remember anything about what occurred at this time, suffering a very sudden lapse of memory, which is significant. Max Schoenfield, in the first examination, which was a part of the examination of the bankrupt, gives as the reason why he made the agreements, that using his language: "I done that because Mr. Salsburg, being a friend of mine, also extended me liberal credit from time to time; I felt this way, if I would get the stock, all the assets of the Schoenfield Company, I figured I would get the stock and all their assets, and I figured then I would pay him so much money."

I find from all the facts and circumstances in the case that Herman Schoenfield and Jacob Salsburg, at this time, had arranged for the bankruptcy of the Schoenfield Company, said Salsburg was to use his influence with other creditors to bring about a composition at 20 cents on the dollar. In the early part of July, following, the bankruptcy petition was filed and the Schoenfield Company adjudicated a bankrupt. There was an agreement in writing, signed by a number of the creditors, authorizing Herman to close up the business, and agreeing to accept 20 cents on the dollar. This composition was made, and a loan was made to Herman Schoenfield of $6,000 less the discount, by Shoeneman & Salsburg, through Jacob Salsburg.

At the time of the bankruptcy, the goods of the Schoenfield Company were in their store at Wheeling, 1128 Market street. After the composition, the store was opened and continued to do business until June 23, 1910, when the store was seized by George A. Blackford, receiver in bankruptcy. The Schoenfield Company had a bank account at Homestead, Pa., up until the company went into bankruptcy, and it did not have an account at any other bank. Herman Schoenfield closed up the store which he had in Pittsburg, which was being conducted by Max, his brother, in August, 1910. The money derived from the sale of goods from this store was deposited in the German National Bank of Allegheny in Max's name. When the store was discontinued in Pittsburg, the money in the bank was checked out, and the goods and the money, as well, taken to Chillicothe, Ohio, where Herman opened another store in his brother's (Max Phillip Schoenfield's) name. He also opened a bank account in a bank in Chillicothe, Ohio, in the name of his brother, Max Phillip Schoenfield, the store at Chillicothe being managed by Max Phillip Schoenfield.

Herman had a bank account in the German Bank of Wheeling, in his own name, which was a very active account. He also had a bank account in the Security Trust Company, at Wheeling, in his own name; also had a bank account in the National Exchange Bank, in the name of his brother, Max Phillip. Herman's store at Chillicothe was moved to Bay City, Mich, about the first of the year 1909, and continued until about May of the same year. The bank account there was in Herman's name. He had the goods at Bay City insured in his own name. When the store at Bay City was closed out, Herman came back to Wheeling, and he and Max were both at the Wheeling store, No. 1128 Market street. During the time Max was at Pittsburg and also at Chillicothe, the book entries were partly in Max's own handwriting, and partly in the handwriting of the clerk, and show that he drew a weekly salary as clerk, the same as the other clerks. The money, except about $135, that was used to make the composition of the Schoenfield Company, came from the bank account at Chillicothe, which was in Max Schoenfield's name.

The books kept at the store in Chillicothe, Ohio, show that when the check drawn by Max Phillip Schoenfield was sent to Pittsburg to Sachs & Hirshfield, to make the composition, an entry was made on Herman Schoenfield's personal account, charging this amount of money to Herman. The additional $135 was made good in Pittsburg, by the check of Jacob Salsburg, which was afterward repaid to Jacob Salsburg by Herman Schoenfield.

Several weeks before June 2, 1910, the date of the bill of sale to Jacob Salsburg, Herman and Max had a quarrel in the store at Wheeling. Max immediately left the store, and did not return to work until after the transfer to Jacob Salsburg. During this time he had made arrangements to go to Europe. Salsburg came to Wheeling in June, 1910, in response to letters and telegrams of Herman's, of which Max was ignorant. Herman Schoenfield listed all of the accounts which were assumed in the bill of sale, which part of the bill of sale is by far the most material part, and is in the handwriting of Herman. After Jacob Salsburg returned to Philadelphia, the bill of sale was admitted to record. There was also returned to Herman a contract of employment, signed by Jacob Salsburg. Very shortly after the 2d of June, a large quantity of the goods at 1128 Market street was shipped to Bay City, Mich., and a store opened there. No bank account was opened at Bay City, Mich., until after the 27th of June, at that time Herman Schoenfield sending a telegram to Wilkins, the manager there, to open a bank account in the name of Jacob Salsburg, and send the book to B. Salsburg, P. O. Box 436, Wheeling. This was Herman's P. O. Box, and this telegram was sent after George A. Blackford had taken possession of the store at Wheeling. Jacob Salsburg did not open an account at Wheeling, but the proceeds of the sales from the store at Wheeling were deposited in the same bank accounts the same as they had been before the bill of sale to Jacob Salsburg.

Herman Schoenfield advertised a sale of goods at the store in Wheeling after he became bankrupt, as the goods of Herman Schoenfield, calling particular attention in the advertisement to the court, and the time when he was adjudicated a bankrupt. This advertisement does not bear the name of Salsburg, nor does it in any way show that Salsburg had any interest in the store, although it was long after the bill of sale, and Salsburg says he knew nothing about this advertisement at the time. The store at Wheeling No. 1128 Market street, contained, across the front thereof, in large letters, the word, "Schoenfield" and the words, "Schoenfield" and "Schoenfield's Store" were displayed on muslin signs in front of the store, and at other conspicuous places in the store. The signs were not changed after the bill of sale to Salsburg, and everything remained just as it was before the bill of sale, and that was the condition when the receiver, Blackford, took charge of the store at Wheeling.

At the time the bill of sale was made, Jacob Salsburg gave his check to Max Phillip Schoenfield for $1,076. By this bill of sale, made by Max Phillip Schoenfield to Jacob Salsburg, Jacob Salsburg bases his title, and it is the only title or claim of title that he claims or makes. Max deposited this check for $1,076 in the German Bank of Wheeling, opening an account in that bank, this item being the only deposit ever made in that account. At the time an account was in his name in the National Exchange Bank at Wheeling, and he gives no reason why this money was not deposited in the account in his name in the National Exchange Bank. Of this $1,076 he immediately checked to Herman $76; afterwards checks to himself $10, then draws a check on the account for $990, thereby checking out the entire $1,076.

The bill of sale recites that Jacob Salsburg is to assume certain accounts as a part of the consideration. He has not paid any of these accounts, and none of the accounts have been paid except one account of about $150 for the payment of which a check was outstanding at the time the bill of sale was given, and which check was met at the bank in Wheeling out of the money which was taken from the sales of the goods; another check being for about $26 was drawn on the account in Bay City and payment thereon was stopped by the receiver. Herman Schoenfield gave a number of fake notes and

fake checks during his business career, the kiting of checks being the rule with him, rather than the exception.

A number of the books of the Schoenfield Company, showing the accounts at the different stores, were introduced. Some of these books were mutilated, at the places where the accounts of the Schoenfields would appear, as indicated by the index. Some of these books were not discovered by the trustee until after Max Schoenfield, Herman, and Jacob Salsburg had gone into the store for the purpose of an inventory after possession had been taken by the receiver. The goods at Wheeling were insured by three policies of insurance in the name of Jacob Salsburg, after the bill of sale. Prior to the bill of sale to Salsburg, a number of applications for insurance on the goods at the store in Wheeling were made, but in practically every instance the insurance was refused or canceled. The premiums were promptly paid, and the building in which these goods were, was a modern brick building on Market street, one of the principal business streets in Wheeling. Many of the contracts for advertisement with the various newspapers were made in the name of Herman Schoenfield; others in the name of the New York Consolidated Clothiers. A number of invoices for the goods were in the name of Herman Schoenfield, and a number of them in the name of Max Phillip Schoenfield. Max was a mere figurehead in the Schoenfield Company. I have no hesitancy in finding, from the evidence and all the facts and circumstances connected with the hearing, that Max Phillip Schoenfield and Herman Schoenfield unblushingly perjured themselves.

Jacob Salsburg's testimony was very unsatisfactory, his manner indicating that if he were not deliberately perjuring himself, he was withholding some very important testimony. To illustrate: He said that he had not done any business with Herman Schoenfield. The examination of his books, which were introduced by him, to which examination he strenuously objected and caused a scene at the hearing, showed that there were thousands of dollars of accounts with Herman Schoenfield, one account especially, the bills payable account, showing that the firm of Shoeneman & Salsburg had notes of Herman Schoenfield up in the thousands of dollars, also showing that the firm of Schoeneman & Salsburg had taken notes of the Schoenfield Company after it was adjudicated a bankrupt, and had renewed these notes in the regular course of business and showed a course of dealings with Herman Schoenfield for years. The account at the German Bank of Wheeling was in the name of Herman Schoenfield. It was a very active account, and most of the goods in the store at Wheeling were paid for by Herman Schoenfield's checks, drawn on this account. The account at the Security Trust Company at Wheeling was also an active account, and a large part of the goods that went into the store at Wheeling, before the Schoenfield Company went into bankruptcy, were paid for by checks drawn on the account in the Security Trust Company, which was in Herman's name. The proceeds of the sales at the store in Wheeling were deposited in this account by Herman. The account at the National Exchange Bank was in the name of Max Schoenfield. It was not a very active account. It was opened in January, 1910.

Charles H. Sachs and J. B. Handlan, for petitioner Jacob Salsburg.
Benjamin Rosenbloom, for bankrupt.
J. W. Ritz, for trustee.

DAYTON, District Judge (after stating the facts as above). I have very carefully read and considered all the evidence presented by this record, set forth as it is, in more than 1,400 typewritten pages, and some 130 odd exhibits filed therewith. The facts are so many and complicated I shall not attempt to set them forth in detail, but content myself with setting forth as above the certificate thereof filed by the referee.

[1] It is still contended by the petitioner, Salsburg, that the stocks of merchandise should have been turned over to him by reason of his

alleged purchase thereof from Max Ph. Schoenfield, by the trustee in bankruptcy, whose remedy then would have been the institution of a plenary suit in some court of competent jurisdiction to recover them back from him or their value. I did not think so at the time I entered the order, directing the referee to investigate and determine the validity of this claim of Salsburg, nor do I think so now. On the contrary I think the wisdom of that order, in the light of the remarkable disclosures of the evidence cannot for a moment be questioned.

First. The evidence clearly discloses that the storerooms both in Wheeling and Bay City were the leased premises of Herman Schoenfield; that notwithstanding Salsburg claims to have made his purchase 21 days before Blackford, as receiver, took possession, he allowed the "Schoenfield" signs to remain, and further allowed the bankrupt, Herman Schoenfield, to remain in charge and in a local paper, under date of June 16th, a week before possession was taken by the receiver, to advertise these goods "at bankrupt sale" as belonging to "Schoenfield's store," situate in this storeroom in Wheeling of which Herman was the lessee. The effort to show that the taking into possession of the goods by the receiver was tortious, has, in my judgment, utterly failed. It was a surrender by those in charge with substantially a declaration that Salsburg was the owner by the bankrupt's brother, who had been connected with the "Schoenfield Store" management all along, and by young Salsburg, the son of claimant. It is just as much the purpose of the present bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), as it was that of the Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517)—

"to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in bankruptcy. Between the first steps initiating them and the appointment of the assignee, a considerable time often elapses, during which the effects of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee, who, when appointed, is entitled to the possession of them. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of the assignee or the process of the court, and thus defy the law." Sharpe v. Doyle, 102 U. S. 686, 689, 26 L. Ed. 277.

The Code of this state (1906) § 3468 (chapter 100, § 13), provides:

"If any person shall transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and co.,' and fail to disclose the name of his principal or partner by a sign in letters, easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the town or county wherein the same is transacted, or if any person transact such business in his own name, without any such addition, all the property, stock, choses in action, acquired or used in such business, shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

This provision taken from the Virginia Code of 1860 has been considered in Partlow v. Lickliter, 100 Va. 631, 42 S. E. 671, where it was held that property used in such business is liable for the payment of

the trader's debts, notwithstanding a bill of sale thereof may be recorded.

The Supreme Court of Appeals of this state in the case of Gilbert v. Peppers, 65 W. Va. 355, 64 S. E. 361, has held that a conveyance of a shifting stock of goods or other personal property of a transitory character left in the possession of the grantor is void per se and on its face. This decision has been followed by this court in In re Elletson Company (D. C.) 174 Fed. 859, and its action in so doing has been affirmed by the Circuit Court of Appeals for this circuit in Ritchie County Bank v. McFarland, 183 Fed. 715, 106 C. C. A. 153.

Then, too, section 1, c. 78, of the Acts of the Legislature 1909, was at the time in force, and provides:

"The sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser at least five days before the sale, make a written statement showing the nature and character of the sale and property to be sold and the price to be paid therefor, and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall at least five days before taking possession of such merchandise or paying therefor, notify personally or by registered mail, every creditor whose name and address is stated in said list, of the proposed sale and of the price, terms and conditions thereof."

Granting that Blackford, receiver, had full notice, by reason of the recordation of Salsburg's bill of sale, of Salsburg's claim to these goods, on its face he must have seen that it was of shifting stocks of merchandise, such as set forth in Gilbert v. Peppers and a very little investigation would have informed him that the "bulk sales" law had not been complied with; that after a lapse of 21 days from the date of such bill of sale, these goods still remained as before under the control of the bankrupt and in his possession, upon his leased premises, and were being advertised and sold, in part, under the old name of the "Schoenfield Store" and in part were being boxed up and shipped to Michigan. Could there be any excuse for his not discharging his duty and taking possession? I think not. Having possession, the law is clear that the bankrupt court's jurisdiction to summarily ascertain and determine Salsburg's title or right to these stocks was complete, as held by such cases as White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, and In re Elletson Co. (D. C.) 174 Fed. 859, affirmed in Ritchie County Bank v. McFarland, 183 Fed. 715, 106 C. C. A. 153.

[2] Second. Touching the determination of the merits upon Salsburg's claim to these stocks of goods I have no hesitation in sustaining the conclusions reached by the referee, adverse to such claim, for several very pertinent reasons.

(a) The Supreme Court has held the validity of such claim of title to be a question of local law, in the determination of which state statutes and decisions will control (Thompson v. Fairbanks, 196 U. S.

516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956); and I have above shown that this sale in bulk was contrary to chapter 78, Acts 1909; that Salsburg did not comply with section 3468 of the Code 1906, and that this sale ran counter to the rulings in Gilbert v. Pepper.

(b) The claim must be rejected also because it is undisputed that Salsburg claims only through purchase from Max Ph. Schoenfield, who, it is clearly shown, never had title to these goods. Going back only one step, it is to be remembered that the goods were in the possession of the Schoenfield Company, a corporation under the laws of Pennsylvania; that this company became bankrupt; that a composition was offered, accepted and confirmed whereby the stock became vested again in this company; that Max Ph. Schoenfield claims (which claim we will more fully consider later) to have furnished the money to effect this composition, but there was no decree vesting in him the title and possession of the goods and there was no subsequent authorization for or transfer of the goods to him by the corporation. As president of this corporation he could not sell and transfer the stock of goods to himself without the consent of the corporation directors at least.

[3] The result was he could acquire no title as against the corporation by merely taking possession and by reason of such possession could sell and confer no title at least to any other than an innocent purchaser without notice and such Salsburg certainly was not; for

(c) The whole proceeding had been, in my deliberate judgment, a corrupt scheme originated by Herman Schoenfield, the bankrupt, and Salsburg to secure the debts due to Salsburg's firms and to defraud the other creditors. This is shown by the fact that Salsburg first obtained the guarantee agreements from Max Ph. Schoenfield, that his firms' debts should be paid; that his two firms then became two of the three petitioning creditors, asking for and obtaining this corporation's adjudication in bankruptcy; that Salsburg or one of his firms loaned nearly $6,000 to effect the 20 per cent. composition; that while this loan was nominally to Max it was largely repaid to him by Herman.

Max has testified that he was a "figurehead" in the Schoenfield Company, and I think there can be no question that this was true. The company itself, in my judgment, has been clearly shown to have been nothing more and nothing less than a mere device to enable Herman to carry on business which he could not do because his effort to defraud creditors by the bankrupt proceedings at Youngstown, Ohio, had failed and he was an undischarged bankrupt. Max and Herman, it seems, just before this attempted sale to Salsburg had fallen out and Max had left Wheeling. It seems clear he wanted to return to Europe. Doubtless he needed money. Herman sent for his friend Salsburg who came on to help out. Max was paid substantially $1,000 to quit, and this bill of sale was made to Salsburg with the strong presumption arising that Herman hoped to get free by this new proceeding in bankruptcy in this court, and then be able to run another course of unparalled fraudulent and corrupt business transactions, in the meanwhile "managing" the goods in Salsburg's name, selling them out quickly by rea-

son of false advertising, realizing and paying Salsburg and his firms their debts in full, while the other creditors got nothing. Herman it seems was a valuable man to Salsburg, for the latter, in one of his letters "takes off his hat" to him in admiration of his qualities as a "hustler" in selling and disposing of goods.

[4] I do not deem it necessary to consider the contention of counsel for Salsburg, that if Herman was the true owner, yet allowed credit to be extended to Max, there would be an estoppel in favor of those who had extended such credit to Max as against Herman and his trustee, further than to say that such question cannot be raised by Salsburg, but only by the persons themselves who have been so innocently defrauded. Salsburg certainly was not so innocently defrauded, but was a party to the scheme by which it was done.

[5] The bankrupt under oath has listed in his schedules debts to the amount of $14,000 and declared himself to have no assets, therefore it was not incumbent upon the trustee in his petition to allege, nor, by evidence prove, "that he has not sufficient assets in his hands to satisfy the claims of the creditors of Herman Schoenfield, bankrupt."

I affirm the conclusion reached by the referee that these two stocks of goods were properly taken in charge by Blackford, receiver and trustee, and must be held liable for the payment of bankrupt's debts, and that Salsburg's petition must be dismissed, and he be required to pay the costs of its defense.

NEWBERY v. WILKINSON et al.

(Circuit Court, E. D. Washington, E. D. September 6, 1911.)

No. 1,441.

1. EXECUTORS AND ADMINISTRATORS (§ 513*)—ACTIONS—DEFENSES—DISCHARGE.
The administratrix of a deceased guardian was not liable for the guardian's alleged default, where suit to enforce such liability was not commenced until five years after she had administered the guardian's estate according to the local law, had accounted for all property she had received, and had been discharged from her trust; the correctness of her accounts not being assailed.
[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2207–2291; Dec. Dig. § 513.*]

2. DESCENT AND DISTRIBUTION (§ 119*)—INDEBTEDNESS OF ANCESTOR—LIABILITY OF HEIRS.
Heirs of a deceased guardian are not liable for his default beyond the amount of their inheritance.
[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 433–439; Dec. Dig. § 119.*]

3. EXECUTORS AND ADMINISTRATORS (§ 224*)—CLAIMS—NONCLAIM SUIT—APPLICATION—"CLAIM"—"CAUSE OF ACTION."
Rem. & Bal. Code Wash. § 1470, providing that every executor and administrator shall immediately after his appointment cause to be published in some paper printed in his county a notice requiring creditors to present claims within a year after the date of notice, and section 1472, declaring that if a claim is not presented within such year it shall be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

barred, apply to mere personal claims against the estate of a deceased guardian; the word "claim" being synonymous with "cause of action."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 768–788; Dec. Dig. § 224.*

For other definitions, see Words and Phrases, vol. 2, pp. 1015–1019; vol. 8, p. 7598; vol. 2, pp. 1202–1211; vol. 8, p. 7604.]

4. COURTS (§ 375*)—STATE STATUTES—ENFORCEMENT IN FEDERAL COURT.

A state statute of nonclaim, requiring claims against executors and administrators to be filed within a specified time, will be enforced in a federal court of equity, where suit was brought against an administrator of a deceased guardian on a mere personal demand several years after the bar of the suit of nonclaim became absolute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. § 375.*]

5. COURTS (§ 375*)—GUARDIAN'S BOND—ACTIONS—LIMITATIONS—ENFORCEMENT IN FEDERAL COURT.

Rem. & Bal. Code, § 1432, provides that an action against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal, and section 1633 declares that all the provisions of the title containing the above-named section relating to administrators' bonds shall apply to bonds taken of guardians. *Held* that, since the state Legislature had supreme power to restrict the obligation of sureties on statutory bonds given by guardians, such sections were enforceable in a federal court and available as a defense to a suit on a guardian's bond against the surety more than six years after the death of his principal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. § 375.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 533.]

6. LIMITATION OF ACTIONS (§ 174*)—REMOVAL OF BAR—EQUITABLE REMEDY.

The rule that a court of equity will remove the bar of limitations to reach trust funds does not apply to a mere surety on a guardian's bond, whose duty is measured alone by the legal force of the bond, and whose only obligation to the obligee is contained in his covenant.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 174.*]

In Equity. Suit by William Fraser Newbery against Clara Wilkinson, administratrix of the estate of B. C. Van Houten, deceased, and others. On final hearing. Dismissed.

Belden & Losey and Graves, Kizer & Graves, for complainant.
H. M. Stephens, for defendants Wilkinson and Van Houten.
P. F. Quinn and E. J. Cannon, for defendant Monaghan.

RUDKIN, District Judge. This is a suit on a guardian's bond. The administratrix of the estate of the deceased guardian, the heirs at law of the deceased guardian, and one of the sureties on the bond of the deceased guardian are made parties defendant. There is little or no controversy over the facts, although the materiality or relevancy of some of the facts is challenged by the complainant.

Pauline B. Newbery, a resident of Spokane county, died intestate on the 4th day of August, 1890, leaving her surviving a husband, A. A. Newbery, and two minor children, William Fraser Newbery, the complainant in this suit, and Laura Isabel Newbery, who died in infancy unmarried and without issue. The deceased left an estate in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Spokane county, consisting of a community interest in certain real property, a particular description of which is not material at this time. Upon her death one half of the community property passed to the surviving husband, and the remaining half descended to the two minor children, share and share alike, under the local laws of the state. At the time of Mrs. Newbery's death a portion of the community real property was incumbered by a mortgage held by the Northwestern & Pacific Hypotheek Bank, and the surviving husband, the father of the two minor children, applied to the bank for a renewal of the mortgage and an increase in the amount of the mortgage loan. The bank agreed to renew the mortgage and to increase the amount of the loan, on condition that the father would clear or perfect his title to the mortgaged property, and the following remarkable procedure was resorted to for that purpose, under legal advice:

B. C. Van Houten, one of the father's business associates, was appointed guardian for the two minor children, and the defendant Monaghan and others became sureties on his bond in the penal sum of $40,000. The father then commenced an action in the superior court of Spokane county against the guardian and the two minor children, for the partition of three certain parcels of land owned by the community at the time of the wife's death. The complaint contained a description of the property, set forth the interest of each of the parties, alleged that partition could not be made without prejudice to the owners, and prayed that the property be sold and the proceeds divided among the respective owners as their interest might appear. The defendants appeared in the action and put in issue the allegations of the complaint. A reference was ordered by the court, and after a formal hearing the referee made a report recommending a sale of the property as prayed in the complaint. This report was confirmed, and the referee was directed to make the sale. Thereafter the referee reported that he had sold the three several parcels of land to one J. F. McEwen (who was another of the father's business associates) for sums aggregating $64,800 in cash, and that he had paid one half of the proceeds of the sale to the father and the remaining half to the guardian of the minor children. Receipts from the father and the guardian were returned and filed in court, acknowledging the receipt of the respective sums thus alleged to have been paid over. The report of sale was adopted and confirmed by the court, and the referee conveyed the property to the purchaser. Immediately thereafter McEwen, the purchaser, conveyed the property to the father, and by this means or subterfuge, his title was cleared or perfected. In truth and in fact McEwen paid nothing for the property at the partition sale, and it was never contemplated that he should. The guardian did not in fact receive the sum of $32,400, or any other sum, on account of the sale, nor was it contemplated that he should.

The entire proceeding was a mere fraudulent scheme or device, resorted to for the purpose of divesting the title of the two minor children and vesting it in the father, to the end that he might mortgage or incumber the property. I do not desire to be understood as holding or finding that the father intended to perpetrate a fraud on

his infant children, for there is no evidence that he did, but such was nevertheless the legal effect of the whole proceeding. While the guardianship was a general one, the active duties of the guardian began and ended with this single transaction some 20 years ago. The guardian thereafter died testate in King county, of this state, on the 25th day of January, 1904, and his estate passed through due course of administration. His will was admitted to probate, an administratrix with the will annexed was appointed and qualified, notice to creditors was published under date of April 30, 1904, and the administration was closed by final decree on the 13th day of July, 1905. No claim on behalf of the complainant was presented to the administratrix of the estate of the deceased guardian within the year allowed by the state statute of nonclaim, or at all. The only estate left by the deceased consisted of some worthless mining stock, for which the administratrix received the nominal sum of $5 at administration sale. No other property of the deceased, of any kind, character, or description, came into the hands of his personal representative or descended to his heirs or next of kin.

The complainant left the state of Washington at an early age and attended school at different places in the East, until he attained the age of about 15 years. He then entered the United States navy, where he remained until he attained his majority. During his term of service in the navy he was stationed the greater part of the time on the Atlantic coast. On attaining his majority he left the navy and wandered about the country from place to place for about two years, until he finally settled in Utah, of which state he is now a citizen. He had no actual notice of the partition or guardianship proceedings until shortly prior to the commencement of this suit. At that time he received a quitclaim deed from his father for his signature, and investigations made by his attorneys led to a disclosure of the proceedings in question. He did receive notice from his stepmother, however, when of the age of 19 years and about 5 years prior to the commencement of this suit, to the effect that he had a claim to certain property in the city of Spokane, derived from or through his mother, which he might establish, provided he instituted proceedings for that purpose within one year after attaining his majority. This notice admittedly referred to other property and other rights, and not to the bond in suit. The original action was commenced on the law side of this court on the 2d day of February, 1910, and within a few months after the complainant attained the age of 24 years. The case was later transferred to the equity side of the court, and the present bill was filed on the 25th day of March, 1910. The administratrix and the heirs on the one hand, and the surety, Monaghan, on the other, have appeared separately; but their defenses are in some respects the same.

Under the foregoing facts the complainant contends, in brief, that he, in his own right and as next of kin to his deceased sister, is entitled to recover the full amount for which their interest in the community property was sold, at the partition sale, with legal interest from that date. The defendants, on the other hand, contend, first, that the remedy of the complainant is at law, and not in equity; second, that

the interest of the complainant and his deceased sister in the community property at the time of their mother's death was of no value, and consequently that they were not injured or defrauded by the proceedings complained of; third, that the suit is barred by the state statute of nonclaim, for failure to present the claim to the administratrix of the estate of the deceased guardian within the time limited by law; and, fourth, that the suit is barred by the statute of limitations.

If this suit were instituted in the proper forum and within the proper time, I am of opinion that the complainant is entitled to recover under the allegations of the bill and according to his theory of the case; but, in view of the conclusion I have reached as to certain of the defenses interposed, a further consideration of the merits of the complainant's claim becomes immaterial.

[1] A few words will dispose of the case made against the administratrix and the heirs at law. The administratrix was not such at the time of the commencement of this suit, and had not been for years. Nearly five years prior to its commencement she had fully administered the estate under and in accordance with the local law. She had fully accounted for all property by her received, and had been discharged from her trust. The correctness of her accounts is not now assailed, and she cannot be called upon at this late day to further account to this or any other court.

[2] I presume it will not be contended that heirs are liable for the debts or obligations of their deceased ancestors beyond the amount of their inheritance. 14 Cyc. 186. It is not claimed that the heirs of the deceased guardian received an inheritance of any kind or of any value from him. On the contrary, it clearly and satisfactorily appears that the guardian died utterly insolvent, that his entire estate consisted of worthless mining stock, and that no part of this descended to his heirs or next of kin. As to the administratrix and the heirs, the bill must therefore be dismissed, regardless of other defenses interposed.

In view of this conclusion it is perhaps unnecessary to consider the effect of the failure to present the claim in suit to the administratrix of the estate of the deceased guardian; but, inasmuch as the bar of the statute of nonclaim may inure to the benefit of the surety, I will refer briefly to that question.

[3] The complainant contends that the state statute of nonclaim does not apply to equitable or unliquidated claims such as this, citing Neis v. Farquharson, 9 Wash. 517, 37 Pac. 697. With this conclusion I am unable to agree, whether we consider the question an open one, or as foreclosed by the decisions of the local courts.

Section 1470, Rem. & Bal. Code, provides that every executor and administrator shall, immediately after his appointment, cause to be published in some paper printed in his county a notice to the creditors of the deceased, requiring all persons having claims against the deceased to present them, with the necessary vouchers, within one year after the date of such notice.

Section 1472 provides that, if a claim is not presented within one year after the first publication of notice to creditors, it shall be forever

barred. This statute would seem to apply to mere personal claims against the estate of a deceased guardian or executor, and it has been so held.

In construing the word "claim" in a similar statute, in Fretwell v. McLemore, 52 Ala. 124, 140, Brickell, C. J., said:

"The language of the statute is clear, unambiguous, and comprehensive. Words more significant to express every demand to which a personal representative can or ought to respond, or which can charge the assets in his hands subject to administration, or more expressive of every legal liability, resting upon the decedent, could not have been employed."

In Rhodes v. Hannah's Adm'r, 66 Ala. 215, it was held that the claim of a ward against the estate of a deceased guardian was barred by the statute of nonclaim, unless presented within the time limited by law. To the same effect see Taylor's Adm'r v. Robinson, Adm'x, 69 Ala. 269; Connelly v. Weatherly, 33 Ark. 658; Patterson v. McCann, 39 Ark. 577; Purcelly v. Carter, 45 Ark. 299; Padgett v. State, 45 Ark. 495; Gillespie v. Winn, 65 Cal. 429, 4 Pac. 411; McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466. See, also, Hill v. State, 23 Ark. 604; Nichols v. Shearon, 49 Ark. 75, 4 S. W. 167; Estate of Halleck, 49 Cal. 111; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Sharpstein v. Friedlander, 54 Cal. 58; Fowler v. True, 76 Me. 43; Atty. Gen. v. Brigham, 142 Mass. 248, 7 N. E. 851; 18 Cyc. 467.

The word "claim" has been given the same broad, comprehensive construction by the Supreme Court of this state. In Barto v. Stewart, 21 Wash. 605, 59 Pac. 480, the court construed the word "claim" as synonymous with "cause of action," and in express terms overruled the case cited by the complainant. An executor or administrator may be required to account for trust funds or property which come into his hands, regardless of the statute of nonclaim; but no such case is presented here. No property or trust funds came into the custody of the deceased guardian himself, and it is not claimed that any such came into the hands of his personal representative, or descended to his heirs or next of kin. The complainant is seeking to enforce a mere personal demand against the estate of his deceased guardian, and as such it is clearly barred by the statute of nonclaim, which applies to all claims, known or unknown, and to all persons, whether sane or insane, infants or adults, residents or nonresidents. It is claimed, however, that a federal court of equity is not bound by the state statute of limitations or of nonclaim, and in so far as claims purely equitable are concerned this much may be conceded.

[4] But the statute of nonclaim is enforced with even greater strictness than the general statute of limitations. Its object is to secure an early and final settlement of estates, to the end that the residuum may be distributed to the heirs or next of kin, free from incumbrances or charges which would lead to protracted litigation. Hall v. Bumstead, 20 Pick. (Mass.) 6. And it would be an unusual case, indeed, in which a federal court of equity would feel warranted in subjecting an estate to the payment of a mere personal

demand, several years after the bar of the statute of nonclaim became absolute. No such case is presented here.

In Morgan v. Hamlet, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043, a bill in equity was filed for an accounting of certain matters growing out of a partnership, and the statute of nonclaim of the state of Arkansas was interposed in defense. After referring to the state statute, which does not differ from the statute of this state, and to the decisions of the local courts, which do not differ from the decisions of the courts of this state, the court said:

"It is sought, in argument on behalf of the appellants, to distinguish their case, at least the case of the two infant children of Samuel D. Morgan, from any case within the statute of nonclaim, on the ground that at the death of their father, his title to the real estate, which constituted the plantation, descended to them as his heirs at law, and thereafter as to the operations conducted by John Morgan in 1864 and 1865, having no guardian, the latter was in equity their representative and guardian de son tort and trustee, so that upon his death, and until they arrived at age, there was no one competent to make a demand against his administrator, within the terms of the statute. But we are unable to appreciate the force of this supposed distinction. The statute in question contains no exception in favor of claimants under disability of nonage or otherwise. The claim of the complainants against John G. Morgan was adverse to his administration, although it may have originated in consequence of a relation of trust; and there is no ground that we are able to understand, upon which it can be excepted out of the operation of the statute in question. Their claim was clearly against the administrator of John G. Morgan, whether the latter be considered as the defaulting partner of themselves or of their father. Whatever its description, it was a claim against the estate of John G. Morgan, and for which his personal representative was in the first instance liable; and the statute is a bar to every such claim, unless presented within the time prescribed. On this ground the decree of the Circuit Court is affirmed."

For these reasons I am of opinion that the claim against the estate of the deceased guardian is barred both at law and in equity. The Supreme Court of the state of Washington has held that the undertaking of the surety is collateral security for the preference of the duties of the principal, and that no action can be maintained against the surety unless the liability of the principal exists at the time of the commencement of the action. Spokane County v. Prescott, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733. There is no doubt a conflict of authority on this question, but:

"No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court." Bauserman v. Blunt, 147 U. S. 647, 652, 13 Sup. Ct. 466, 468, 37 L. Ed. 316.

[5] Aside from this, the suit is barred by the special statute of limitations of the state applicable to sureties on the bonds of executors, administrators, and guardians. Section 1432, Rem. & Bal. Code, provides that:

"An action against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal."

Section 1633, Id., provides that:

"All the provisions of chapter 8 of this title relative to bonds given by executors and administrators shall apply to bonds taken of guardians."

The complainant admits that the suit at bar is controlled by these provisions, that the suit is barred by them, and that the complainant is entirely without remedy in the courts of the state of Washington. Again he insists, however, that those limitations are not binding on a federal court of equity. This rule may be conceded in certain cases, but I deny its application to the case now under consideration. No doubt a state Legislature may not limit or restrict the general jurisdiction of a federal court of equity, but its power to limit and restrict the obligation of sureties on statutory bonds is supreme; and if under the laws of the state the surety is released at the expiration of six years from the death of his principal, it is beyond the power of a court of law, or a court of equity, state or federal, to revive the obligation. The bond in suit is not a mere private contract inter partes, and the special statute of limitations does not affect the remedy merely. In speaking of a similar statute of Wisconsin in Hudson v. Bishop (C. C.) 32 Fed. 519, 523, the court said:

"When the Legislature of Wisconsin provided for the giving of a bond by a guardian, it had a right to enact and declare the duties and obligations imposed thereunder upon the sureties signing the same. The extent of the liability thereby imposed is to be determined by the statute of Wisconsin, no matter in what forum suit may be brought thereon. When the statute in express terms declared that, as against the sureties, no action can be maintained unless brought within four years after the discharge of the guardian, this defines the extent of the liability of the surety. It cannot be treated as a mere matter affecting the remedy upon the contract of suretyship, but it is part of the contract itself. In this regard sureties stand in a different position than the principal. The guardian receiving the property of his wards would be liable to account therefor without any statutory declaration to that effect. He has no vested interest in any particular period of limitation, and cannot complain if the statute should be entirely abrogated. When, however, a person is asked to assume the position of a surety for another, by signing a statutory bond, and the statute expressly limits his liability by providing that he cannot be sued thereon after a fixed period, it will not do to hold that the limitation is a mere matter of form, affecting the mode of procedure, and that it may be wholly taken away by legislative enactment. It is a substantial right protecting the surety by limiting the extent of the liability assumed, and enters into the obligation of the bond given under the statute. As such it is one of the conditions of the contract, and therefore an action cannot be maintained against the surety unless brought within the period thus fixed."

These views were concurred in by the late Justice Brewer at circuit on a petition for rehearing. Hudson v. Bishop (C. C.) 35 Fed. 820.

[6] Furthermore, while a court of equity will sometimes remove the bar of the statute of limitations in order to reach trust funds or trust property, this rule can have little or no application to a mere surety—

"whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the

interposition of a court of chancery." Pickersgill v. Lahens, 15 Wall. 140, 144, 21 L. Ed. 119.

For these reasons I am of opinion that the right of recovery against either the personal representative, the heirs, or the surety is barred, and the bill is accordingly dismissed. I reach this conclusion with the less hesitation because I have grave doubts as to the inherent equity of the complainant's claim. Notwithstanding the indefensible methods resorted to for the purpose of divesting infants of their title to the property in question, I doubt if they would have received any considerable sum had their mother's estate been administered in the regular course. The complainant invokes strict rules of law for the purpose of fixing the amount of his recovery, and he cannot complain if his own conduct and his own rights are measured by the same rules.

Let a decree be entered accordingly.

In re STERNE & LEVI.

(District Court, E. D. Texas. June 7, 1911.)

No. 81.

1. BANKRUPTCY (§ 18*)—COURTS—JURISDICTION.

Where partners were domiciled in different bankruptcy court districts, and the firm maintained a business establishment in each district, both bankruptcy courts had jurisdiction of bankruptcy against the firm and the individual partners.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 18.*]

2. BANKRUPTCY (§ 18*)—COURTS—JURISDICTION.

Bankruptcy Act July 1, 1898, c. 541, § 32, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), provides that, where petitions are filed against different members of a firm in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred to the court which can proceed with the same for the greatest convenience of the parties in interest. General Order 6 (89 Fed. v, 32 C. C. A. ix) confers exclusive jurisdiction on the court in which the petition in bankruptcy is first filed, subject to transfers authorized by section 32. Partners were domiciled in different districts, and the firm maintained a business establishment in each district. An involuntary petition in bankruptcy against the firm and the partners individually was filed in one district. Subsequently a voluntary petition was filed in the other district. *Held*, that the court in which the first petition was filed was vested with the exclusive jurisdiction to determine the question which of the two courts could proceed with the case for the greatest convenience of the parties in interest.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 18.*]

3. BANKRUPTCY (§ 18*)—COURTS—JURISDICTION.

Bankruptcy proceedings against a firm maintaining establishments in Texas and Arkansas and against the partners, one of whom resided in each state, were pending in bankruptcy courts in Texas and Arkansas. On motion to transfer the case from the court in Texas to the court in Arkansas, more than 50 creditors with claims aggregating $10,596 appeared in opposition. Two of the creditors had claims for rent due and to become due to the amount of about $2,000 on two buildings occupied by the bankrupts in Texas and claimed priority under the state law.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The total liabilities were less than $18,000. The bankrupt who formerly resided in Arkansas had removed to Texas, where he and the other partner were within the jurisdiction of the court in Texas, subject to call as witnesses in the proceedings. *Held*, that a transfer of the case to the court in Arkansas was not justified under Bankruptcy Act July 1, 1898, c. 541, § 32, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), authorizing transfers for the greatest convenience of parties in interest.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 18* *

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In the matter of the bankruptcy of Sterne & Levi. Petition of W. C. Hudson, trustee, to transfer the cause to the District Court of the United States for the Eastern District of Arkansas. Denied.

The following is the opinion of Hampson Gary, Referee:

The issues referred to me, as special master, to ascertain and report the facts, with my conclusions thereon, arise upon a petition of W. C. Hudson, trustee, for a transfer of the above-entitled cause from this court to the District Court of the United States for the Eastern District of Arkansas on the alleged ground that the latter court can proceed with said cause for the greatest convenience of all parties in interest.

The facts, as derived from the petition and exhibits thereto, responses filed by Thos. D. Bonner, trustee, and various creditors, the record, and the evidence, are as follows:

On February 28, 1911, certain creditors of the firm of Sterne & Levi, merchants having stores at Texarkana, Tex., and Pine Bluff, Ark., filed in this court a petition in involuntary bankruptcy, praying an adjudication of bankruptcy of the partnership and the individual partners. This petition was prosecuted with due diligence to an adjudication, which was made on March 23, 1911, and on April 7, 1911, respondent Thos. D. Bonner was elected and duly qualified as trustee herein.

Meanwhile, said firm of Sterne & Levi, and the individual partners, on March 6, 1911, filed their voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Arkansas, and order of adjudication was made the same day, and on March 21, 1911, W. C. Hudson, the petitioner, was appointed and qualified as trustee.

The stock of merchandise of the bankrupts located at Pine Bluff, Ark., was sold by W. C. Hudson, trustee, for the sum of $5,060; that at Texarkana, Tex., by Thos. D. Bonner, trustee, for the sum of $4,100; both sales were confirmed by the courts under whose respective orders they were made; and said sums of money, representing all—or practically all—of the assets of said bankrupts, are in the hands of the respective trustees.

[1] The first question that presents itself for consideration and decision is that of jurisdiction. It is apparent from the facts that both courts had jurisdiction of the parties and the subject-matter herein, both on account of the fact that a partner was domiciled in each district and because a business was maintained in each, and, the jurisdiction of both having been invoked, the initial step in this inquiry is to determine to which of said courts the law gives the preference; for, unless that preference is here, this court has no jurisdiction to entertain the motion to transfer the cause on the ground of the convenience of parties in interest.

The letter as well as the spirit of General Order 6 in Bankruptcy (89 Fed. v, 32 C. C. A. ix), which is hereinafter quoted at length, confers exclusive jurisdiction upon that court *in which the petition is first filed*, subject to the provision for the transfer of cases from one to another district court where the convenience of parties in interest demands it, which will be discussed later herein. As between two District Courts of the United States it is the duty of the other court to yield jurisdiction and the control and direction of the entire proceeding to the one whose jurisdiction was first invoked. In re

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Elmira Steel Co. (D. C.) 5 Am. Bankr. Rep. 484, 109 Fed. 456; Matter of United Button Co. (D. C.) 12 Am. Bankr. Rep. 761, 132 Fed. 378.

[2] The first petition in bankruptcy having been filed in the District Court of the United States for the Eastern District of Texas, it is clear that this court is entitled to, and should, proceed with the case unless it clearly appears that the convenience of parties in interest requires its transfer under section 32 of the act to some other court. This conclusion is inevitable, notwithstanding the fact, so strongly urged by counsel for the Arkansas trustee, to the contrary, that the second petition was voluntary, and that bankrupts cannot be deprived of their right to a voluntary adjudication, even with an involuntary petition pending against them, unless it be shown that injury would result to creditors by reason of preferential or other transfers between the dates of the respective petitions.

The right of a person to become a voluntary bankrupt under such circumstances was formerly doubted; but it is no longer open to question. The proper practice, as pointed out by the authorities, under such circumstances, is to stay the proceedings on the involuntary petition, with protection to creditors as to costs, and make an order of adjudication, with leave to creditors to bring forward the involuntary petition in the event that it should develop in the further proceedings in the case that such course is necessary in the interest of creditors. But this contemplates that both petitions are presented to the same court, as is usually the case, or, if presented to different courts, upon a transfer and consolidation of the cases in one of the courts, and is a matter of practice and expediency, which in no way affects, alters, or relates to the question of jurisdiction in the first instance.

In this connection, it may be remarked that no real distinction is to be found between a voluntary petition in bankruptcy and an admission by bankrupt upon the filing of an involuntary petition against him of his "inability to pay his debts and a willingness to be adjudged bankrupt on that ground," with adjudication thereon, under which conditions the case proceeds, under the law, as though it were voluntary. Prior to the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838) corporations could not become voluntary bankrupts in the strict and technical sense; but, by filing the admission above referred to, they could and often did accomplish the same end—indeed, practically the only use found for that ground of bankruptcy was in just such cases. This course was resorted to in the case of Elmira Steel Co., supra, upon the second petition filed; and, as stated, no distinction worthy of any serious consideration is perceived in respect to the character of the bankruptcy, i. e., whether voluntary or involuntary, between that case and the one here. For the purposes of this inquiry they may be considered as presenting identical facts.

Section 32 of the bankrupt act is as follows:

"In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by one of such courts which can proceed with the same for the greatest convenience of parties in interest."

This section does no more than provide against the hard and fast rule of the former law, under which a case in bankruptcy had to proceed in the court having jurisdiction in which the petition was first filed, without regard to the convenience of parties. It will be observed that no effort is made therein to specifically point out the manner of obtaining a transfer or the court to which the application is to be made, and general order 6 must be resorted to for more specific directions. Collier on Bankruptcy (8th Ed.) p. 478.

This general order is as follows:

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction, the petition first filed shall be first heard, and may be amended by the inserting of an allegation of an earlier act of bank-

ruptcy than that first alleged, if such earlier act is charged in either of the other petitions, and, in either case, the proceedings upon the other petitions, may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different courts by different members of the same partnership for an adjudication of bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court."

This order leaves no room for doubt but that the court taking and retaining jurisdiction shall have exclusive jurisdiction to determine the question of a transfer under section 32, for it expressly provides that the court *"so retaining jurisdiction* (because the petition was first filed therein) *shall, if satisfied that it is for the greatest convenience of parties in interest*, that another of said courts shall proceed with the case, *order them transferred to that court.*

Therefore, this court, and this court only, is vested with jurisdiction to determine the question here presented, i. e., which of the two courts can proceed with the case for the "greatest convenience of parties in interest." Authorities supra.

[3] Neither the act nor the general order attempts to define the terms "greatest convenience" or "parties in interest." The interpretation placed upon them by the court in the Matter of United Button Co. (D. C.) 13 Am. Bankr. Rep. 454, 137 Fed. 668—that the terms "parties in interest" covers every party having any interest in or connection with the case, including priority, secured and unsecured creditors, as well as the bankrupts themselves, and that the term "greatest convenience" depends upon all the circumstances, proximity of a majority of creditors and the place of business of the bankrupts to the court, proximity of witnesses whose attendance is desired in any hearing, and perhaps numerous other factors—would seem to be the correct view. And, in order that all the circumstances might be fully developed and a full and complete hearing assured herein, 10 days' notice of the time, place, and object of this hearing was given to every party in interest shown by the schedules of the bankrupts herein. In response to this notice of the referee, more than 50 creditors with claims aggregating $10,596 (the total liabilities shown in the schedules are less than $18,000) appeared in person and by attorney in opposition to the petition of the Arkansas trustee for a transfer of the cause. Other creditors having claims of about $1,000 on file with the referee were not present or participating in the hearing and were not considered. Two creditors have claims for rent due and to become due to the amount of about $2,000 on the two store buildings occupied by bankrupts at Texarkana, Tex., and are claiming priority under the state law, which gives them a lien for one year's rent. The claims are being contested by the trustee, and the hearing thereon has been adjourned to enable claimants and the trustee to secure the attendance of witnesses residing in Texarkana Tex., on issues of fact involved therein. It further developed at the hearing that Chas. Levi, one of the bankrupts, who formerly resided at Pine Bluff, Ark., is now residing in Texarkana, Tex., where he and the other partner, Nathan Sterne, are within the jurisdiction of the court, subject to call as witnesses in the further proceedings herein, if their attendance is desired; and said bankrupts were present at the hearing herein and represented to this court that it would better suit their convenience for the case to proceed here.

Although, under section 32 and general order 6, the burden of satisfying this court by a fair preponderance of the evidence that it would be for the greatest convenience of parties in interest to transfer this case to the Arkansas court was upon the petitioner, nothing in support of his petition to transfer was offered by the Arkansas trustee against the array of facts and circumstances constituting a great preponderance of the evidence in favor of

this court retaining and proceeding with the case. Not one creditor, although all had ample notice of the time and object of the hearing, appeared in favor of a transfer.

Counsel for the Arkansas trustee argued with much earnestness that the question here presented has been determined by the District Court of the United States for the Eastern District of Arkansas, and the matter is res adjudicata. This is a question that I approach with much reluctance, as it involves an inquiry into the jurisdiction of a sister court of equal dignity with this court. As said in the case of Elmira Steel Co., supra:

"But no court can close its doors to parties who have a right to come before it. * * * Its duty to pass judgment is not the less exacting where it sometimes involves, as it does in this case, the disagreeable task of determining the validity of proceedings in another court. 'And it must be assumed here at the outset that the other court intended, not merely no error in its proceedings, but no interference with or disparagement of proceedings in a sister court; if it committed any error, or acted without right, it must be believed that it was moved thereto by the parties before it. * * *'"

It should likewise be stated that this court has the greatest possible respect for the honorable District Court for the Eastern District of Arkansas, although, with the views herein expressed and the authorities cited, it feels compelled to differ with its ruling and hold that that court was without jurisdiction to determine the question as to which of these courts could proceed with this case for the greatest convenience of parties in interest. In re Tybo Mining Co. (D. C.) 13 Am. Bankr. Rep. 62, 132 Fed. 697; Matter of United Button Co. (D. C.) 13 Am. Bankr. Rep. 454, 137 Fed. 668.

It being the opinion of this court that the honorable Arkansas court was without jurisdiction in respect to the matter of a transfer of this case, it is unnecessary to determine whether or not creditors who appeared there by petition are concluded by its ruling on said petition. Certainly other creditors would not be so concluded; nor would the trustee herein, who filed a response to the petition of the Arkansas trustee and appears in opposition to a transfer. And none of the parties could compromise, intentionally or otherwise, the dignity of this court, by waiving without its consent jurisdiction in a case of undoubted jurisdiction of which it has taken cognizance, as it did in this case upon the filing of the petition, upon a matter with which it is vested with exclusive jurisdiction to determine.

It follows that the petition to transfer this cause should be denied, and it is so ordered.

To the end that the administration of said estate may proceed in this court without further confusion and delay, Thos. D. Bonner, the trustee herein, is hereby directed to respectfully apply forthwith to the honorable District Court for the Eastern District of Arkansas for a stay of proceedings there and pray for an order directing the trustee therein to turn over to this court the assets in his hands.

Bridges & Wooldridge, for petitioner.
Webber & Webber, for respondent trustee, and various creditors.
Rodgers & Dorough, for respondent Feinberg.
Smelser & Vaughan, for respondent Wessel.

RUSSELL, District Judge. Now on this, the 29th day of May, 1911, came on to be considered the exceptions of W. C. Hudson, trustee appointed by the District Court of the United States for the Eastern District of Arkansas, to the findings of fact and conclusions of law filed herein by Hon. Hampson Gary, special master appointed in this behalf by the District Court of the United States for the Eastern District of Texas; and, the court being fully advised in the premises, the court is of opinion that said exceptions of said W. C. Hudson are not well taken. It is therefore ordered by the court that said exceptions be, and the same are, overruled, and the said

petition of said Hudson, trustee as aforesaid, to transfer this cause to the District Court of the United States for the Eastern District of Arkansas, is hereby denied, and the court hereby approves in all things the findings, conclusions, and opinion of said Hampson Gary, Special Master; and Thomas D. Bonner, the trustee heretofore appointed in this behalf by this court, is hereby directed to respectfully apply, forthwith, to the honorable District Court for the Eastern District of Arkansas for the stay of proceedings in that court, and for an order directing the said Hudson, trustee, to deliver over to this court all the assets in his hands belonging to the estate of said bankrupts.

SEATTLE, R. & S. RY. CO. v. CITY OF SEATTLE et al.

(Circuit Court, W. D. Washington, N. D. May 13, 1911.)

No. 1,932.

1. EVIDENCE (§§ 31, 32*)—JUDICIAL NOTICE—CITY CHARTER—PLEADING.

Pierce's Code Wash. § 408, provides that in pleading any ordinance of a city or town it shall be sufficient to state the title of such ordinance and the date of its passage, whereupon the court shall take judicial notice of the existence of such ordinance and the tenor and effect thereof. *Held* that, in a suit to restrain a city and its officers from repealing a certain railway franchise ordinance, the court will take judicial notice of the charter of the city and of the franchise ordinances, though pleaded by their titles only.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 40–42; Dec. Dig. §§ 31, 32.*]

2. CONSTITUTIONAL LAW (§ 120*) — OBLIGATION OF CONTRACT — REPEAL OF STATUTORY GRANT.

Where an absolute right of repeal of a statutory grant is reserved by the granting authority, the exercise of such right is not a violation of the federal Constitution restraining states from passing any act impairing the obligation of a contract.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 120.*]

3. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION—OBLIGATION OF CONTRACT—IMPAIRMENT.

Where ordinances granting a city railway franchise reserved a conditional right of repeal in case the franchise was not operated in accordance with the provisions of the ordinances, a determination of the city council of the question of fact that the grantee had violated the ordinances, and that they should be repealed, was not conclusive, and hence a suit to restrain the city and its officers from repealing the franchise ordinances, and from enforcing such repealing ordinance on the ground that it constituted an impairment of complainant's contract rights in violation of the federal Constitution, involved a federal question and was therefore within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–824; Dec. Dig. § 282.*

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purch Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7; Earnhart v. Switzler, 105 C. C. A. 262.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CONSTITUTIONAL LAW (§ 120*)—OBLIGATION OF CONTRACT—IMPAIRMENT—APPLICATION.

The prohibition of the federal Constitution against laws impairing the obligation of a contract applies to all contracts, whether executed or executory, whoever may be parties thereto.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 279–285; Dec. Dig. § 120.*]

In Equity. Bill by the Seattle, Renton & Southern Railway Company against the City of Seattle, its Mayor, City Comptroller, and Members of its City Council. On demurrer to bill. Overruled.

Morris B. Sachs and Will H. Thompson, for complainant.
Scott Calhoun and Howard D. Hughes, for defendants.

DONWORTH, District Judge. The defendants have demurred to the bill on a number of grounds; but the only point urged in argument is that the court is without jurisdiction because both complainant and the defendant city are corporations of the state of Washington, and the individual defendants are citizens of the same state, and the suit does not arise, it is contended, under the Constitution or any law of the United States. The bill alleges (treating the supplemental bill as a part of the bill) that complainant is the owner of a line of street railway in Seattle, maintained and operated by virtue of two franchise ordinances duly enacted by the city, namely, ordinance No. 15,919, passed April 22, 1907, and ordinance No. 20,088, passed January 18, 1909; that these ordinances were duly accepted by complainant or its predecessors in interest and constitute contracts between the city and complainant; that the city council early in December, 1910, passed two resolutions declaring its intention to repeal these ordinances and directing the service of written notice upon complainant to appear before the city council on December 19, 1910, to show cause, if any it had, against such repeal; that at the time fixed complainant appeared and objected to the proposed action, but, nevertheless, the mayor and city council after receiving, over the objection of complainant, certain evidence claimed by the city to be due ground for the repeal, passed two ordinances, numbered respectively 25,962 and 25,963, repealing the two franchise ordinances first mentioned; that complainant and its predecessors had duly complied with all the terms and conditions of these franchise ordinances; and that no cause for the repeal existed. It is further averred that the two repealing ordinances are laws impairing the obligation of the contracts created by the franchise ordinances, and, if permitted to stand as valid ordinances, will deprive complainant of its property in the franchise ordinances and the street railway without due process of law. There are other allegations to the effect that the action of the city in enacting and enforcing the repealing ordinances will result in irreparable injury to the complainant.

The allegations of the bill, with respect to the point now under consideration—that is, as showing that the suit arises under the Constitution of the United States—are not as clear and direct as might

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be desired; but it sufficiently appears that complainant contends that the repealing ordinances are in violation of the contract and due-process clauses of the Constitution of the United States and has invoked the jurisdiction of this court on that ground.

[1] It is urged, however, by defendants' counsel that for aught that appears in the bill the entire controversy may be determined upon a pure issue of fact without reference to any provision of the Constitution of the United States. In this connection it should be stated that this court takes judicial notice of the charter of the city of Seattle (Pierce's Code, § 3731), and also takes judicial notice of the tenor and effect of the franchise ordinances, though they are pleaded in the bill by their titles only (Pierce's Code, § 408). During the period embracing the passage of these several ordinances, the charter of Seattle has contained the following clause:

"Every grant of a franchise, right or privilege shall be subject to the right of the city council at any time thereafter to repeal, change or modify the said grant if the franchise granted thereby is not operated in accordance with the provisions thereof, or at all, and every ordinance making such grant shall contain a reservation of the right of the city council to so repeal, amend or modify said ordinance."

Pursuant to this charter provision, each of the franchise ordinances contains a section stating that:

"This grant is subject to the right of the city council to at any time hereafter repeal, change or modify this ordinance if the franchise granted hereby is not operated in accordance with the provisions of this ordinance, or at all, and the city of Seattle reserves the right at any time hereafter to so repeal, change or modify this grant."

The argument of defendants' counsel is that since the franchise ordinances themselves provide that they may be repealed on the happening of a certain event, the occurrence or nonoccurrence of the possible event is purely a question of fact, the decision of which involves no constitutional or federal question.

[2] It is well established by the decisions of the Supreme Court that, where an absolute right of repeal of a statutory grant is reserved by the granting authority, the exercise of such right is not in violation of the federal Constitution. Northern Central Railroad Co. v. State of Maryland, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167; Hamilton Gas Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961.

[3] But it does not follow that, when a conditional right of repeal has been reserved, the holder of the grant is not entitled to resort to the federal courts for protection against a repeal enacted before the happening of the event which makes the right of repeal available, or, in other words, to litigate in the federal courts his claim that the repeal has been made not in pursuance of, but in violation of, the terms of the contract. Cases are cited which hold that, though a party claims to found his property right on a federal statute or on a treaty, this fact does not entitle him to resort to the federal courts when he becomes engaged in a controversy concerning such property right which turns wholly on a question of fact. Bushnell v. Smelting Co., 148 U. S. 682, 13 Sup. Ct. 771, 37 L. Ed. 610; Budzisz v. Steele Co.,

170 U. S. 41, 18 Sup. Ct. 503, 42 L. Ed. 941; Theurkauf v. Ireland (C. C.) 27 Fed. 769; California Gas Co. v. Miller (C. C.) 96 Fed. 12.

In the opinions in these cases many others applying the same principle are cited, but I do not consider these in point on the question now presented. When it is claimed that a contract made by a state or one of its agencies has been impaired by subsequent legislation, the federal courts will construe the statute, or ordinance, or other law of the state alleged to constitute the contract, and determine the proper interpretation to be given thereto, for the purpose of ascertaining whether there is a contract and whether it has been impaired. Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922, and cases cited.

It follows that when it is claimed that a franchise contract created by city ordinance, as is alleged in the bill, has been impaired by a repeal without just cause, and the contract clause of the federal Constitution is invoked as invalidating such repeal, the construction to be given to the franchise, especially as to that portion of it which reserves the conditional right of repeal, necessarily involves at the same time the construction of the federal Constitution in order to determine whether the repeal is or is not prohibited by that instrument. Nor can the question of fact, namely, whether the condition giving rise to the right of repeal really exists, be altogether separated from these questions of law.

A question closely akin to that presented in this case arose in Knickerbocker Trust Co. v. City of Kalamazoo (C. C.) 182 Fed. 865; but the court did not find it necessary to decide it, as it appeared that jurisdiction could be sufficiently grounded upon diverse citizenship alone.

The only case directly in point which has fallen under my observation is that of Iron Mountain Railway Company v. City of Memphis, 96 Fed. 113, 37 C. C. A. 410, decided by the Circuit Court of Appeals of the Sixth Circuit. In a very clear and instructive opinion written by Circuit Judge Taft and concurred in by the entire court, it is held that, on a state of facts substantially identical with the situation shown here, the suit arises under the Constitution of the United States. The franchise ordinance considered in that case contained a conditional provision for forfeiture by the city and the holder of the franchise brought suit in the United States Circuit Court to enjoin the city from putting into effect a forfeiture which the city had declared pursuant, as it claimed, to the terms of the franchise. On this point the court said:

"Does the resolution impair the obligation of the contract contained in the grant? If what the complainant has done and is doing is a breach of the condition of the grant, then the resolution was certainly neither a breach nor an impairment of the contract. It was only legislative action equivalent to a re-entry upon condition broken in its effect upon the title and right of possession, and was therefore in exact accord with the terms of the contract and grant. If, however, the condition has not been in fact and in law broken, then the resolution as law assumes to divest title and the right of possession, when not permitted by the terms of the contract, and purports to secure a right to the city and her officers of resuming possession which would be violative of its provisions. This is certainly an impairment of the obligation of a contract. It is true that the question whether the resolution impairs

the obligation of a contract turns on mixed quesions of law and fact: First, whether the contract provides for a forfeiture upon a breach of the covenant that the complainant will not charge to Memphis and her citizens unequally discriminating rates; and, second, whether complainant, or any corporation for whom complainant is responsible, is charging such rates. That the application of the constitutional restriction depends partly on a question of fact is no reason for holding that the case is not one in which it may be relied on. The existence of the contract, the impairment of which is averred, may often be an issue of fact. The circumstances which render the operation of the law an impairment of the obligation of the contract may often be brought to the knowledge of the court by parol proof."

At a later point in the opinion it is stated:

"It is unnecessary for us to discuss at length the reasons for holding that the resolution was a law depriving the complainant of its property without due process of law, if, in fact, the condition had not been broken, for they are substantially the same as those just stated for concluding that the resolution is a law of the state impairing the obligation of the contract. If this resolution violates the federal Constitution, there can be no doubt that complainant is entitled to equitable relief. It is certainly a cloud upon the title of the railroad company in its occupancy of the street, which it may ask a court of equity to remove, and to enjoin any claim under it. We conclude, therefore, that the bill stated a good cause of action on the ground that the resolution of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky avenue, if it be true, as averred in the bill, that no condition of the contract had been broken justifying forfeiture. This gave to the court below jurisdiction of the whole controversy between the city and the railroad company."

On full consideration I am of opinion that it would not be in accordance either with the adjudged cases or with reason to hold that the jurisdiction of this court upon constitutional grounds does not extend to cases where the contract, which, it is claimed, is impaired by subsequent legislation, contains a conditional reservation of the right of termination or forfeiture. [4] The prohibition of the Constitution against laws impairing the obligation of contracts applies to all contracts, executed and executory, whoever may be parties to them. Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403; Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.

I therefore conclude that on the face of the bill the court has jurisdiction, and the demurrer will be overruled.

WILLIAMS v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court, E. D. Washington, E. D. August 3, 1911.)

No. 1,474.

MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, an employé of a mining company, was injured by coming in contact with a trolley wire heavily charged with electricity. Plaintiff was in full possession of all of his faculties, and was intelligent and experienced. He had worked in the mine for five months, and had daily ridden in and out of the mine on a train, and could see the exposed trol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ley wire within a few inches of his eyes, and could have known that it was not guarded or protected, and that it conducted sufficient electricity to propel a train of some 10 or 12 cars. In plaintiff's daily walks through the dark tunnels, the wire in many places came down as low as his shoulder within a few inches of his head, and he consistently avoided contact with the wire under such conditions, and saw his fellow workmen take the same precautions. He testified that he knew, if he came in contact with the wire, he would get hurt, but did not know there was enough power to harm him. *Held*, that he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

At Law. Action by Thomas Williams against the Bunker Hill & Sullivan Mining & Concentrating Company. On motion for judgment non obstante. Granted.

Belden & Losey, B. K. Wheeler, and Maury & Templeman, for plaintiff.

Myron A. Folsom, for defendant.

RUDKIN, District Judge. The plaintiff in this action is a subject of the king of Great Britain and Ireland, and the defendant a corporation organized and existing under the laws of the state of Oregon. On the 10th day of July, 1910, the plaintiff was injured, while in the employ of the defendant, through coming in contact with a trolley wire maintained and used by the defendant for the purpose of propelling cars in and out of its mine near the town of Kellogg, in the state of Idaho. A motion for nonsuit was interposed at the close of the plaintiff's testimony, and a motion for a directed verdict at the close of all the testimony; but these motions were denied, the court reserving the right to reconsider the questions thus presented on motion for judgment notwithstanding the verdict, in the event the jury should return a verdict in favor of the plaintiff. This practice is sanctioned by the local laws of the state of Washington. Roe v. Standard Furniture Co., 41 Wash. 546, 83 Pac. 1109; Quackenbush v. City of Yankton, 186 Fed. 991. Such a course was deemed in the interest of society and in the interest of the parties, to the end that a final judgment may be ordered on the verdict by the appellate court, should this court err in the conclusion it is about to reach.

The negligence charged in the complaint consisted in a failure on the part of the defendant to insulate the trolley wire, or to guard or protect it, and a failure to warn the plaintiff against the danger of coming in contact with a trolley wire charged with electricity—a danger of which he is alleged to have been wholly ignorant. Of course, the trolley wire could not have been insulated without wholly destroying its functions; but for the purposes of this case it will be conceded that the defendant was negligent in other respects, and that the plaintiff was wanting in contributory negligence. The motion for a judgment notwithstanding the verdict is interposed on the sole ground that the plaintiff assumed the risk, and this is the only question I deem it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

necessary to discuss or consider. The rule is well established that every servant assumes certain risks incident to his employment, and the application of that rule to the facts of this case is all that remains. As said by the court in Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281:

"One who understands and appreciates the permanent conditions of machinery, premises, and the like, and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence, and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an extensive discussion of it, or an attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption of risk has been thought by many a hard one, when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves to the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it which, from time to time, have been made, as, for instance, by Congress in the safety appliance law. * * * But the common law in this regard has not been modified in the District of Columbia, and we have no other duty than to enforce it."

Again the court said:

"Where the elements and combination out of which the danger arises are visible, it cannot always be said that the danger itself is so apparent that the employé must be held, as matter of law, to understand, appreciate, and assume the risk of it. * * * The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employé is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

In Maki v. Union Pac. Coal Co. (C. C. A.) 187 Fed. 389, the court said:

"The second contention of the plaintiff's counsel is that the defendant's failure to fence off the machinery was negligence in itself, that a servant does not assume the risk of his master's negligence, and that, therefore, the plaintiff was entitled to a verdict. The answer is that, while it is true that the servant does not assume the risk of his master's negligence, the effect of which is neither known to him nor readily observable, nor to be apprehended, yet he does, by continuing in the employment without complaint, assume the risk of the effect of such negligence which is known to him, or is obvious or plainly observable, and the danger of which is appreciated by him, or is clearly apparent, just as completely as he assumes the ordinary risks of his occupation. * * * The absence of any fence about the revolving cogwheels, and the risk and danger of injury by them, were so plainly observable by the decedent, who had been oiling them and passing them on the plank by their side about once an hour, that he could not have failed to have seen and known them."

"Finally, attention is called to the rule that a recovery may sometimes be had where the risk is obvious, but the danger is not fully appreciated by the party injured; and counsel argue that the question whether or not the decedent appreciated the danger should have been submitted to the jury. But the decedent was a man presumably possessing the ordinary faculties of an adult who has a sound mind and body. It is true that he was a Finlander; but the statement of his counsel contained no intimation that he could not see these engaging wheels, could not understand or know that they would crush a human being drawn between them, that a person upon the revolving horizontal wheel might be caught between them, and that the clothes of one caught between the engaging cogs would draw him between the wheels; and in the absence of any claim or declaration that he had not the ordinary intelligence, ability, and prudence of men in like situations, he must be presumed to have been a Finlander of ordinary prudence and intelligence. And one cannot be heard to say that he did not know or appreciate a danger, whose knowledge and appreciation were so unavoidable that a person of his prudence and intelligence could not have failed to perceive and appreciate it. * * * Under the settled rules of law to which reference has been made, the plaintiff was not entitled to recover any damages of the defendant in this case, and there was no error in the court's instructions to the jury to that effect."

The law deals with men in their various relations in life as endowed with average intelligence and capacity, and recognizes their limitations; but in this case we are not required to indulge in or rely upon presumptions. The plaintiff was a man in the full possession of all his mental faculties and of more than average intelligence and experience. He had worked in this mine continuously for a period of about five months. He rode in and out of the mine daily on the train, and could see the naked, exposed trolley wire within a few feet—nay, within a few inches—of his eyes. He could see that it was not guarded or protected. He could see the sparks flying from the wire as the trolley passed over it. He knew that the wire conducted sufficient electricity to propel a train of 10 or 12 cars. In his daily walks through the narrow tunnels of the mine, the wire in many places came down as low as his shoulder, within a few inches of his head. He studiously and consistently avoided contact with the wire under these conditions for a period of five months. He saw his fellow workmen take the same precautions. He knew that he should not come in contact with the wire. He knew that, if he did so, he would "get hurt," or "get stung." And in the light of these facts, and possessed of this knowledge, how can it be said that he did not understand or appreciate the danger? All of these facts he admitted on cross-examination, but qualified them to this extent on redirect:

"Q. Williams, what knowledge did you have of the danger of touching that wire with the hose? A. Well, I didn't— I didn't intend to touch it at all with the hose. Q. Did you know whether it was dangerous to touch it with the hose? A. I knew it would shock you, but I didn't know it would knock you out. I didn't know there was enough power in it to hurt or to harm you."

But the question here is, not only what the plaintiff knew, but what should he have known by a proper exercise of his faculties, and the bare denial of knowledge by an interested party in such a case does not necessarily present an issue of fact for a jury. As said by the court in Bier v. Hosford, 35 Wash. 544, 77 Pac. 867:

"It was apparent and obvious that if, while running clothes through the machine, she should allow her hand or fingers to get caught between the nearest revolving cylinder and the hot concave iron underneath, she would suffer an injury. The bare statement of this proposition is sufficient to demonstrate its verity, notwithstanding respondent's statement that she was not aware of such danger. Physical facts, apparent to individuals of the most ordinary understanding, particularly those things capable of sensation and touch, cannot be overcome or discredited by word of mouth. Courts and juries in such instances are not warranted in making erroneous deductions from known premises."

Or, as said by the court in Maki v. Union Coal Co., supra:

"And one cannot be heard to say that he did not know or appreciate a danger, whose knowledge and appreciation were so unavoidable that a person of his prudence and intelligence could not have failed to perceive and appreciate it."

In this day and age we are hourly beset by wires laden with that mysterious, invisible, deadly force that man can master, but can so little understand. We know, however, that electricity will shock and burn. We know that it will maim and kill. This is a part of our common store of knowledge, and a person occupying the position of the plaintiff, with his knowledge and opportunities for gaining knowledge, will not be permitted to gainsay it.

"While electric companies are bound to use the highest degree of care practicable to avoid injury to every one that may be in lawful proximity to their wires, yet the ordinary person is held to know that danger attends contact with electric wires, and it is his duty to avoid them so far as he may." Haertel v. Pennsylvania Light & Power Co., 219 Pa. 640, 69 Atl. 282.

This rule applies with double force to the plaintiff here. Having reached the conclusion that it appears from the uncontradicted testimony that the plaintiff knew and fully appreciated the dangers surrounding him in the working place furnished by the master, I have no alternative but to direct a judgment for the defendant. This conclusion is so apparent and so self-evident to my mind that I can only account for the verdict on the theory suggested by the Supreme Court in Butler v. Frazee, supra—the notorious unwillingness of juries to apply the rule of assumption of risk in cases of this character.

Let a judgment be entered accordingly.

REYMER & BROS., Inc., v. HUYLER'S.

(Circuit Court, W. D. Pennsylvania. July 3, 1911.)

No. 51.

TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT.

The word "Metropolitan," when used by a manufacturer on pound and half-pound boxes of chocolates and bonbons, is an arbitrary and fanciful word, not indicative of ingredients, quality, or amounts, and constitutes a valid trade-mark, which is infringed by its use by another, in connection with other words, giving the packages a similar appearance on choc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

olate cakes sold at candy stores in the same city and vicinity, where it has become identified by long use with the goods of the first user.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68–72; Dec. Dig. § 59.*

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth v. Warner, 50 C. C. A. 323.]

In Equity. Suit by Reymer & Bros., Incorporated, against Huyler's. On motion for preliminary injunction. Motion granted.

James Negley Cooke, James L. Wehn, Leander Trautman, Frank F. Reed, and Edward S. Rogers, for complainant.

Bakewell & Byrnes, George H. Parmelee, and Ely, Agar & Fulton, for respondent.

YOUNG, District Judge. This is a trade-mark case, and not a case of unfair competition. Most of the affidavits in the case, which is a suit to enjoin the infringement of a trade-mark, and the arguments of counsel are altogether irrelevant, because they are more applicable to a case of unfair competition than to one of infringement of a trade-mark. The principle governing courts in such cases has been clearly formulated by Judge Acheson in the case of Codillot v. American Grocery Co. (C. C.) 71 Fed. 873, where it is said:

"Courts of equity interfere by injunction to protect trade-marks, upon the ground that the plaintiff has a valuable interest in the good will of his trade, and that a rival merchant or manufacturer shall not be permitted, by the use of the plaintiff's symbol, to palm off his own goods to purchasers as those of the plaintiff. McLean v. Fleming, 96 U. S. 245 [24 L. Ed. 828]. To entitle a plaintiff to an injunction, it is not necessary that a specific trade-mark has been infringed; for, irrespective of a technical question of trade-mark, a defendant has no right, by imitative devices, to deceive purchasers, and thus induce them to believe that they are buying the goods of the plaintiff. Id.; Coates v. Thread Co., 149 U. S. 562, 13 Sup. Ct. 966 [37 L. Ed. 847]. As to the degree of similarity necessary as a ground for an injunction, no precise rule, applicable to all cases, can be formulated; but the decisions agree that it is enough if the resemblance is so close that purchasers exercising ordinary caution are likely to be misled. In McLean v. Fleming, supra, the court (citing Gorham Co. v. White, 14 Wall. 511 [20 L. Ed. 731]) said: 'Two trade-marks are substantially the same, in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one, supposing it to be the other.' The resemblance need not be such as would deceive persons who would see the two marks placed side by side. Seixo v. Provezende, 1 Ch. App. 192, 195. 'Similarity, not identity,' said Judge Bradley, in Celluloid Manufg. Co. v. Cellonite Manufg. Co. [C. C.] 32 Fed. 94, 97, 'is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary, unsuspecting customer is obnoxious to the law.'"

These principles are still further defined and applied, in their application to the two classes of cases of unfair competition and infringement of trade-marks, by Judge Baker in Church & Dwight Co. v. Russ (C. C.) 99 Fed. 276, 278:

"The tendency of the courts at the present time seems to be to restrict the scope of the law applicable to technical trade-marks, and to extend its scope

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in cases of unfair competition. Mill Co. v. Alcorn, 150 U. S. 460 [14 Sup. Ct. 151, 37 L. Ed. 1144]; Laughman's Appeal, 128 Pa. 1 [18 Atl. 415, 5 L. R. A. 599]; Koehler v. Sanders, 122 N. Y. 65 [25 N. E. 235, 9 L. R. A. 576]; Castle v. Siegfried, 103 Cal. 71 [37 Pac. 210]; Fleischmann v. Starkey [C. C.] 25 Fed. 127. As this case falls more appropriately under the head of an infringement of a technical trade-mark, rather than under the head of unfair competition, it becomes desirable to ascertain as nearly as may be the distinctions, as well as the points of resemblance, between them. The underlying principle of each is the same, namely, the prevention of that which in its operation and results, and usually in intention, is a fraud upon the public, and an injury to the rival trader. That this is the underlying principle is clearly shown in the leading case on technical trade-mark law (Canal Co. v. Clark, 13 Wall. 311, 322 [20 L. Ed. 581]) where the Supreme Court say: 'This will be manifest when it is considered that, in all cases where rights to the exclusive use of the trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the cases.' But, while the idea of fraud or imposition lies at the foundation of the law of technical trade-marks, as well as the law of unfair competition, it must be borne in mind that fraud may rest in actual intent shown by the evidence, or may be inferred from the circumstances, or may be conclusively presumed from the act itself. In the case of unfair competition the fraudulent intent must be shown by the evidence, or be inferable from the circumstances, while, in the case of the use by one trader of the trade-mark or trade symbol of a rival trader, fraud will be presumed from its wrongful use. It is commonly said that there is a right of property in a technical trade-mark, and an infringement of it is spoken of as a violation of a property right."

Regarding this property right, it was said by Mr. Justice Miller in Trade-Mark Cases, 100 U. S. 82, 92, 25 L. Ed. 550:

"The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the states. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage."

In Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, it is said:

"These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbols, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of a mark or device claimed as a trade-mark is founded upon priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like ar-

ticles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

Controlled, then, by the foregoing considerations, let us first see what the established facts of this case are. It appears from the evidence in this case that Reymer & Bros. have been for the past 65 years engaged in the manufacture and sale of candy and confectionery, first and until 1901 as a copartnership, and since that time as a corporation. In 1897 they adopted as a trade-mark the word "Metropolitan," which they used upon one pound and one-half pound boxes of chocolate creams, mixtures of chocolate creams, and other candies called "bonbons." There was also printed upon the boxes, in addition to the work "Metropolitan," the words, "Reymers," "Pittsburgh," "Assorted," or "Chocolates." It appears by the evidence that these packages, so marked, have been sold and supplied by the complainant to the wholesale and retail establishments in the district surrounding Pittsburgh to the extent of 60,000 packages in the last 2½ years, and 150,000 since 1897, and that complainant's "Metropolitan" chocolates are well known and are bought and sold and asked for and identified by purchasers and the public by the word "Metropolitan." It also appears that the word "Metropolitan" has become so associated with the product of complainant as to indicate to purchasers and the public its origin and manufacture. In its present application it is an arbitrary and fanciful word, and, printed upon a box of candy, does not in any way describe any ingredient or quality of the candy, or amounts, or indicate the place of manufacture, or the person who manufactures it.

The respondent in the spring of 1910 began the use of the word "Metropolitan" as a trade-mark for sweetened cakes of chocolate, and these were put up in wrappers and also in small boxes, with a picture of the tower of the Metropolitan Life Building, Madison Square, N. Y. These boxes were sold at the small price of five and ten cents. The evidence also clearly shows that, although confusion may arise by the alleged expert and technical definition as to the meaning of the word "chocolate" and the meaning of the word "candy" given by deponents on both sides, chocolate mixed with sugar and other substances is sold at candy stores, confectioneries, and other places where candy is sold and purchased indiscriminately by those who wish to eat it in the form in which it is sold.

It appears upon comparison of complainant's boxes with the packages of respondent that the marks are very similar. On the complainant's, the word "Reymers," "Pittsburgh," "Metropolitan," "Chocolates"; on the respondent's, on its boxes, "Huylers," "Metropolitan," "Chocolate"; and on its cake packages, "Huylers," "Metropolitan," "Sweet Chocolate."

Measured, then, by the principles above laid down, it is established in this case that the complainant has a property right in the trade-mark "Metropolitan"; that it was adopted for the purpose of identifying the origin and ownership of certain candies manufactured and sold as chocolate creams, mixed chocolate creams, and bonbons by complainant; that it was used to distinguish such candies from like articles manufactured by others, and that this device or mark, "Metro-

politan," was not adopted and placed upon the above-mentioned candies for the purpose of identifying their class or quality; that the complainant was the first to use this trade-mark on like articles of production; and that the word "Metropolitan" is an arbitrary and fanciful term, and does not designate locality, section, or region of country.

The complainant's trade-mark, then, being a valid trade-mark, and one to the exclusive use of which, as used by complainant, it is entitled, it only remains to determine whether or not respondents have infringed.

It clearly appears, by a comparison of the packages used by complainant and respondents, that the words "Metropolitan," "Chocolate," or "Chocolates" are conspicuously presented. The different shape of the packages is not likely to be observed by the ordinary purchaser because the class of goods being dealt in, candies and chocolates, are placed in many different kinds of packages by the same manufacturer. The ordinary purchaser, having in mind chocolate which is ready for consumption and "Metropolitan" as descriptive of Reymers' chocolate, is unlikely to look further than for the two words. These he finds on both packages. As said in Celluloid Manufg. Co. v. Cellonite Manufg. Co., supra:

"Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."

So we have here, not identity, but similarity, and, as was said in the same case:

"What similarity is necessary to effect the object has to be determined in each case by its own circumstances."

Taking, then, this similarity—this resemblance—and keeping in mind the other circumstances of the case as shown by the evidence, the location by defendant of its store in one formerly occupied by complainant in its retail cigar business, the keeping of its cakes of "Metropolitan" sweet chocolate on the counter with other candies and with small packages of candy, the beginning of the use by it of the trade-mark in the same city with complainant, after being engaged in business there for about one year, and where complainant's use of the trade-mark was well known and largely advertised, we must conclude that, not only does the use of complainant's symbols by respondent result in the palming off of respondent's own goods to purchasers as the goods of complainant, but by its imitating the trade-mark of complainant the respondent has deceived purchasers and induced them to believe they have been buying the goods of complainant, and thus has violated the property right of complainant in its trade-mark. Even were there no evidence of fraudulent intent in the case, it being one where a trade-mark is infringed, fraud may be presumed from its use.

We are therefore satisfied that the respondents have infringed the complainant's trade-mark, and should be restrained from the further use of the same upon articles of its production like those of complainant.

Let an order be drawn accordingly.

In re GILLASPIE.

(District Court, N. D. West Virginia. September 16, 1911.)

1. BANKRUPTCY (§ 482*)—ATTORNEYS FOR PETITIONING CREDITORS—INVOLUNTARY PROCEEDINGS.

Since involuntary proceedings in bankruptcy can only be brought by unsecured creditors, and the fund which they can reach is only that which arises after either the payment of existing liens or from a sale of the property subject to the liens, their attorneys, instituting such proceedings, cannot be allowed compensation out of funds necessary to pay off the liens or prior to the satisfaction of lien creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

2. BANKRUPTCY (§ 482*)—SALE OF PROPERTY—EXISTING LIENS—COSTS.

Where there is reason to believe that a bankrupt's property may sell for an excess over existing liens, but it turns out that it does not, the court may charge the actual costs of the suit and expenses of sale against the fund realized by the lienholders, but such allowance cannot extend to compensation to attorneys instituting the suit for unsecured creditors who have realized nothing.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

3. BANKRUPTCY (§ 22*)—COURTS—EQUITY JURISDICTION.

Bankruptcy courts are courts of equity, and governed by equity rules, except so far as otherwise expressly provided by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 22.*]

4. ATTORNEY AND CLIENT (§ 155*)—EMPLOYMENT—FEES—EQUITY.

Since the relation of attorney and client is purely personal, depending on personal contract, courts of equity will never attempt to fix the compensation due the attorney in any ordinary litigation, but will leave the parties to an action at law.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 155.*]

5. ATTORNEY AND CLIENT (§ 171*)—ATTORNEY'S LIEN—NOTICE.

An attorney has a charging lien not recognized by the common law, but created generally either by statute or judicial legislation, to sustain which notice is required.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. § 171.*]

6. ATTORNEY AND CLIENT (§ 182*)—CHARGING LIEN—EQUITY RIGHT.

An attorney's charging lien is an equitable right to be paid for services out of the proceeds of the judgment obtained by his labor and skill; the attorney to the extent of such services being regarded as an equitable assignee of the judgment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. § 182.*]

7. ATTORNEY AND CLIENT (§ 171*)—POSSESSORY LIEN—DEFINITION.

An attorney's possessory lien is a right to retain property or money of his client until his fees are paid.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. § 171.*]

8. ATTORNEY AND CLIENT (§ 182*)—LIENS—SCOPE.

An attorney's retaining and charging liens apply solely to the personal relation between the attorney and his client, and may not be extended to or affect the rights of third persons who may be interested in the litigation, but who have not employed such attorney; the liens being allowed to cover only the interest of the client in the property charged, subject

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to any rights in the property which are valid against the client at the time the liens attach.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 182.*]

9. BANKRUPTCY (§ 482*)—ATTORNEYS' LIENS—IMPOSITION BY EQUITY AND BANKRUPTCY COURTS.

The only proper case where a court of equity or bankruptcy can award compensation to an attorney out of funds due to others than his client is where the attorney for one of a class has created or secured a fund and brought it into the custody of the court, which is to inure, not only to the benefit of his client, but to that of all those belonging to the class.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

In the matter of bankruptcy proceedings of Charles D. Gillaspie. On petition to review a referee's ruling allowing compensation to petitioner's attorneys. Reversed.

W. B. Maxwell and D. H. Hill Arnold, in pro. per.

James P. Scott and Cunningham & Stallings, for excepting creditors.

DAYTON, District Judge. The whole theory upon which the bankruptcy law authorizes the allowance of fees to the attorneys for petitioning creditors is that such creditors are acting for the joint benefit of themselves and all other unsecured creditors who will, by reason of their efforts, share equally with them in the unincumbered assets of the bankrupt. It is right and just that for this reason the fund secured to common creditors should, as against such creditors equally participating in it, share the expense incurred in securing it. But it is to be borne in mind that involuntary proceedings in bankruptcy can only be brought by unsecured creditors, and the fund that they can reach is only that which may arise after either the payment of the existing liens or from the sale of the property subject to liens. It must, therefore, always be a subject of careful consideration on the part of unsecured creditors whether it will be worth their while to proceed against one whose property is heavily incumbered, for they must do so taking the risk that no surplus fund will arise from which they may realize anything with which to pay their debts or the compensation due their attorneys.

[1, 2] They can have no interest ordinarily in the funds necessary to pay off the valid subsisting liens, and certainly they cannot ask a court to pay their attorneys out of the funds due such lienholders for instituting and prosecuting a suit not calculated to benefit them, but only to diminish and lessen such lienor's vested right. It is true that it may be presumed that, if a man is bankrupt with his property incumbered with liens, a suit will have to be brought by some lienholder to marshal the liens and have sale decreed to satisfy the same. Therefore courts of bankruptcy, upon broad, equitable grounds, where there is reason to believe that the property may sell for an excess over the existing liens thereon, but it turns out that it does not, may well charge the actual costs of the suit and expenses of sale against the fund realized by the lienholders, for such costs of suit and expenses of sale would have had ordinarily to be incurred on some proceeding by them in order to sell and dispose of the property. But such allowance can-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not extend further than this, and certainly not to the extent of compensating attorneys who have instituted the suit for unsecured creditors who have realized nothing. This is apparent for the very simple reasons, first, that lienholders cannot in any proceeding in equity to enforce liens be allowed compensation, as against other lienholders, for their attorneys in the suit instituted by them to enforce such liens; second, because, if such attorney's fees be allowed, then the junior lienholder's lien may be utterly and wholly consumed at the instance of unsecured creditors instituting the bankruptcy proceeding; and, third, because attorneys' liens for fees attach only to such funds as may be secured by their effort to their clients, and those others who are in the same class with them as regards interest. A simple illustration of these sound principles may be made. Suppose A. to have real estate estimated to be worth $20,000. Against this real estate B. holds a vendor's lien for $10,000, C. a judgment lien for $5,000, and D. a trust lien for $3,000; B.'s judgment lien being second in priority and D.'s trust lien third in priority. Neither B. nor C. can have this real estate sold without under the law of this and other states where the common law and equity practice prevails, resorting to a court of equity to decree such sale, and D., under his deed of trust, can only sell the property subject to B.'s vendor's and C.'s judgment lien. This, in actual practice, is seldom done because such sales are not satisfactory; purchasers generally demanding clear titles at such sales. Therefore, under such conditions, C., too, would resort to equity to decree the sale after marshaling the liens and ascertaining their amounts, priorities, and to whom owing. Suppose C. institutes the suit upon his judgment lien to sell the property and it sells at forced sale for $18,000. Under our practice prevailing for at least a century in this state and Virginia, the court of equity will, out of the proceeds of sale, pay first the costs of suit and expenses of sale; second, B.'s vendor's lien in full; third, C.'s judgment lien in full; and, finally, the balance it will apply as a credit upon D.'s trust lien. In no event will it allow to the attorneys of C. instituting the suit compensation for services beyond the nominal docket fee taxed in the costs. To do so would be to create a new lien in favor of such attorneys not existing before the institution of the suit and give such new lien priority over D.'s vested lien existing before this new lien's creation, and which, in many cases, would absolutely deny to D. any recovery at all.

[3-8] Bankruptcy courts are courts of equity and governed by equity's rules, except so far as otherwise expressly provided by the bankruptcy statute. The relation of attorney and client is a purely personal relation, dependent, under all ordinary circumstances, upon the personal contract made between the two as to what compensation the attorney shall have for his services. Courts of equity should never attempt to fix the compensation due the attorney in any ordinary litigation. The law courts are open to enforce this class of contracts in actions of debt or assumpsit just as they are open to enforce all other contracts for services rendered, whether express or implied. The only exceptions in favor of the attorney are: First. The charging lien not recognized by the common law, but created in most of the states either

by virtue of statutes or by judicial legislation. To sustain this lien in this state notice is required to be given. Renick v. Ludington. 16 W. Va. 378. This lien may be defined to be an equitable right of the attorney to be paid for his services out of the proceeds of the judgment obtained by his labor and skill. To the extent of such services he is regarded as an equitable assignee of the judgment. Second. The possessory lien which is the attorney's right to retain the property or money of his client until his fees are paid. Both these liens apply solely to the personal relation existing between the attorney and his client, and can in no condition of affairs be extended to or affect the rights of other persons who may be interested in the litigation but who have not employed such attorney. Such liens cover only the interest of the client in the property charged, and are subject to any rights in the property which are valid against the client at the time the lien attaches. 4 Cyc. 1005, 1008, 1017.

[9] The only proper cases that can arise where courts of equity and bankruptcy as well can award compensation to an attorney out of funds due others than his client is where, as I have heretofore indicated, such an attorney for one of a class has "created" or secured a fund and brought it into the custody of the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class. In such cases the courts award compensation to the attorney out of the fund due to all, not on the theory of his having an attorney's lien, but on the broader theory that all interested in the fund should contribute ratably to the cost of "creating" or securing it. These principles are very clearly set forth in Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central R. R. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; Jefferson Hotel Co. v. Brumbaugh (4th Circuit) 94 C. C. A. 279, 168 Fed. 867.

In this case it is apparent that the property of the bankrupt consists largely of real estate, such as a hotel property and a tract of coal land. It further appears that these properties are very heavily incumbered by many valid and existing liens which must be satisfied in full before the petitioning and other unsecured creditors can realize anything. The referee by his decree complained of and sought to be reviewed herein before sale of said properties and before it had been ascertained what surplus, if any, will remain for common creditors after payment of such liens, has allowed to attorneys for petitioning creditors a fee of considerable amount, payable out of the proceeds of sale when made, as against the rights of lienholders whose liens may be or may not be affected thereby. This is error, and his ruling and order must be reversed and annulled, and the cause be referred back to him with instructions to withhold action upon this petition of Maxwell and Arnold until all the property of the bankrupt shall have been sold and he has ascertained what sum will arise, after payment of all valid liens, for distribution among the common or unsecured creditors, and from this fund, and this fund only, he shall allow such sum to attorneys for the petitioning creditors as will be a reasonable compensation for the services rendered by them.

In re GOBLE BOAT CO.

(District Court, N. D. New York. September 25, 1911.)

1. BANKRUPTCY (§ 332*)—CLAIMS—SUFFICIENCY.

The manager of a bankrupt corporation filed a claim against it, alleging that there was justly due claimant $1,494.83, that the consideration for the debt was for labor as manager of the bankrupt's plant, that no part of it had been paid, that there were no set-offs and counterclaims, and that deponent had not received any security. Attached to the claim was a statement of account, charging the bankrupt "to money advanced and salary from September 18, 1909, to December 19, 1910, $2,295.96," and giving a credit "by money drawn from firm, $801.13," leaving a balance of $1,494.83. *Held*, that the claim was insufficient for failure to set out an itemized account, showing the amount and rate of salary and the dates or amounts of the advances of money, and for failure to state when the salary became due and that no note had been received for the account nor any judgment rendered thereon as required by General Order 21 (89 Fed. ix, 32 C. C. A. xxii).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 332.*]

2. BANKRUPTCY (§ 339*)—CLAIMS—OBJECTIONS.

Bankruptcy Act July 1, 1898, c. 541, § 57k, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), provides that claims which have been allowed may be reconsidered for cause and allowed or rejected in whole or in part according to the equities, before but not after the estate has been closed. *Held*, that where a claim for money advanced and services rendered was insufficient in form and at the first meeting of creditors was allowed only for voting purposes, after which a petition was filed by objecting creditors to expunge the claim, and on this the referee appointed a time and place for hearing, the claim filed did not prove itself, but it was the duty of the claimant to reply to the creditors' petition, and, in the absence of any such reply or appearance by the claimant, the referee properly expunged the claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 339.*]

In the matter of bankruptcy proceedings of the Goble Boat Company. On petition to review a referee's order expunging and disallowing the claim of J. Lee Goble, an alleged creditor. Affirmed.

John C. Henry, for objecting creditors.
Joseph T. McCaffrey, for claimant.

RAY, District Judge. At the first meeting of creditors, J. Lee Goble by his attorney filed a claim against the bankrupt estate for $1,494.83 dated May 16, 1911. The claim was verified in Cuyahoga county, Ohio, but accompanied by a power of attorney to Joseph T. McCaffrey, who presented it. The referee before whom this proceeding was pending allowed the claim for voting purposes only as formal objections were interposed thereto by creditors. The referee certifies that the claim was allowed for that purpose only and the objections not examined into or evidence taken.

[1] The allegation and statement of the claim (aside from mere formal parts) are as follows:

"That the Goble Boat Company, the corporation by which a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent (claimant) in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the sum of $1,494.83; that the consideration of said debt was for labor in the employ of said company as manager of its plant; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that deponent has not nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever. [Signed] J. Lee Goble, Creditor."

The certificate and signature of notary public before whom sworn to followed.

Attached to the claim was the following statement of account:

Oswego, N. Y., January 1, 1911.

Goble Boat Company,

To J. Lee Goble, Dr.

To money advanced and salary due from Sept. 18, 1909, to Dec. 19, 1910	$2,295 96
Credit	
By money drawn from firm	801 13
	$1,494 83

Then followed the power of attorney.

It is evident this is a claim on an open account. The claim is in no manner itemized, and, while the account attached itself shows the claim was for money advanced to the firm and for salary or compensation, the amount or rate of salary is not given nor the dates or amounts of advances of money. The verified claim itself makes no mention of money advanced, but refers to labor solely. Clearly taking the two together the bankrupt was not owing the claimant $1,494.83 for labor unless the money drawn from the firm, $801.13, equaled the money advanced. However this may be, the claim does not state specifically when the salary became due, and the proof of claim fails to state that "no note has been received for such account nor any judgment rendered thereon," as required by General Order 21 (89 Fed. ix, 32 C. C. A. xxii). The money may have been drawn at one time or at different times. Perhaps the fair inference is that the salary became due December 19, 1910, and that the $1,494.83 was all for salary.

In any event, the claim was never allowed, as the referee says he allowed it for voting purposes only, and in effect that the trial of the merits of the objections was postponed.

Later and on application of the objecting creditors an order was made by the referee for a re-examination of the claim fixing time and place, pursuant to the provisions of subdivision 6 of General Order 21 (89 Fed. x, 32 C. C. A. xxiii), and requiring the claimant to appear and submit to examination regarding his claim. This was duly served on the claimant; but on the day and at the place fixed the claimant did not appear in any way, and thereupon the referee expunged and disallowed the claim. No evidence or testimony whatever was offered or taken.

[2] The contention of the claimant is that this was error; that the claim is in due form and sufficient on its face, and proves itself; that even with objections filed it was the duty of the referee to allow the claim, unless some evidence showing or tending to show the invalid-

ity of the claim was presented by the objecting parties; that the general order referred to does not impose any obligation on the creditor whose claim is questioned to appear or produce evidence in support of his claim or throw any burden of proof on him; that, his claim and the proofs thereof being in due form and regular, it was for the objecting parties to produce some evidence impeaching it. The creditors, on the other hand, contend that General Order 21 is for the protection of the estate and general creditors; that they have the right to examine the claimant as to the merits and justice of his claim for the purpose of ascertaining the truth; that, having been cited for the purpose, his failure to obey the order was a denial to them of this right; and that, the objections being verified, such failure to appear may be taken as a confession or admission that the allegations of the answer or objections are true.

General Order 21 is one the Supreme Court had power to make and is one essential to the protection of general creditors against fraudulent claims. It confers the right on the objecting creditors to examine the claimant if he appears, but does it impose the obligation on the claimant to appear and submit to examination? This general order says:

"At the time appointed the referee shall take the examination of the creditor and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

The consequences of a failure of the claimant to appear and submit to an examination are not in terms indicated or declared. This really is not the case of the reconsideration and re-examination of a claim once allowed, as the referee certifies he never allowed it except for voting purposes at the first meeting. It will be noted that the general order referred to does not require the claimant to appear or authorize the referee to make an order requiring such claimant to appear. It of course contemplates that he will appear, but does not make such appearance obligatory or indicate the consequences of nonappearance. If he does not appear, he cannot, of course, give evidence. On the other hand, the objecting parties are deprived of the opportunity to examine him.

I know of no rule making sworn objections to a claim prima facie evidence of their truth. And, when a petition to re-examine a claim once allowed is filed, I know of no rule or decision that makes the allegations of such petition prima facie evidence of their truth. However, in Re Docker-Foster Co. (C. C.) 123 Fed. 190, Judge McPherson held that, under the provisions of General Order 37 (89 Fed. xiv, 32 C. C. A. xxxvi):

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. Rule 18 of the Supreme Court is applicable in case of a petition to reconsider a claim and demands an answer to the petition in default of which a decree or an order disallowing the claim may be taken pro confesso."

See, also, In re Lewis Eck & Co. (C. C.) 18 Am. Bankr. Rep. 657, 153 Fed. 495, that an answer is necessary or claimant cannot give evidence on the merits of the claim.

On the other hand, the Supreme Court has held that the formal proofs of claim, if sufficient on their face, are some evidence, and therefore prima facie evidence, of the justice and accuracy of the claim and, in the absence of evidence impeaching it, sufficient to require its allowance. That case (Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 584, 50 L. Ed. 963) did not arise on an application for a reconsideration of the claim, but on objections filed and a hearing thereon. The bankruptcy act itself has declared of what the proofs of a claim shall consist and has declared that when duly made and presented to the referee or court the claim shall be allowed, unless of course objections are filed and sustained by proof. It is a question whether equity rule 18 of the Supreme Court is to be applied to the case of a petition for the re-examination of a claim once allowed. The proper prayer of the petition is that the claim be re-examined, reconsidered, and disallowed in whole or in part. If no answer is interposed, the claimant of course consents that the claim be reopened, reconsidered, and examined into; that the grounds for reconsideration are sufficient, but the claim and proofs accompanying stand; and on the rehearing or examination may not the burden of producing evidence to impeach the claim remain in the objecting party? It is with considerable hesitation that I agree with Judge McPherson, in the case cited, that failure to file an answer to the petition to reconsider the claim justifies the disallowance of the claim and is a confession that the facts stated in the petition as cause for reopening and reconsidering are true. Section 57k reads:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

If the petition for reconsideration is to state the alleged cause for rejection and disallowance and the objections to the claim, and these objections must be established by evidence before the claim can be reconsidered—that is, if the objections and merits of the claim are to be fully tried out in the proceeding to reconsider the claim, that is, determine whether it should be reconsidered, and an order thereupon made both reconsidering and either allowing or disallowing the claim in whole or in part—then a failure to answer the petition for a reconsideration may well be considered as a confession that all its allegations are true. If, on the other hand, the proceeding on the petition for a reconsideration for cause is to determine merely whether sufficient grounds exist for a reopening of the case as to the claim and full trial of the claim on the merits, and the trial on the merits is to follow the order allowing a reconsideration and determining that grounds for a full trial of the truth of the objections exist, then the failure to answer is a confession merely that sufficient grounds exist for reconsidering the claim and trying out the merits of the objections. I find nothing very satisfactory on the subject. The general orders adopted and promulgated by the Supreme Court are not definite or conclusive,

and the forms indicate little if anything. On the other hand, the forms given in "Bankruptcy Forms, Hagar and Alexander," would indicate an understanding that the petition for a reconsideration of the claim is a pleading in a proceeding for determining the justice or merits of the claim, and that an answer is essential to raise any question as to the facts therein alleged, and that there is but one order to be entered after the filing of such a petition, notice of hearing, or order to show cause thereon, and answer, or the petition and notice if no answer to the petition is filed. See Bankruptcy Forms, Hagar and Alexander, pp. 221, 222, 223, forms Nos. 144, 145, 146.

In re Watkinson & Co. (D. C.) 12 Am. Bankr. Rep. 370, 130 Fed. 218, it is held and in Re Ankeny (D. C.) 4 Am. Bankr. Rep. 72, 100 Fed. 614, it is indicated that the petition for the reconsideration of a claim need not allege facts sufficient to defeat the claim in whole or in part; that it is only necessary to allege facts which, if true, are sufficient cause for reconsideration. If the proceedings for the reconsideration of a claim once allowed are to be considered and treated as a motion or application for a new trial merely, then if the petition shows reasonable and sufficient grounds therefor, and notice is given or an order to show cause granted and served, and an answer thereto made, the first determination of the court or referee would be: Shall the claim be reconsidered—that is, opened—and its merits tried out, and, if that should be answered in the affirmative, the claim would be at issue on the proofs of claim (and any amendments thereto) and the objections to the claim, not on the petition for reconsideration and answer thereto.

I think the order of the referee disallowing the claim was correct and must be affirmed, but on the ground that the proofs of claim were defective and not in compliance with General Order 21, demanding and requiring that the proofs, in such a case and claim as this, shall state whether or not a note has been received for such account or any judgment rendered thereon. It appears that the claim had been allowed for voting purposes only, and objections had been filed and not heard, tried, or determined. The claim was therefore open for a hearing on the merits and the order to show cause made by the referee July 12, 1911, on the petition of Henry M. Stacy, trustee, requiring Goble, the claimant, to appear July 26, 1911, and show cause why he should not then and there be examined concerning his claim and the merits of said objections (those filed at the first meeting of creditors) determined as in said petition prayed, was sufficient notice, and on that day the referee had the right to pass on the claim, its merits, and the sufficiency of the proofs presented. The proofs filed were insufficient to justify the allowance of the claim, and it was properly disallowed whether we consider the hearing July 26, 1911, as one on the petition of creditors to reconsider the claim or one on the petition of the trustee to have the original objections to the claim heard and the sufficiency, etc., of the claim determined. A referee is not justified in allowing a claim against an estate in bankruptcy when the proofs filed do not comply with the statute or general orders promulgated by the Supreme Court, whether

creditors or the trustee raise specific objections to the sufficiency of the proofs filed or not. It is the duty of the referee to examine the proofs filed and see that they are sufficient. As a rule a majority of the creditors of a bankrupt cannot afford to go to the expense of employing an attorney to attend and examine the claims filed, and the duty rests on the referee before allowing a claim to see to it that the proofs filed comply with the statute and general orders.

Section 57d says that:

"Claims which have been *duly* proved shall be allowed upon receipt by or upon presentation to the court," etc.

Such claims and no others are to be allowed by the referee whether objected to or not. A claim is not "duly proved" when on its face the proofs fail to comply with the general orders promulgated by the Supreme Court as to the proof of claims. If this claimant was "manager" of the plant of this bankrupt down to the time of its bankruptcy, as his claim indicates he claims he was, it was all important in the matter of a claim of this size presented by himself against the estate he managed and only fair and just that he appear and submit to examination regarding such claim. His failure to obey the order of the court, or appear in person or by his attorney who resided in the same town with the referee and where the order was returnable, does not commend him or his claim to the favorable consideration of the court. Being unable to appear, being at a distance and in the state of Ohio, if he was there, did not justify him in paying no attention to the order of the court, and certainly it offered no justification to his attorney, who resided in the same city with the referee, and who could have applied for a modification of the order allowing the examination to take place in Ohio.

The order disallowing and expunging the claim is affirmed.

In re McDAVID LUMBER CO.

(District Court, N. D. Florida. September 25, 1911.)

BANKRUPTCY (§ 348*)—WAGE LIENS—PRIORITY.

Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 563, § 64b (U. S. Comp. St. 1901, p. 3447), providing that wages due to clerks or servants earned within three months before the action of bankruptcy proceedings, not to exceed $300 to each claimant, shall have priority of payment, does not merely prescribe the order of distribution of assets after satisfaction of liens existing against the property, but creates prior liens to the extent stated in favor of the servants designated, and is enforceable without reference to state statutes relating to the same subject.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*]

In the matter of bankruptcy proceedings of the McDavid Lumber Company. On petition of William F. Lee to review a referee's ruling denying priority of liens for services rendered as defendant's book-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

keeper as against certain chattel mortgages on the bankrupt's assets. Reversed.

Pattillo Campbell, for petitioner.
Blount, Blount & Carter, for export company.

SHEPPARD, District Judge. This cause comes here for consideration on petition of Wm. F. Lee for review of the ruling of C. L. Shine, Esq., referee in bankruptcy, and involves the question of priority of liens attaching to the lumber and other product of a sawmill plant in due course of administration in a court of bankruptcy.

The McDavid Lumber Company, bankrupt, was lately engaged in manufacturing lumber and operated a large plant when proceedings in bankruptcy were begun. The company was adjudicated a bankrupt in June, 1910. Wm. F. Lee was employed as bookkeeper for the company, and by his petition before the referee sought to declare his lien on the stock of lumber and fixtures of the company for wages due him for the month of April and a part of May, 1910, at the rate of $115 per month. It is disclosed by the petition that the stock of lumber, the greater portion of which was produced during Lee's employment, comprised the principal assets of the company. Three months prior to Lee's employment, to wit, on January 10, 1910, the McDavid Lumber Company executed a chattel mortgage, based upon the present consideration of $1, to the Hayward Export Company, embracing all the lumber and timber of whatsoever kind which should be manufactured at the mill of said company from the 1st of January, 1910, to the 1st of January, 1911; this mortgage provided that the export company should advance 80 per cent. of the value of the output of the mill each month, and further stipulated that the export company should be the selling agent of the lumber company for all its product, excepting interior stock. The advances to the extent of 80 per cent. were secured by a mortgage based upon the whole output, and included all the lumber and timber stored upon the yards of the company during the existence of the mortgage.

The further point is made by Lee's petition that the mortgage of the export company was not recorded until the 15th of April, 1910, 15 days after Lee's employment by the McDavid Lumber Company; but actual notice of its existence is nowhere negatived by the petition, although, as will later appear, notice of the mortgage is not material in view of the determination of the question certified to this court. Lee by his petition seeks to have his claim for wages declared a preference over the mortgage of the export company on the proceeds of the product embraced in the mortgage, and that the export company which has disposed of the lumber be required to pay his claim for wages.

The Hayward Export Company interposed a demurrer to Lee's petition, the first ground of which is only necessary to be considered at this time, viz.:

"(1) The allegations of the petition show that the rights of the Hayward Export Company under its mortgage and contract of sale are superior to the rights of petitioner in the proceeds of the lumber."

The referee upon the hearing before him sustained the demurrer, and it is this order which is certified here on petition of Lee for review.

The contest seems to have waged so far over the priority of the respective liens of contestants, the mortgage of the export company, and the statutory lien of the laborer as created by section 2198, Gen. St. Florida 1906, which provides:

"That liens prior in dignity to all others *accruing thereafter* shall exist in favor of bookkeepers, clerks, etc., upon the stock and fixtures and other property of merchants and corporations."

Whether the statutory lien in favor of Lee should be declared superior to the mortgage of the Hayward Export Company, which antedated the performance of any labor by Lee, was the question before the referee, and was decided by him in favor of the mortgage lien. If the question were to be settled by state statute and without reference to the order of distribution of the estates of bankrupts provided by the federal bankruptcy act, the referee may have decided rightly. It will be conceded that the bankrupt act (section 67d) recognizes liens generally in the priority precisely as the state law fixes them, when the bankruptcy act is silent, or where by its terms priority is left for state regulation. When, however, the lien of the laborer for his wages earned within three months of his employer's bankruptcy is given preference in the distribution of the assets of the estate, it is immaterial whether under the state law his claim is or is not superior to the mortgage lien. It was earnestly insisted at the argument that the bankruptcy act (section 64b) does no more than provide for the order of distribution of the assets after satisfaction has been made of valid liens recognized by section 67d. 'When Congress, however, provides the order of payment and gives preference to a certain class of claims, such as taxes, cost of administration, and wages in limited amounts for a definite time, such legislation can have no other effect in reality than to create a lien in favor of the claims thus preferred. Undoubtedly it was intended by Congress that when property of employers should be placed in bankruptcy and beyond the reach of those who had aided in its creation, to charge and impress such property to the limited extent noted with a preference by law second only to taxes and cost of administration. Those entering into contracts with employers of labor for manufactured product must contemplate the relation of the labor to the finished product and should be held to know that, in case bankruptcy overtakes the enterprise, the assets resulting from the administration of such trust shall be distributed in the course provided.

Nor does the adoption of this principle destroy the probity of contracts or work greater hardship to secured creditors than would fall unhappily to the lot of that creditor class who live from hand to mouth, if a different construction were adopted. The priority of laborers' claims when they are based upon productive or operating expense of a quasi public corporation is a salutary doctrine long established in this country predicated upon the theory of public interest and of public benefit as well as pecuniary advantage to the security holders; the operating expenses of such corporations are recognized by the courts as a first lien on the property of such corporations. Burnham

v. Brown, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458.

What substantial reason would justify any distinction in the protection the law secures to the flagman of the railroad train whose wages are preferred over the interest of the bondholder, and the laborer in the sawmill whose handiwork is a constructive force in the product of the plant, which not only pays the interest on the mortgage, but returns the investment?

That sound legal philosophy established by numerous and powerful decisions of the Supreme Court recognizing the priority of labor engaged in the service of quasi public corporations because of the public convenience and necessity of continued operation, fortunately, is being gradually and wisely extended to the legal preservation of the rights of the laborer whose toil produces the output which pays the interest and enhances the value of the mortgage security. L'Hote v. Boyett, 85 Miss. 636, 38 South. 1; Dickinson v. Saunders, 129 Fed. 20, 63 C. C. A. 666.

It was well said by the Court of Appeals of the First Circuit, in Dickinson v. Saunders, supra, discussing the effect of the federal bankruptcy act regulating priority:

"Turning, therefore, either to the local statute, or to what for the federal courts is the higher authority, the bankrupt act, the priority in favor of creditors of the class of interveners in this case is declared as a rule of administration, not only for quasi public corporations, but for all corporations, and in the federal statute for corporations and individuals."

It was further observed by the learned court in this instructive case that the statute of Massachusetts could not control administration in bankruptcy in the federal court.

When the order of distribution of a bankrupt estate has been expressly laid down by Congress that order should be observed by the federal court in administration in bankruptcy. As said by Collier in his admirable work on Bankruptcy ([7th Ed.] 742):

"The bankrupt act not only controls the state law in case of absolute conflict, but by its express legislation on these priorities excludes the state law altogether."

And again, as said by Judge Lowell, when both a state statute and the bankrupt act gives priority to the same class of debts, the bankrupt act supersedes the state law. Dickinson v. Lewis, 129 Fed. 20, 63 C. C. A. 666; In re Lewis (D. C.) 99 Fed. 935; In re Erie Lbr. Co. (D. C.) 150 Fed. 823; In re Tebo (D. C.) 101 Fed. 420.

It is clear that the trust fund arising from the administration is distinctly charged by the act in favor of wages to the extent provided by section 64b, and, if it cannot be said to constitute technically a lien, its effect is tantamount to any claim or privilege created by state statute. It will not be denied that, where liens have attached before bankruptcy administration and are not dissolved by the act, they will be respected as criteria in the order for distribution of the estate, except preferred claims under the bankruptcy act which unquestionably supersedes the

state law. In re Laird, 109 Fed. 557, 48 C. C. A. 538. It should be the policy of the law and the primary duty of society to protect the wages of the laborer in every contingency. Congress has indicated its purpose, and courts should declare the law.

In re NORRIS.

(District Court, D. Minnesota, Fourth Division. September 29, 1911.)

1. BANKRUPTCY (§ 314*)—CLAIMS—RELEASE.
Where claimants, after bankruptcy proceedings had been commenced, expressly released the bankrupt from all claims against him, in consideration of the capital stock of a corporation, the release was valid and a bar to the claims in the absence of any evidence other than the release itself as against an objection that it was without consideration.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

2. PARTNERSHIP (§ 20*)—RELATION—CONSTRUCTION.
A bankrupt operated a speculating pool and issued three sets of certificates, one certifying a receipt of money in payment for a number of shares in the pool of the company, by the terms of which the latter agreed to invest the money according to its judgment and to pay the certificate holder on the first of each month his pro rata share of the profits. It also authorized the holder to draw his money or any part of it at the beginning of each month by giving 10 days' notice, and authorized the company to cancel the certificate on January 1, 1910, or on the 1st day of January thereafter by giving 30 days' notice. The second form of contract provided that the company should pay a dividend of $2.50 a share on each hundred dollars of profit on the first day of each month, and also provided that the investment could be withdrawn on the first of each month by giving 10 days' notice, and contained no provision for repayment by the company. The third form of certificate was the same as the second, except that it did not contain the word "pool." *Held*, that such certificates did not create the relation of partners between the company and certificate holders, but the relation of borrower and lender.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 20.*]

3. BANKRUPTCY (§ 314*)—LENDERS OF MONEY—RIGHT TO RECOVER.
Where, at the time of bankruptcy, the bankrupt had in his hands all the money he had received from lenders with which to conduct gambling transactions, the result of his operations being profitable, the lenders were entitled to share in the proceeds to the extent of their original investments.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

4. BANKRUPTCY (§ 314*)—MONEY LOANED FOR GAMBLING—CONVERSION.
Where a bankrupt, three or four days before bankruptcy proceedings were commenced, had a considerable sum of money in his possession, which had been loaned to him to conduct gambling transactions, which money was not used by him in gambling, but converted to his own use, the lenders were entitled to prove their claims against him for the full amount of the money delivered to him; he having failed to establish the amount of the funds converted.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

In the matter of bankruptcy proceedings of Sherman R. Norris, trading as the Minnesota Grain Indemnity Company. On petition of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Emma Gould and 34 others for review of an order disallowing their claims against the bankrupt. Affirmed in part and reversed in part.

WILLARD, District Judge. This case came on to be heard before the court on the 23d day of September, 1911, upon the petition of Emma Gould and 34 others for a review of an order made by the referee on August 29, 1911, disallowing their claims against the above-named bankrupt.

Mr. Breding and Mr. Hall appeared in opposition to the order of said referee; Mr. Thomas and Mr. Newton appeared for certain creditors in support thereof, and Mr. Odell appeared for the bankrupt in support thereof.

The order, so far as it relates to Emma Gould, Anton Swardm, Mrs. W. K. Pennell, Charles Silberman, F. W. Hewett, Clyde L. Ivey, Ed. Guslander, and Mrs. A. H. Dafoe, is affirmed.

[1] Each one of these claimants, after the bankruptcy proceedings were commenced, expressly released the bankrupt from all claims that they had against him. These claimants suggest that there was no consideration for such release. There is clearly nothing in this suggestion. The consideration named in the written contract was the receipt of capital stock in a corporation; whether that stock was at the time the receipt was signed worth more or less than the claim against Norris was something then considered and decided by the claimants, and they must have determined that it was worth more. In the absence of any evidence other than the release itself, the latter cannot be set aside.

[2] To the other claimants mentioned in said order three kinds of certificates, and only three, were issued by Norris. In the great majority of cases the certificate stated that Norris had received a sum of money therein mentioned in full payment for the number of shares therein stated in the pool of the Minnesota Grain & Indemnity Company, under which name Norris was then doing business. By the terms of that certificate the company agreed to invest this money according to its judgment, and to pay the certificate holder on the first of each month his pro rata share of the profits on hand at that time. The holder could draw the whole or any part of his money on the first of any month, by giving 10 days' notice of his intention so to do, and the company could cancel the certificate on the 1st day of January, 1910, or on the first day of any January after, by giving 30 days' notice.

By the second form of contract, the indemnity company—that is, Norris—agreed to pay a dividend of $2.50 a share on each and every hundred dollars of profit, payable on the first of each month. This also provided that the investment could be withdrawn on the first of any month by giving 10 days' notice. It made no provision for repayment by the company.

The third form of certificate was similar to the second, except that it did not contain the word "pool."

The relation created by each of these certificates between the parties was that of lender and borrower. There is nothing in them to support the contention that the relation was that of partners. The word "pool"

is entirely insufficient for that purpose. The person paying the money had the right to withdraw it at any time. Norris had the right to return it at stated intervals. The fact that dividends were paid from the profits indicated only that such was the method adopted for paying interest on the money loaned.

[3] It is contended by the bankrupt, and by the creditors who objected to these claims, that the transaction between Norris and the certificate holders was void, because it was a gambling transaction, and evidence was presented to show that Norris speculated in wheat and stocks by buying and selling puts and calls, and by buying wheat and stocks on margin, which transactions were closed out, as a general rule, on the same day. Evidence was also introduced tending to show that certain certificate holders knew that the money was to be used for speculations of this kind. The referee supported this contention and disallowed the claims, holding that Norris was simply a wheat gambler, and that the claimants intrusted their money to him for the purpose of such gambling.

These creditors do not claim to recover any profits that Norris may have made; they do not base their claims upon the contract, but upon money had and received. All that they ask is that Norris pay back the amounts which he actually received from them.

In view of their restricted claims, I do not find it necessary to decide whether or not the transaction was illegal because it was for the purpose of gambling.

If Norris, at the time the petition in bankruptcy was filed against him, had in his hands all the money which he had received from these claimants; if the result of his gambling was that he had lost none of it, but then had it and profits in addition thereto—then I hold that the claimants would have a right to share in that sum, so far as their original investments were concerned, whatever may be said of their rights to the profits, and whatever may be said of their rights against Norris if he had lost the amounts intrusted to him.

If Norris had not gone into bankruptcy, and had intact the money which had been paid to him by the investors, and one of them had sued him at law, not for profits, not under the contract, but for money had and received, he could, in my judgment, have recovered. If such a person had said, "I will have nothing more to do with this transaction, I will gamble no more, and I wish my money back," can it be said that Norris could have answered, "I have gambled with your money, and though I have not lost it, and though I have it still in my possession, and though you have decided not to gamble any more and ask nothing from me by way of profits which I have made, yet, as long as you gave the money to me for the purpose of gambling, I can keep it"? It cannot be that the law would hold that such an answer was a sufficient one.

A somewhat similar case is found in Re E. J. Arnold (C. C.) 133 Fed. 789, 792, decided by Judge Adams of this circuit. See, also, In re Dorr, 186 Fed. 276, 108 C. C. A. 322, 26 Am. Bankr. Rep. 408. Moreover, if Norris, having received this money for an unlawful pur-

pose, did not devote it to that purpose, but appropriated it to his own use, in violation of the terms of the agreement between the parties, the claimants would have a right to recover.

The case is therefore reduced to a question of fact.

[4] Had Norris lost in gambling the money intrusted to him for that purpose, or did he have it at the time of his bankruptcy? Or had he then converted it to his own use in ways other than those provided for in the agreement between the parties? That Norris speculated in wheat with the money is proven. The claimants testify that he told them that he had a system for operating in the wheat market under which it was impossible to lose. Norris denies this. He says that occasionally, in very rare instances, he might lose; but he testifies that each month of his operations showed a net profit. His bookkeeper says that she does not remember that she ever entered a loss. The improbability of this result would make this evidence insufficient of itself to sustain a finding that Norris had the original investment or any part of it intact.

There is, however, other evidence which shows that he had not lost in speculation all of the money delivered to him. He rented a box in a safety deposit vault. The company owning the vault kept a record of the day, hour, and minute of every visit to the vault by the owner of the box. That record shows that the last time Norris was at the vault was on July 3d, three days before he disappeared. Norris does not himself testify that he took any money from the vault after July 1st. The attendant at the vault testified that on this last visit on July 3d, Norris took out the box, which was 2 inches deep and about 20 inches long; that on lifting the lid several bills of large denominations blew onto the floor; that he (the attendant) picked them up and delivered them to Norris; and that the box was full of bills. Later, on a warrant issued to the marshal, the box was opened, and the marshal found in it over $300 in bills. The box was apparently empty at that time, and the money was discovered only by shaking the box. Norris makes no explanation with regard to the disappearance of these bills, except to say that he did not take them, and has not secreted any property.

It satisfactorily appears from the evidence that a considerable part of the money was in the possession of Norris three or four days before the bankruptcy proceedings were commenced. It also appears that this money was not used by him in gambling. It therefore follows that Norris converted it to his own use, and for money so converted the claimants are entitled to recover. It does not appear how much money was there at that time; it was in the power of Norris to establish that fact. He has failed to do so, and the claimants are therefore, in my judgment, entitled to prove against him for the full amount of the money originally delivered to him by them.

The order of the referee is reversed as to the claimants who did not release their claims, and as to them the matter is remanded to the referee to determine from the evidence taken, or from such other evidence as he may see fit to receive, the amount of cash paid by each of these claimants to Norris, and to allow the claims for such amounts.

Among the papers submitted to the court upon this hearing is found a release signed by George Zahner. It does not appear that this release was offered in evidence before the referee. Upon the further hearing which is hereby ordered the referee may receive evidence as to such release, if it is offered, and determine whether the claim of Zahner should be allowed or not.

In re FIFTY GOLD MINES CORPORATION.

(District Court, D. Colorado. October 10, 1911.)

No. 1,916.

CORPORATIONS (§ 170*)—STOCKHOLDERS—CREDITORS.

Preferred stock certificates guaranteed to the holders 10 per cent. per annum if the net profits permitted; reserved to the corporation the right to redeem the certificates after January 1, 1911, at a fixed amount per share; bound the corporation to redeem all the outstanding certificates on or before January 1, 1916; and authorized the holders, on failure to pay dividends to which they were entitled for 90 days, to foreclose a mortgage securing such preferred stock, and provided for a first mortgage lien on all the corporation's property as security therefor, in which the holders of the certificates were entitled to participate ratably. Such stockholders were not entitled to participate in the management of the corporation nor in its profits above 10 per cent. per annum, nor in the assets on distribution above $11 per share. *Held*, that such stockholders were creditors of the corporation and not stockholders, and hence a mortgage given to secure such stock was not fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624–632; Dec. Dig. § 170.*]

In the matter of bankruptcy proceedings of the Fifty Gold Mines Corporation. On certificate of the referee to review an order canceling a deed of trust securing preferred stock. Reversed.

J. E. Robinson and J. L. Bennett, for trustee.
Henry C. Hall, for Corporation Trust Co.
Kelley & Haines, for preferred certificate holders.

LEWIS, District Judge. The bankrupt was incorporated under the laws of this state in November, 1905, and on January 3d, 1906, its board of seven directors first met and organized, after each director had subscribed and paid for one share of the common stock of the company.

The articles of incorporation provided:

"The capital stock of our said corporation is three million (3,000,000.) dollars, to be divided into three hundred thousand shares of ten (10) dollars for each share and said stock shall be non-assessable. One hundred thousand shares being preferred stock and two hundred thousand shares being common stock."

At the time the corporation was organized one O. B. Thompson was the owner of a large number of mining claims situate in Gilpin Coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ty; some of these claims had been worked for a great many years and had produced much valuable ore. The referee certifies that the undisputed testimony taken before him placed their value, at the time the corporation was organized, at three million dollars. Mr. Thompson made a proposition in writing to the board of directors at their first meeting, and to the stockholders of the company at a meeting held by them on the same day, by which he offered to convey all of his said mining property to the corporation in consideration of the company issuing to him therefor the said one hundred thousand shares of preferred stock and the two hundred thousand shares of common stock less the seven shares thereof that had been taken and paid for by the directors. His written offer further provided that the corporation should execute a first mortgage lien upon the said property to be conveyed by him to it to secure the said preferred stock, the terms of his offer in that regard being, as reported by the Referee:

"That it is executed for the sole and exclusive purpose of guaranteeing to the holders of the preferred stock of said corporation that all and each of the provisions contained therein will be fully and promptly complied with on the part of said corporation."

Thompson's offer also bound him to place the preferred stock in the hands of a trustee for sale, and when sold a fixed percentage of the proceeds obtained for said preferred stock was to be paid over to the treasurer of the corporation. The stockholders at their meeting (being the seven directors) and the seven directors, as such, both accepted Thompson's proposition. Thompson thereupon conveyed the property to the corporation and the corporation on February 20th, 1906, executed and delivered its deed of trust to the Empire Trust Company of New York securing to the present and future holders of said preferred stock the performance, on the part of the corporation, of the conditions contained in the certificates issued, and to be issued, for said preferred shares. This deed of trust was filed for record under the Colorado recording Acts on Feb. 25th, 1906. Thompson thereupon, in compliance with his offer, placed the preferred shares in the hands of agents in New York City for sale, and sales were made to the extent of sixty-five thousand dollars ($65,000), one-fourth of which went to said agents for commissions, one-fourth to the corporation and one-half to Thompson. No further sales of preferred stock were ever made. The common stock was afterwards increased to ten million dollars ($10,000,000) and Thompson surrendered to the company all of the remainder of said preferred shares, which were taken up and canceled and presumptively common stock issued instead. The certificates of preferred stock gave the holder the right to surrender them and take in lieu thereof an equal amount of shares in common stock, and at the time of adjudication more than half of the preferred shares that had been sold by New York agents had been surrendered to the company and canceled, so that there was at adjudication, and is now, outstanding of the one million dollars of preferred stock only thirty-one or thirty-two thousand dollars thereof. The corporation never realized profits out of which dividends could be paid.

Certificates for preferred shares were in the following form:

Incorporated under the Laws of the State of Colorado.

No. ——— ——— Shares.

THE FIFTY GOLD MINES CORPORATION.

Capital Stock $3,000,000.00.

Shares $10.00 each.

Preferred Stock $1,000,000.00 — Common Stock $2,000,000.00

This is to certify that ——— is the owner of ——— Shares of the Preferred Capital Stock of The Fifty Gold Mines Corporation, fully paid and non-assessable and transferable only by entry on the books of the Corporation, upon surrender of this certificate properly endorsed.

The Preferred Stock is entitled to CUMULATIVE dividends of ten (10) per cent. per annum, payable quarterly, commencing April 1st, 1906, from the net profits of the corporation before any dividends are paid on the common stock, and the COMMON stock is entitled to all dividends in excess of said ten (10) per cent. In the event of the dissolution of the Corporation or a distribution of its assets, the Preferred Stock outstanding at that time shall first be paid at Eleven Dollars ($11.00) per share, plus all accumulated unpaid dividends, and the remainder of the corporate assets shall be divided ratably among the holders of the Common Stock.

The owner of unredeemed preferred stock, may, at his option, exchange the same at any time for common stock of the corporation, share for share. The voting power at any stockholders' meeting is confined exclusively to owners of Common Stock.

THE FIFTY GOLD MINES CORPORATION reserves the right to redeem any number or all of its certificates of Preferred Stock, at Eleven Dollars ($11.00) per share, plus all accumulated unpaid dividends, at any time after January 1st, A. D. 1911, and to determine by lot which certificates shall first be redeemed, and said corporation expressly agrees to redeem all its preferred stock on or before January 1st, A. D. 1916. A failure of said corporation for a period of ninety days to pay any quarterly dividend hereon, after the same becomes due and payable, shall render the corporation in default as to such payment, and thereby entitle the owner of this certificate to a foreclosure of the Mortgage securing the same.

As a guarantee that THE FIFTY GOLD MINES CORPORATION will promptly pay all dividends upon its preferred stock and redeem the same in strict accordance with the provisions of this Certificate, said corporation has made, executed and delivered to The Empire Trust Company of New York City, as Trustee, a FIRST MORTGAGE LIEN UPON ALL ITS PROPERTY in the amount of $1,000,000.00, in which security all owners of preferred stock participate ratably.

This certificate is not valid until countersigned by The Empire Trust Company of New York City, N. Y.

Witness the seal of the Corporation and the signature of its duly authorized officer this ——— day of ———, A. D. 19—.

COUNTERSIGNED AND REGISTERED

The Empire Trust Company
By ———.

THE FIFTY GOLD MINES CORPORATION,
By Thomas Fielding, President,
and J. L. Fielding, Treasurer.

Thereafter, and in November 1908, the corporation issued its negotiable bonds to the extent of four hundred and fifty thousand dollars ($450,000), and to secure payment of the same gave its deed of trust to the Corporation Trust Company of New Jersey, as Trustee. In this deed of trust it is represented that the preferred shares then outstanding, secured by the deed of trust to The Empire Trust Compa-

ny, did not exceed the principal sum of sixty-two thousand dollars ($62,000), and it was also noted that The Empire Trust Company, as trustee under said first deed of trust, had certain rights, under the instrument executed to it, with reference to fire policies to be issued on the property of the corporation as other security to the holders of said outstanding preferred shares.

After adjudication Fermor J. Spencer, the trustee in bankruptcy, took possession of the mining properties and he thereupon filed a petition before the Referee asking that the deed of trust given to The Empire Trust Company to secure the outstanding preferred shares be declared null and void. The Corporation Trust Company, trustee under the second deed of trust, also filed its petition asking the same relief. Service of all parties in interest was made by publication, under order of the Referee, on the said petition of the trustee in bankruptcy. When the matter came on for hearing six holders of preferred certificates, amounting in all to nine hundred shares, appeared by counsel and resisted the orders sought by the two petitions. The relief sought by the trustee in bankruptcy and The Corporation Trust Company was granted, the deed of trust to The Empire Trust Company was declared null and void and an order entered that the holders of said preferred shares were not entitled to assert, or have allowed, any claims against the bankrupt under their certificates as against creditors, either secured or unsecured; and on petition of the holders of the said nine hundred preferred shares who resisted said order the Referee has certified the controversy.

Oral arguments were made at length and exhaustive briefs have been filed.

There is only one inquiry involved in the controversy, and that is: *Do the preferred certificates constitute the holders thereof stockholders in the corporation, or are they, under the terms of the certificates, made creditors of the corporation?*

An examination of the certificate issued for preferred shares, so-called, discloses; (1) that the holder thereof was not entitled to participate in the management of the corporation's affairs, (2) nor in the profits thereof, above a limit of ten per cent. per annum, (3) nor in the assets thereof on distribution, above eleven dollars per share. These privileges, denied to the holders of these certificates, are the usual ones belonging to a stockholder. But, on the contrary, these certificates (1) guaranteed to the holders thereof, if net profits permitted it, ten per cent. per annum, (2) reserved to the corporation the absolute right to redeem said certificates after January 1st, 1911, at a fixed amount per share, (3) bound the corporation to redeem all of said outstanding certificates on or before January 1st, 1916, (4) authorized certificate holders, on failure to pay the dividends to which they were entitled thereunder for ninety days after such dividends became due, to foreclose the mortgage securing them, and (5) provided for a first mortgage lien upon all of the corporation's property as security in which the holders of said certificates should participate ratably. These are indubitable evidences of an intention to create a debt and constitute the holder thereof a creditor of the corporation.

It is insisted that the officers of the corporation, in attempting to comply with state statutes, certified that the capital stock of the corporation was three million dollars ($3,000,000), divided into three hundred thousand shares of the par value of ten dollars ($10) each; but their acts could not change the contractual relation of the corporation to the holders of these certificates without the consent of the holders. It is further said that the articles of incorporation denominated the one hundred thousand shares as being preferred stock, and that the certificates themselves purport to represent stock. It is aptly said in some of the authorities cited below on a like inquiry:

"To call a thing by a wrong name does not change its nature. * * * The question in such cases is not what did the parties call it? But what do the facts and circumstances require the court to call it?"

In my opinion the holders of preferred certificates are creditors and not stockholders, and they are entitled to have their claims allowed as preferred claims against the bankrupt. Heller v. Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212, and cases therein cited; Savannah v. Silverberg, 108 Ga. 281, 33 S. E. 908; Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596.

The findings and order of the Referee are therefore overruled. He will take further action in keeping with these conclusions.

AMERICAN SHIPBUILDING CO. v. WHITNEY et al.

(Circuit Court, N. D. Ohio, E. D. August 31, 1911.)

No. 8,197.

COURTS (§ 508*)—FEDERAL COURTS—JURISDICTION—STATE COURTS—"PROCEEDINGS."

Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), provides that an injunction shall not be granted by any federal court to stay "proceedings" in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. *Held*, that the term "proceedings" as so used included the taking of depositions in an action in the state court, so that a federal court, having obtained no jurisdiction of the action, could not enjoin the taking of such depositions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1430; Dec. Dig. § 508.*

For other definitions, see Words and Phrases, vol. 6, pp. 5631–5638.

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; Copeland v. Browning, 63 C. C. A. 437.]

Action by the American Shipbuilding Company against Frank P. Whitney and others. On motion to dissolve an order restraining the taking of depositions of certain witnesses. Motion granted.

Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff.

Thompson & Hine, Griswold & White, and J. H. Cousins, for defendants.

DAY, District Judge. The defendants in this action have heretofore been temporarily enjoined by the Honorable John M. Killits from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceeding with the taking of depositions of certain witnesses in an action brought by one Frank P. Whitney against William A. Hawgood et al. in the common pleas court of Cuyahoga county, and were also further enjoined from inspecting, examining, or disclosing the books, records, papers, etc., of the American Shipbuilding Company.

It appears that the temporary restraining order was granted on an ex parte hearing, and that the judge who granted the temporary injunction expresses his desire that the hearing on the motion of the defendants to dissolve the order heretofore issued may be heard and considered by me.

Inasmuch as the federal court has obtained no jurisdiction in reference to the subject in controversy, the only question for consideration is whether or not the temporary restraining order was such an order as would enjoin proceedings in a state court, contrary to the provisions of section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581).

Section 720 provides as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The only question to decide, then, is whether or not the taking of depositions and the incidents thereto are a proceeding in a state court in contemplation of section 720 of the federal statutes.

As to what constitutes a "proceeding" in contemplation of this section, the courts have often given expression. Justice Marshall, in the case of Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, in considering and defining the term "proceedings," said:

"It is applicable to writs and executions and is applicable to every step taken in the cause; it indicates the progressive course of the business from its commencement to its termination."

In United States v. Collins, Fed. Cas. No. 14,834, it was held that "proceedings," within the meaning of the statute under consideration, include all steps taken in a suit from its inception to and including final process. The term "proceedings" includes a sale and the judgment thereon. Ruggles v. Simonton, Fed. Cas. No. 12,120; Pickett v. Filer & Stowell (C. C.) 40 Fed. 313.

So far as I am able to ascertain, there have been no decisions in the federal courts holding that the taking of depositions was a "proceeding" in contemplation of section 720 of the Revised Statutes. However, the Supreme Court of California, in the case of Burns v. Superior Court of the City and County of San Francisco, 140 Cal. 1, 73 Pac. 597, has held that the taking of a witness' deposition before a notary public to be used in a pending action was a proceeding of the court. An examination of this well-considered opinion indicates that the California statutes governing the taking of depositions are much similar to the Ohio statutes. An examination of the sections of the Ohio statutes relating to the taking of depositions and a consideration of the cases defining the term "proceedings" in contemplation of section 720 of the United States Revised Statutes leave no possible doubt

but that the taking of depositions which have been temporarily enjoined, as in this action, is a proceeding in the state court, and therefore the provisions of section 720 are applicable.

As was said by Judge Taft in the case of American Association, Ltd., v. Hurst, 59 Fed. 1, 7 C. C. A. 598, in referring to section 720:

"That section was passed, not to preserve comity and harmonious action between courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereigns exercising concurrent jurisdiction over the same territory. The purpose of the statute is so important that a liberal construction should be given to accomplish it."

In the case at bar this court has not obtained jurisdiction, nor has the case in question been removed to the federal court, and no question is presented involving proceedings in the state court which would have the effect of defeating or impairing the jurisdiction of this court. The jurisdiction of the state court has attached in the suit of Frank P. Whitney v. William A. Hawgood et al. in the common pleas court of Cuyahoga county, and it is quite apparent that the federal statute absolutely prohibits this court from enjoining the taking of depositions in the state court.

The motion to dissolve the temporary restraining order will be granted, the complaint dismissed, and exceptions given to the complainant.

In re SUSSMAN.

(District Court, M. D. Pennsylvania. April, 1911.)

1. EVIDENCE (§ 43*)—JUDICIAL NOTICE—FORMER PROCEEDINGS.
On an application for a bankrupt's discharge, the court will take judicial notice of the record of a former application of the bankrupt to have his exemption set off to him, which was denied, because it was found he had attempted to conceal his assets.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—CONCEALMENT OF ASSETS.
Where a bankrupt willfully attempted to conceal the fact that he had certain insurance policies, with the hope that he might secure the benefit thereof, his right to a discharge was forfeited, though he listed the property after his fraudulent attempt at concealment was discovered.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

In the matter of bankruptcy proceedings of one Sussman. On the bankrupt's petition for discharge, to which certain creditors objected. Objections sustained.

Abraham Salsburg, for bankrupt.

John H. Dando, W. H. Goodwin, and G. Fred Lazarus, for opposing creditors.

WITMER, District Judge. The bankrupt law is intended to afford honest, unfortunate debtors relief. The dishonest or those unwilling to surrender all their property required to secure a complete discharge from their obligations are not entitled to its benefits. It

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appears that this court, in an opinion filed December 2, 1910 (183 Fed. 331, 24 Am. Bankr. Rep. 909), found that "the bankrupt willfully tried to cover up the fact that he had two insurance policies with the idea of getting the benefit of the policies." Upon this finding the court based its refusal of the exemption claimed by the bankrupt.

[1, 2] The same appears sufficient reason to deny the bankrupt his discharge, on attention being called to the record, of which the court will take notice. The fact that the bankrupt listed such property after his attempt to conceal the same, after the making of the false oath by him had been discovered, will not relieve him from the consequence of such act. The right to a discharge is forfeited, if the bankrupt knowingly conceals his property, or knowingly makes a false oath in the bankruptcy proceedings. In re Breiner (D. C.) 129 Fed. 155, 11 Am. Bankr. Rep. 689. The wrongful act, when once committed during the proceedings, may not be avoided, so as to restore the dishonest bankrupt to his former status, and enable him to reap the benefits, notwithstanding the attempt.

There are other exceptions to the discharge which might prove sufficient; but, in view of the conclusion reached, they will not be considered.

The petition for discharge must be denied, and it is so ordered.

In re GARA.

(District Court, E. D. Pennsylvania. October 3, 1911.)

No. 3,971.

BANKRUPTCY (§ 407*)—DISCHARGE—FRAUDULENT CREATION OF DEBT.

Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), providing the grounds on which a bankrupt's discharge may be denied, does not authorize such denial because of the existence of a debt fraudulently contracted from which the discharge is not a release, as provided by section 17.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

In the matter of bankruptcy proceedings of Henry C. Gara. On motion to dismiss objections to bankrupt's discharge. Granted.

William H. Burnett, for bankrupt.

Alfred I. Phillips, for objecting creditor.

J. B. McPHERSON, District Judge. It may be that the debt due to the objecting creditor was created by the misconduct of the bankrupt while acting in a fiduciary capacity. Assuming this to be true, section 17 protects the debt from discharge, but the mere existence of such a debt does not prevent the bankrupt from receiving a discharge from his other provable obligations. The only obstacles to a discharge are described in section 14, and I do not find among them the creation of a debt by the bankrupt's fraud or other misconduct while acting in a fiduciary capacity. At the best, the pending specification charges such creation and nothing more, and this is plainly insufficient.

The motion to dismiss is granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AMERICAN TRUST CO. v. METROPOLITAN S. S. CO. et al.

(Circuit Court of Appeals, First Circuit. September 25, 1911.)

No. 914.

1. RECEIVERS (§ 128*)—RECEIVERS' CERTIFICATES—PRIORITY AS AGAINST DEFICIENCY OF MORTGAGE ON FORECLOSURE.

Where, after the appointment of receivers for a corporation whose property was mortgaged to complainant trustee to secure bonds, the receivers on notice to and without objection by complainant were authorized to issue certificates to pay interest on the bonds and the issuance of such certificates, and the payment of the interest was beneficial to all concerned, in that it prevented a sale of the property on mortgage foreclosure at an inopportune time, complainant could not claim after foreclosure that it was delayed in the exercise of its right to foreclose by reason of their issuance and the payment of the interest, and hence the certificates were entitled to priority of payment out of the net earnings of the property in the hands of the receivers over a deficiency arising on foreclosure of complainant's mortgage.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 205, 219–222; Dec. Dig. § 128.*]

2. RECEIVERS (§ 128*)—RECEIVERS' CERTIFICATES—PRIORITY.

Whether receivers' certificates are entitled to priority of payment out of net income in the hands of receivers over a deficiency judgment arising on mortgage foreclosure is not governed by fixed rules, but is dependent on the equities of the parties appearing from all the facts and circumstances of the case.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 205, 219–222; Dec. Dig. § 128.*

Receivers' certificates, see notes to Postal Telegraph Cable Co. v. Vanes, 26 C. C. A. 350; Nowell v. International Trust Co., 94 C. C. A. 601.]

Appeal from the Circuit Court of the United States for the District of Maine.

Suit in equity by the American Trust Company as trustee against the Metropolitan Steamship Company and others. From an order (183 Fed. 250) directing payment of a receiver's certificate as a prior claim over a deficiency judgment on mortgage foreclosure, the claimant trust company appeals. Affirmed.

J. Markham Marshall (Ralph W. Gwinn, on the brief), for appellant.

Clarence A. Hight (Coolidge & Hight, on the brief), for appellees receivers of Metropolitan S. S. Co.

William H. Best and Robert S. Gorham (Raymond H. Oveson and Ropes, Gray & Gorham, on the brief), for appellees Hayden, Stone & Co. and another.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

COLT, Circuit Judge. This is an appeal from an order of the Circuit Court directing the payment of certain receivers' certificates. The opinion of the Circuit Court is found in 183 Fed. 250.

The only question in the case is whether these certificates are en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

titled to priority of payment over the deficiency claim under the mortgage, out of the net income of the property while in the hands of the receivers.

[1] It is now well settled in this class of cases that questions of priority are not governed by fixed and inflexible rules. Each case has its own special facts and circumstances which properly influence the court in reaching a just conclusion. This is because the appointment of a receiver is not a matter of strict right; and hence, when a mortgagee calls upon a court of equity to exercise its extraordinary powers and grant him purely equitable relief, he submits himself to the operation of equitable rules. Fosdick v. Schall, 99 U. S. 235, 253, 254, 25 L. Ed. 339.

The order of the circuit judge in this case was based upon the application of this doctrine to the facts of this particular case. In other words, Judge Putnam held that the right of the mortgagee to the net earnings in the hands of the receivers could only be enforced on equitable principles, and that, the mortgagee having received the proceeds of these certificates, the holders of such certificates were entitled to priority of payment over the deficiency claim under the mortgage.

[2] The material facts, which are fully set forth in the opinion of the court below, may be summarized as follows:

The Metropolitan Steamship Company was a Maine corporation engaged in a coastwise steamship business as a carrier of freight and passengers between New York and Boston. On January 29, 1908, a creditors' bill was filed against the company, and receivers were appointed who took possession of the property and proceeded to carry on the business. At this time the company had made a mortgage to the American Trust Company of all its property "now owned or hereafter acquired," to secure an issue of $3,000,000 bonds, of which $2,509,000 were outstanding. The mortgage did not specifically cover rents, profits, or income. The decree appointing receivers expressly stated that it was made subject to all the rights of the trustee and bondholders under the mortgage.

At the time of the appointment of the receivers the semiannual interest on the mortgage, due November 1, 1907, had only been partially paid, leaving a balance due of $29,375. There was also a default of $6,000 in the sinking fund requirements of the mortgage.

On March 4, 1908, the American Trust Company filed a foreclosure bill based upon the defaults in interest and in the sinking fund, and on the same day, with the consent of all parties, an order was entered consolidating the two cases, and extending the receivership under the creditors' bill "to all the matters and things to which said bill of complaint of said American Trust Company" related.

On June 25, 1908, the receivers filed a petition to issue receivers' certificates to pay the interest due November 1, 1907, and to meet the sinking fund requirement of the mortgage.

On June 29, 1908, an interlocutory decree was entered authorizing the issuance of receivers' certificates to cure these defaults. This issue of certificates amounted to $36,000, and is known as series "B."

These certificates were made "subordinate and inferior to the lien of any mortgages made to the American Trust Company." It appears from the decree that counsel representing all parties were present in court, and that no party opposed the entry of the decree.

On November 5, 1908, on a similar petition by the receivers, another series of certificates was authorized by the court to pay the coupons due May 1, 1908. This series amounted to $64,000, and is known as series "C."

On the face of this decree the trust company made the indorsement that it did not care to be heard. These certificates were made subordinate to the lien of the mortgage and also subordinate to the lien of certain claims for supplies.

On August 7, 1909, a foreclosure decree was entered. At the foreclosure sale the property did not bring enough to satisfy the mortgage debt in full; the deficiency amounting to $261,295.27. The foreclosure decree reserved, subject to the further order of the court, the net earnings of the property in the hands of the receivers. These earnings amount to $275,000.

The only liabilities remaining unpaid are (1) receivers' certificates, $100,000; (2) supply claims, $144,395.11; (3) deficiency claim under the mortgage, $261,295.27.

It is admitted that the supply claims have the first lien on this fund of $275,000, and in the brief for the receivers it is stated that these claims have been paid in full, and that there now remains in the hands of the receivers about $125,000 from which to pay the receivers' certificates and the deficiency claim under the mortgage.

If the deficiency claim has priority, it will exhaust this fund, and leave nothing to pay the holders of the certificates. On the other hand, if the certificates have priority, there will be a balance left of about $25,000, to be applied to the mortgage indebtedness.

In considering which of these two claims has the superior equity, the Circuit Court in its opinion says:

"It is true that the receivers' certificates in question here were sold merely for the purpose of paying interest in arrears on the bonds which the mortgage to the American Trust Company secured. It is also true, as said by the American Trust Company, that the payment of those coupons postponed the foreclosure for the corresponding period covered by the due dates thereon, in this case we understand a year. It is also true that the American Trust Company maintains that the purpose of the issue of the certificates, and of applying the funds to the payment of coupons, was merely through an intent on the part of the corporation to delay foreclosure. There is not a particle of proof in favor of that proposition. On the other hand, these certificates were issued by virtue of an order based upon petitions setting out that it was for the common interest that those particular coupons should be paid. Why it was for the common interest does not appear; but it is a matter of common knowledge that, if a foreclosure sale had taken place at the earliest time at which it might have occurred if the coupons paid out of the proceeds of the certificates had not been paid, it would have come at a time before the market had recovered from a general panic, and at a time when the Metropolitan Steamship lines were in a broken-down condition financially; and therefore at a time unfortunate for the sale in view of the interests of all concerned. However, the case puts clearly the contrary of this proposition. The American Trust Company was duly notified of the applications for the issues of the certificates in question, was

in court when the orders were made, made no objection thereto, and not only made no objection thereto, but indorsed on the order authorizing the issue of certificates O that it did not care to be heard thereon. There can be no question that the American Trust Company knew that, if it had opposed the issues of these certificates for the mere payment of interest to its own clients and to its own bondholders, the court would never have made any of the orders providing therefor. It would be beyond credit to assume that the court would have authorized these certificates for the purpose of forcing payment of interest on bondholders who did not wish it. We doubt not under the circumstances that the allegations in the petitions of the receivers to which we have referred were in accordance with the facts. If they had not been, there was ample opportunity to meet them; and therefore we find as a fact that it was for the interest of all concerned that these certificates should have been issued as they were issued. Beyond that it cannot require any argumentation to show that the receivers' certificates, issued by the court without any objection, which court was administering a receivership in a matter involving several millions of dollars, in comparison with which the total of the certificates was almost a negligible quantity, should be protected as against an unpaid balance of a deficiency decree."

It is contended by the American Trust Company on this appeal that, the receivers having taken possession of the property in the foreclosure suit, it has a prior lien on the net income in their hands; and, further, that this prior lien was recognized both in the wording of the interlocutory decrees authorizing the issuance of the certificates and in the wording of the certificates themselves.

Conceding this contention to be sound, as a general proposition, it does not meet the real issue in this case, as is apparent from the following statement:

As the case now stands, the mortgagee has received the value of the property under the foreclosure sale, and $100,000, the proceeds of the receivers' certificates; and, if its present claim is allowed, it will receive in addition thereto the net income of the property while in the hands of the receivers.

So that the real question in this case is not whether the mortgagee is entitled to the proceeds of the property and the net income after possession by the receivers, but whether over and above this, and, as against the claim of the certificate holders, it is entitled to an additional $100,000, new money, borrowed on these certificates.

The ground upon which the trust company claims that it is entitled to this additional $100,000 is that it was paid for the purpose of delaying the foreclosure of the mortgage. And here we reach what may be said to be the turning point in this case.

If the evidence had showed that the trust company and the bondholders were pressing for a speedy foreclosure of the mortgage, and to that end had desired to take advantage of the defaults in interest due November 1, 1907, and May, 1, 1908, and that these certificates were issued by the court against their will and in spite of their objection, it might with reason be said that this $100,000 was forced upon them in order to secure a postponement of the foreclosure sale for a year; in other words, that this $100,000 was paid for the involuntary surrender of the right to a speedy foreclosure.

The evidence, however, does not present any such state of facts. On the contrary, the court below has specifically found "as a fact that

it was for the interest of all concerned that these certificates should have been issued as they were issued."

In support of this finding it appears, as stated by the court below, that, if the foreclosure sale had occurred at an earlier date, it would have come at a time when the business of the country had not recovered from the recent panic, and at a time when the steamship company was in a broken-down condition financially, and hence at an unfortunate time for the sale; and it further appears that the trust company was duly notified of the applications for the issue of the certificates, that its counsel were present in court when the orders were made and offered no objection, and that in case of series C the counsel indorsed upon the order that they did not care to be heard.

These facts and circumstances fully warrant the finding that these certificates were issued in the interest of all concerned, and they fully disprove any contention that the trustee and bondholders desired a speedy foreclosure of the mortgage, and that they were forced to surrender this right through the issue of these certificates.

Since the issuing of these receivers' certificates and the consequent postponement of the sale under the mortgage were for the benefit of all concerned, no party in interest should derive any undue advantage therefrom.

It follows that the bondholders should receive no more and no less than they would have received if no certificates had been issued. And this is exactly what they will receive if the claim of the holders of these certificates has priority.

Assuming that no certificates had been issued, the deficiency claim under the mortgage would have been $100,000 more or $361,295.27 (instead of $261,295.27), and if from this we deduct $125,000, the net earnings in the hands of the receivers, it leaves a balance of mortgage indebtedness of $236,295.27. On this basis, it is apparent that the bondholders would receive the entire proceeds of the corpus of the property at the foreclosure sale and the entire net income in the hands of the receivers.

Now precisely the same result is reached if we take from the $175,000 net income in the hands of the receivers the sum of $100,000 to pay the holders of the certificates and apply the remaining $25,000 to the present deficiency claim under the mortgage. The account will then stand as follows: Deficiency claim $261,295.27, from which deduct $25,000, which leaves a balance of mortgage indebtedness of $236,295.27. This is the same amount as would have been left unpaid provided no certificates had been issued, and upon this basis the bondholders will have received an amount equal to the proceeds of the sale and the net income in the hands of the receivers.

In conclusion, it may be said that in allowing priority to the claim of these certificate holders we reach an equitable result, whereas, to hold otherwise, would be in effect giving the bondholders a bonus of $100,000, which, under the existing facts and circumstances, would be manifestly unjust.

The order of the Circuit Court is affirmed.

CHICAGO, R. I. & P. RY. CO. v. BARRETT et al.

(Circuit Court of Appeals, Sixth Circuit. July 12, 1911.)

No. 2,085.

1. CARRIERS (§ 94*)—DELAY IN DELIVERY OF GOODS—MEASURE OF LIABILITY.
The mere nondelivery of cotton by a carrier, even though a reasonable time for delivery had elapsed, does not, without other wrongful act, constitute a conversion so as to render the carrier liable for its value, but gives a right of action only for the damages caused thereby.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 371; Dec. Dig. § 94.*]

2. APPEAL AND ERROR (§§ 223, 242, 527*)—REVIEW—TRIAL WITHOUT JURY.
A special finding made by a trial court where a jury is waived becomes a part of the record, and the appellate court may, under Rev. St. § 700 (U. S. Comp. St. 1901, p. 570), determine its sufficiency to support the judgment without a bill of exceptions, and even though no exception was taken to the judgment in the court below, or any specific ruling made on the question of law involved.
[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 223, 242, 527.*]

3. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSE—REVERSAL.
Where on a writ of error a special finding is found to be insufficient to support the judgment, and silent as to essential facts involved under the issues, and as to which there is a conflict in the testimony, the appellate court, being limited to a determination of the questions of law arising upon the record, cannot supplement or piece out the imperfect findings of fact by its own original investigation and determination of original facts, but in such case the judgment should be reversed, and the case remanded for a new trial.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4599; Dec. Dig. § 1177.*]

4. APPEAL AND ERROR (§ 719*)—REVIEW—FINDINGS OF FACT.
Where the special findings of fact made by a trial court are insufficient to support the judgment, the error is of such controlling character that the Circuit Court of Appeals will take notice of it under its rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), although without a sufficient assignment of error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2976; Dec. Dig. § 719.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action at law by Thomas Barrett, Jr., A. L. Waldo and Henry D. Hynds, trustees in bankruptcy of Inman & Co., for the use of the Maritime Insurance Company, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

E. E. Wright and Alex C. King, for plaintiff in error.
Caruthers Ewing, for defendants in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANFORD, District Judge. This suit was brought by the trustees of Inman & Co., bankrupts, the defendants in error, to recover of the Railway Company, the plaintiff in error, for the use of the Maritime Insurance Company, Limited, the value of 263 bales of cotton alleged to have been received by the Railway Company from Inman & Co. for transportation and not delivered.

The issues were tried by the Circuit Court without the intervention of a jury, in pursuance of a written stipulation filed under section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 525). The court made a special finding of facts and upon such findings rendered judgment against the Railway Company for $17,100.90, and costs. A motion for a new trial having been overruled, the Railway Company has brought this writ of error to review the judgment.

The declaration, which was filed July 12, 1909, alleged, so far as here material, that the firm of Inman & Co., of which the plaintiffs below were the trustees in bankruptcy, owned, prior to the adjudication in bankruptcy, in May, 1908, 263 bales of cotton, which were delivered to the Railway Company, a common carrier, at various points in the state of Arkansas on various dates, for transportation and delivery to Inman & Co. at Little Rock, Ark.; that said cotton was never delivered to Inman & Co., and the Railway Company was liable for its failure to deliver said cotton within a reasonable time; that a reasonable time for transporting and delivering said cotton was not exceeding 10 days from its delivery to the Railway Company, and yet said Railway Company had not only failed to deliver the cotton within a reasonable time but had failed to deliver it at all, and the same had never yet been delivered, though demand had been made therefor; that the reasonable market value of the cotton at the time and place where it should have been delivered by the Railway Company was $20,000.00; that the cotton, for loss of which the suit was brought, had been shipped unbilled and negligently kept by defendant Railway Company in its cars and on the ground for a long time, and became greatly damaged by negligent handling, and while undertaking to rework the cotton, or a part of it, to reduce the damages, the Railway Company had lost said cotton, or a part thereof, and had failed to deliver the same; that the suit was brought to recover for the cotton received by the Railway Company for transportation and never delivered to the consignee; that prior to delivery to the Railway Company Inman & Co. had said cotton insured against loss in the Maritime Insurance Company, Limited, and that after the defendant Railway Company became liable therefor and failed to pay for said cotton said Insurance Company, as under its insurance contract it was obligated to do, paid Inman & Co. therefor, and in settlement of said loss it was understood and agreed that the recovery of the Railway Company of the value of said cotton should be by the plaintiffs paid to said Insurance Company and said Insurance Company became subrogated for its indemnity to any and all rights of Inman & Co., or the plaintiffs, as trustees; and that the suit was brought and prosecuted for the use and benefit of said Insurance Company.

The declaration did not, however, aver the destruction of the cotton, either by fire or otherwise.

The Railway Company filed pleas of the general issue, and also a special plea to the effect that it had duly delivered the cotton at its destination to the Gulf Compress Company for the account of Inman & Co. and subject to their order, and that while the cotton was stored in this compress after such delivery it was destroyed by fire without any negligence or fault upon the part of the Railway Company.

By stipulation of the parties it was agreed, among other things, that the plaintiffs were the trustees of Inman & Co. and had been authorized by the court of bankruptcy to bring the suit; that the defendant admitted liability for 23 bales of the cotton and denied liability for the remaining 237 bales; that said 237 bales were delivered to the Railway Company at various points in Arkansas for transportation to Inman & Co. at Little Rock, Ark., on the average date of December 16, 1906; that the average weight of each bale was 512 pounds and the average price 10¾ cents per pound; and that said 237 bales were burned in the Gulf compress on July 17, 1907, at Little Rock, Ark. The undisputed evidence further showed that this cotton was consigned to Inman & Co. at Little Rock, Ark., and in pursuance of written directions from Inman & Co. was to be delivered at that place to the Gulf Compress Company, which handled cotton for Inman & Co. and other shippers; that it was shipped by the Railway Company unbilled; that in consequence upon its arrival at the Compress Company it could not be identified, and the Compress Company refused to accept delivery; that it was then deposited for some time in a field near the compress, where it became materially damaged, and later was taken to the Compress Company for the purpose of being reconditioned, that is, of being rebaled when necessary and otherwise placed in proper condition. There is conflicting evidence, however, as to whether Inman & Co. made a demand on the Railway Company for the delivery of the cotton or refused to accept delivery of it in its damaged condition without reconditioning and settlement of the claims for damage; as to whether the sending of the cotton to the Compress Company for the purpose of being reconditioned was done by the Railway Company for its own protection or at the instance of Inman & Co. and as a condition of settlement demanded by them; and as to whether it was reconditioned by the Compress Company as the agent of the Railway Company or as the agent of Inman & Co. and under the supervision of their officers and agents.

It is undisputed, however, that while still at the compress, more than six months after the original shipments and when the reconditioning had been nearly, if not entirely, completed, the cotton was destroyed by fire in the compress, the cause of the fire not, however, being shown; and that thereafter the Insurance Company paid the amount of the loss caused by the fire to Inman & Co., taking their receipt therefor, in which it was recited that in consideration of this payment the Insurance Company was subrogated to all the rights of recovery and claim of Inman & Co. against the Railway Company, and

that subsequent to such payment Inman & Co. had no interest in such recovery except for the benefit of the Insurance Company.

The findings of fact made by the trial judge were as follows:

"In this case the court finds that Inman & Co. delivered to the defendant two hundred and sixty (260) bales of cotton of an average weight of (512) five hundred pounds each, and of an average value of ten and three-quarter cents (10¾) per pound, on December 16, 1906, and that a reasonable time within which delivery should have been made thereof was ten days, and that the defendant has never complied with its obligation to deliver said cotton, nor (now) made such tender thereof to the consignee as relieves it from its liability as a common carrier. I find that the right of the Insurance Company to be subrogated to the rights of Inman & Co. was not waived, and that the Insurance Company, having paid Inman & Co., for the loss of the cotton in question, is entitled to subrogation. I find that plaintiffs are entitled to recover of the defendant the value of 260 bales of cotton of an average weight of 512 pounds per bale, and the average value of 10¾ cents per pound, with interest from January 1, 1907."

A judgment was thereupon entered in which it was recited that "the court having heard the evidence and duly considered the same, and having made a special finding of facts now finds in favor of the plaintiffs and against the defendant," and it was ordered and adjudged that the plaintiffs recover of the defendant Railway Company, for the use and benefit of the Insurance Company, the sum of $14,310.40, with interest from January 1, 1907, amounting to $2,790.50, making a total of $17,100.90, together with all the costs of the cause. The defendant excepted to the rendition of this judgment.

Subsequently, upon the defendant's petition to rehear and motion for new trial, the court, in a memorandum opinion, stated that upon re-examining the testimony he thought its greater weight warranted "the finding that there was no delivery of the cotton to the plaintiff;" and both the petition to rehear and motion for a new trial were disallowed.

We are of the opinion that the judgment below should be reversed and a new trial granted, for the following reasons:

1. While the declaration is inartificially framed, it must clearly be regarded as a suit to recover the value of the cotton on account of its conversion by the Railway Company before the fire, as distinguished from a suit to recover damages arising either from negligent delay in delivery or from the destruction of the cotton by fire. No evidence was introduced either as to the extent of the damages caused by the delay in delivery or as to the cause of the fire; and it is clear from the entire record that the case was tried by both sides as a suit for conversion, and that it was upon this theory alone that the court below rendered judgment for the entire value of the cotton.

And it is upon this theory that the case has been argued in this court. Thus in the brief in behalf of the trustees it is specifically stated that it "is immaterial that the cotton was burned;" that the "declaration casts the right of recovery on a conversion of the cotton by defendant;" that "the admitted facts and the facts as found by the trial judge establish a conversion," and that this conversion arises from the fact that after the Railroad Company had by its negligent failure left a delivery in abeyance, it removed the cotton and took pos-

session of it and refused to surrender the cotton to the consignee though in its possession when the consignee demanded it, and exercised rights of ownership over the cotton in defiance of the rights of the consignee, thus constituting a conversion which made the Railroad Company liable and created an obligation to pay for the cotton which cannot be defeated by what thereafter happened to the cotton.

It follows, therefore, that under the declaration as construed by the parties and the court and upon the theory on which the case has been tried, the correctness of the judgment of the court below must be tested by the rules applicable to an action for the value of the cotton on account of its conversion, and that it cannot be here sustained as a recovery for the damages arising either from a mere negligent delay in transportation and delivery, or from its destruction by fire. The Hattie Palmer (2d Circuit) 68 Fed. 380, 15 C. C. A. 479.

2. It is clear that if the finding of facts by the trial court had shown, in addition to an unreasonable delay in delivery, acts of misfeasance, such as an unexplained refusal on the part of the Railway Company to deliver the cotton, after demand, or a wrongful appropriation of the cotton by the Railway Company, such finding of facts would show a conversion of the cotton which would support the judgment for its value. Angell on Carriers (5th Ed.) § 431; 6 Cyc. 513; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Wamsley v. Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Hamilton v. Railway Co., 103 Iowa, 325, 72 N. W. 536; Rubin v. Express Co. (Sup.) 85 N. Y. Supp. 1108. And see Garvin v. Luttrell, 10 Humph. (Tenn.) 16, 22; Duckworth v. Overton, 1 Swan (Tenn.) 381; Roach v. Turk, 9 Heisk. (Tenn.) 708, 715, 24 Am. Rep. 360; Merchants' Nat. Bank v. Trenholm, 12 Heisk. (Tenn.) 520, 524.

[1] On the other hand it is equally clear that the mere nondelivery of the cotton, even though a reasonable time for delivery had elapsed, being a misfeasance only, does not, without other wrongful act, constitute a conversion so as to render the carrier liable for its value, but gives a right of action only for the damages caused thereby. 2 Hutchinson on Carriers (3d Ed.) § 651; 3 Id. § 1372, citing many cases; Angell on Carriers (5th Ed.) § 433; The Hattie Palmer (2d Circuit) 68 Fed. 380, 15 C. C. A. 479; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Scovill v. Griffith, 12 N. Y. 509; Wamsley v. Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Goldbowitz v. Express Co. (Sup.) 91 N. Y. Supp. 318.

3. However, in the present case the finding of facts shows merely that there had been no delivery of the cotton by the Railway Company, although more than a reasonable time for delivery had elapsed. The sole finding is:

> "That a reasonable time within which delivery should have been made * * * was ten days, and that the defendant has never complied with its obligation to deliver said cotton nor (now) made such tender thereof to the consignee as relieves it from its liability as a common carrier."

There is no finding whatever of any refusal to deliver the cotton after demand or other act of misfeasance that would constitute a conversion of the cotton. Nor is this omission cured by the supplemental

finding on the petition to rehear, even if this can be looked to in support of the judgment, since here again there is merely a finding that there has never been any delivery of the cotton. Neither is the finding of facts enlarged by the recital in the judgment that "the court having heard the evidence and duly considered the same and having made a special finding of facts now finds in favor of the plaintiffs and against the defendant." Obviously this imports into the judgment no finding of facts beyond that contained in the special findings. Thus, where the facts are agreed on, a recital in the judgment that the court finds the issues in favor of one of the parties is no more than a declaration that it finds the issue of law in favor of such party on the agreed case. Supervisors v. Kennicott, 103 U. S. 554, 556, 26 L. Ed. 486; Anderson v. Messinger (C. C. A., 6) 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094.

It results, therefore, that the special finding of facts can be considered only as a finding that the Railway Company had never delivered or tendered the cotton as required by its obligation as a common carrier, although more than a reasonable time for delivery had elapsed. Such finding of facts is, however, under the authorities above cited, clearly insufficient to support a judgment against the Railway Company for the value of the cotton upon the theory of its conversion.

4. Section 700 of the Revised Statutes (U. S. Comp. St. 1901, p. 570) provides, however, as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

[2] A special finding made by the trial court under this statute becomes a part of the record, and the appellate court may without a bill of exceptions determine whether the finding is sufficient to support the judgment. St. Louis v. The Ferry Co., 11 Wall. 423, 428, 20 L. Ed. 192; Tyng v. Grinnell, 92 U. S. 467, 23 L. Ed. 733; Insurance Co. v. Boon, 95 U. S. 117, 124, 24 L. Ed. 395; Allen v. St. Louis Bank, 120 U. S. 20, 30, 7 Sup. Ct. 460, 30 L. Ed. 573. It is furthermore now settled that the question of law whether the special finding of facts supports the judgment is open for determination by the appellate court, although no exception was taken to the judgment in the court below or any specific ruling made by the court below on the question of law involved. Seeberger v. Schlesinger, 152 U. S. 581, 14 Sup. Ct. 729, 38 L. Ed. 560; United States v. Ady (8th Circuit) 76 Fed. 359, 360, 22 C. C. A. 223; Hooven v. Featherstone (8th Circuit) 111 Fed. 81, 86, 49 C. C. A. 229; Webb v. National Bank of Republic (8th Circuit) 146 Fed. 717, 719, 77 C. C. A. 143. And see in direct analogy The Adriatic, 107 U. S. 512, 2 Sup. Ct. 355, 27 L. Ed. 497; also Walker v. Miller (8th Circuit) 59 Fed. 869, 8 C. C. A. 331; Mercantile Trust Co. v. Wood (8th Circuit) 60 Fed. 347, 8 C. C. A. 658; Weist v. Morlock, 116 Mich. 606, 74 N. W. 1012; Stafford v. Crawford, 118 Mich. 285, 76 N. W. 496. It is true that an opposite con-

clusion was reached in Press v. Davis (7th Circuit) 54 Fed. 267, 4 C. C. A. 318, and that it was suggested obiter in the opinion of this court in Humphreys v. Third National Bank (6th Circuit) 75 Fed. 852, 856, 21 C. C. A. 538, in language which was quoted obiter in the opinion of this court in Fales v. Insurance Co. (6th Circuit) 98 Fed. 234, 236, 39 C. C. A. 38, that if a party wishes to except to conclusions of law drawn by the court below from facts found he should have them separately stated and excepted to. In view, however, of the context and of the language used by the Supreme Court in Norris v. Jackson, 9 Wall. 125, 128, 19 L. Ed. 608, and Insurance Co. v. Sea, 21 Wall. 158, 160, 22 L. Ed. 511, upon which this suggestion was apparently based, it is somewhat doubtful whether it was intended to apply to a special finding "which raises the legal propositions," or to do more than state the necessity of a separate ruling on the propositions of law involved in the case of a general finding of both fact and law. But, however this may be, in view of the direct ruling by the Supreme Court in Seeberger v. Schlesinger, supra, at page 586 of 152 U. S., at page 731 of 14 Sup. Ct. (38 L. Ed. 560), that no exception is necessary, "in case of special findings by the court to raise the question whether the facts found support the judgment," if there be any intimation to the contrary in the suggestions contained in Humphreys v. Third National Bank, supra, and Fales v. Insurance Co., supra, in neither of which the ruling of Seeberger v. Schlesinger was called to the attention of the court, the same must now be overruled.

Since, therefore, no exception in the court below is necessary to raise in this court the question whether the special finding is sufficient to support the judgment, it is unnecessary to determine whether if such exception had been necessary the general exception which was made in this case to the rendition of the judgment without specifying the ground of the exception would have been sufficient. See Press v. Davis (7th Circuit) 54 Fed. 267, 4 C. C. A. 318; Nashua Iron & Steel Co. v. Brush (1st Circuit) 91 Fed. 213, 219, 33 C. C. A. 456; Webb v. National Bank of Republic (8th Circuit) 146 Fed. 717, 718, 77 C. C. A. 143; Keely v. Ophir Mining Co. (8th Circuit) 169 Fed. 598, 600, 95 C. C. A. 96.

[3] 5. It is furthermore clear that where under writ of error the special finding is found to be insufficient to support the judgment and silent as to essential facts involved under the issues in the case and as to which there is a conflict in the testimony, the appellate court, being limited in reviewing the judgment below to a determination of the questions of law arising upon the record, cannot supplement or piece out the imperfect findings of fact by its own original investigation and determination of additional facts; but in such case the judgment below should be reversed and the case remanded for a new trial. Anglo-American Land Co. v. Lombard (8th Circuit) 132 Fed. 731, 734, 68 C. C. A. 89, and opinion of Judge (now Mr. Justice) Lurton in Quinlan v. Green County, 157 Fed. 33, 48, 84 C. C. A. 537, 19 L. R. A. (N. S.) 849. This is in direct analogy to the rule of procedure applicable where the special verdict of the jury does not contain findings sufficient to support the judgment (Ward v. Cochran, 150 U. S. 597,

610, 14 Sup. Ct. 230, 37 L. Ed. 1195), or where the case is tried on an agreed statement of facts which is insufficient to support the judgment (Graham v. Bayne, 18 How. 60, 15 L. Ed. 265; Burnham v. North Chicago St. Ry. Co. [7th Circuit] 78 Fed. 101, 23 C. C. A. 677). And see Clement v. Insurance Co., 7 Blatchf. 51, 5 Fed. Cas. 1022.

6. However, in the present case the Railway Company has not filed any assignment of error to the effect that the special findings of fact of the trial court were insufficient to support the judgment. This would clearly have been the proper method of raising this question.

It is true that it has assigned as error that the court below erred in refusing to find, as specially requested by it at the conclusion of all the proof, that while the Railway Company had negligently and unreasonably delayed the shipment of the cotton and there had been unreasonable delay in its delivery, the mere delay on the part of the Railway Company was not an act of conversion; that the storing in the compress was not an act of conversion; that the Railway Company had never declined to deliver the cotton; and that no acts of conversion had been proven. There was, however, a material conflict in the evidence upon the question whether the Railway Company had in fact converted the cotton by refusal to deliver upon demand or otherwise; and the conflict in the evidence is such that we cannot say, as matter of law, that the court was in error in declining to make this special finding of facts in favor of the Railway Company. See City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84.

[4] After a careful consideration we are of opinion, however, that as the court did not either specifically refuse or grant this request, but made a finding of facts which is insufficient to support the judgment for the value of the cotton, this error is one of a controlling character of which the court should take notice, although without sufficient assignment of error, under the provision of rule 11 of this court that even where errors are not properly assigned, "the court, at its option, may notice a plain error not assigned." 150 Fed. xxvii, 79 C. C. A. xxvii; City of Memphis v. St. Louis & S. F. R. Co. (6th Circuit) 183 Fed. 529, 106 C. C. A. 75.

7. As this question is conclusive of the matters now submitted to this court for decision, we pass, without determination, various other questions of importance argued by counsel or suggested by the record, such as the question whether plaintiffs below seek in their declaration to recover for the use of the Insurance Company solely upon the theory of subrogation arising from the payment of the fire loss, and whether, upon that theory, the Insurance Company on paying the fire loss became subrogated, as a matter of law, to a claim against the Railway Company for a conversion of the cotton independently of liability for its destruction by fire, or whether the plaintiffs also seek to recover for the use of the Insurance Company upon the theory of an actual assignment to the Insurance Company of Inman & Co.'s claim for conversion of the cotton, and have upon that theory established any such assignment in fact.

8. For the reason, therefore, that the finding of facts is insufficient to support the judgment of the court below, the judgment will be reversed and the case remanded for a new trial.

MELTON et al. v. PENSACOLA BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. July 12, 1911.)

No. 2,115.

1. TRIAL (§ 177*)—APPEAL AND ERROR (§ 866*)—REVIEW—SCOPE—EFFECT OF JOINDER IN REQUEST FOR DIRECTED VERDICT.

Motions by both parties to an action at law for a directed verdict, unaccompanied by requests for specific instructions in case the motion should be denied, amount to an admission by each party that there is no conflict in the evidence and no question for the jury, and to a request to the court to find the facts and direct a verdict accordingly; and where it has done so each party is estopped from assailing its finding upon disputed issues of fact, and is limited in the appellate court to a review of the question whether there was any substantial evidence, not inconsistent with the undisputed evidence in the case, upon which to support the verdict as directed under the issues presented by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177;* Appeal and Error, Cent. Dig. §§ 3467, 3475; Dec. Dig. § 866.*]

2. BILLS AND NOTES (§ 489*)—ACTIONS—ISSUES—ADMISSIONS IN ANSWER.

In an action on a promissory note by one claiming to be a purchaser, an admission in the answer that the note had been indorsed by the payee is a waiver of proof of such indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.*]

3. BILLS AND NOTES (§ 525*)—ACTIONS—EVIDENCE OF BONA FIDE PURCHASE.

In an action on a promissory note by one claiming to be an innocent purchaser, the production of the note by the plaintiff, properly indorsed by the payee, makes out a prima facie case that plaintiff had become its holder for value, before maturity, in the usual course of business, and without notice of anything to impeach the title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

4. BILLS AND NOTES (§ 358*)—BONA FIDE PURCHASER—TRANSFER AS SECURITY FOR ANTECEDENT DEBT.

Under the rule of the federal courts, a transfer of a negotiable note by indorsement before maturity as security for an antecedent debt is a transfer for value in due course of business.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 913-923; Dec. Dig. § 358.*]

5. BILLS AND NOTES (§ 363*)—BONA FIDE PURCHASERS—TITLE AND RIGHTS ACQUIRED.

A bona fide holder of a negotiable instrument, who, for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, took it by indorsement before its maturity, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without legal validity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 790, 791; Dec. Dig. § 363.*]

6. PLEDGES (§ 30*)—RIGHT OF ACTION—PLEDGEE.

A pledgee by indorsement of a negotiable note held as collateral may maintain an action at law thereon in his own name.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 30.*]

7. BILLS AND NOTES (§ 378*)—DEFENSES AGAINST BONA FIDE PURCHASERS—ALTERATION.

Where a note was made on a printed blank giving the name of a bank as the place of payment, which bank to the knowledge of most, if not all,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the makers, had previously changed from a state to a national bank, changing its name, but continuing in business in the same building, the fact that the name of such bank was correspondingly changed in the note after its execution, without the knowledge of the makers, did not constitute a material alteration, which invalidated the note in the hands of a bona fide holder.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 378.*]

8. BILLS AND NOTES (§ 368*)—DEFENSES AS AGAINST BONA FIDE PURCHASER—EXECUTION IN BLANK.

That a note was blank as to the name of the payee when signed, and was filled in by the person to whom it was delivered, does not impeach its validity in the hands of a bona fide purchaser without notice.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 368.*]

9. BILLS AND NOTES (§ 153*)—NEGOTIABILITY—MAKER AS PAYEE—KENTUCKY STATUTE.

Under Negotiable Instruments Act Ky. (Acts 1904, c. 102) § 8, the fact that one of the makers of a promissory note is also the payee does not destroy its validity as a negotiable instrument.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 153.*]

10. APPEAL AND ERROR (§ 918*)—REVIEW—PRESUMPTIONS—AMENDMENT OF PLEADINGS.

The petition in an action by a bank on a promissory note stated plaintiff's right of recovery as that of a pledgee of the note before maturity, and there was evidence tending to support such claim. After the trial plaintiff by leave of court filed an amendment alleging that the payee of the note had pledged the same to another as collateral to a note of his own, and that while an officer of plaintiff he had, without authority, paid his note with funds of plaintiff. *Held*, that such amendment could not be considered by an appellate court as an abandonment of the original cause of action, especially where it was not so treated by the trial court, nor by the parties therein.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 918.*]

11. BANKS AND BANKING (§ 116*)—NOTICE TO OFFICER AS AFFECTING CORPORATION—BANK CASHIER.

Where the cashier of a bank pledged notes with such bank as collateral security for his own indebtedness, the bank is not chargeable with his knowledge of any infirmity in such notes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282–287; Dec. Dig. § 116.*

Knowledge or notice acquired by officer or agent of bank, in private business or outside scope of duties as affecting its liability, see note to McCalmont v. Lanning, 84 C. C. A. 139.]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

Action at law by the Pensacola Bank & Trust Company against R. E. Melton, J. S. Thornsberry, J. B. Ramsey, J. R. Ramsey, E. J. Ramsey, C. H. Ramsey, and D. H. Sharp. Judgment for plaintiff, and defendants bring error. Affirmed.

Sweeney, Ellis & Sweeney (J. W. Powell, of counsel), for plaintiffs in error.

John B. Baskin (R. A. Miller, Robt. S. Todd, and Blount & Blount & Carter, of counsel), for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANFORD, District Judge. This is an action at law brought by the Pensacola Bank & Trust Company, a Florida corporation, against R. E. Melton and other plaintiffs in error, all citizens of Kentucky, on a promissory note for $5,467.50, together with another note for $5,000.00, as to which the plaintiff was subsequently permitted to dismiss the suit without prejudice and which is not now involved. There was a trial by jury. At the conclusion of all the evidence each side moved the Court for peremptory instructions in its favor. The defendants' motion was overruled, and under peremptory instructions from the Court the jury returned a verdict in favor of the plaintiff and against the defendants for the amount of the note remaining in suit, with interest. Judgment was rendered on this verdict; and the defendants' motion for new trial having been overruled they have brought this writ of error to review the judgment.

[1] First. The defendants have assigned various errors to the action of the trial court in overruling their motion for peremptory instructions, in not submitting the case to the jury to pass upon the facts, and in directing a verdict in the plaintiff's favor. In the court below the defendants excepted to the action of the court in overruling their motion for peremptory instructions, but did not except to the direction of the verdict in plaintiff's favor, or to the action of the court in not submitting the case to the jury for its determination of the facts.

Since, however, in this case each side moved the court for peremptory instructions in its favor, unaccompanied by requests for specific instructions in case the request for a directed verdict should be denied, this amounted to an admission by each side that there was no conflict in the evidence and no question presented for the jury, and to a request to the court to find the facts and direct the verdict accordingly. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; United States v. Bishop (C. C. A. 8) 125 Fed. 181, 183, 60 C. C. A. 123; Anderson v. Messenger (C. C. A. 6) 158 Fed. 250, 253, 85 C. C. A. 468; American Nat'l Bank v. Miller (C. C. A. 6) 185 Fed. 338, 341. And when, pursuant to such requests, the court accepted these waivers, and by its peremptory instructions determined the questions of fact and law in favor of one of the parties, each is estopped from assailing its finding upon disputed issues of fact, and is limited in the appellate court to a review of the question whether there was any substantial evidence not inconsistent with the undisputed evidence in the case, upon which to support the verdict as directed, under the issues of fact and law presented by the pleadings. United States v. Bishop, supra, 125 Fed. at page 183, 60 C. C. A. 123; American Nat'l Bank v. Miller, supra, 185 Fed. at page 342.

Obviously, therefore, the assignment of errors relating to the action of the trial court in not submitting the case to the jury for its determination of the facts, must be overruled. And since the question whether the trial court was in error in overruling the defendants' motion for peremptory instructions, to which exception was duly reserved, necessarily involves the same question as that in reference to its action in granting peremptory instructions in favor of the

plaintiff, the two matters being correlative, we proceed to the consideration of the fundamental question involved under this review, namely; whether there is substantial evidence in the record not inconsistent with the undisputed evidence in the case upon which to support the verdict as directed, under the issues presented by the pleadings.

The amended petition which, under order of the court, was filed as a substitute for the original petition as previously amended, alleged that on April 23, 1906, the defendants with one G. C. Scudamore by their note of said date, filed with the petition, promised to pay to the order of said Scudamore on or before May 15, 1908, the sum of $5,467.50, with interest from May 15, 1906, payable at the First National Bank of Sebree, a corporation under the National Banking Act; that after the execution and delivery of said note, before its maturity and for value, the said Scudamore endorsed and delivered the same to the plaintiff; and that the plaintiff was then the owner and holder thereof.

The answers admitted that the defendants had signed this note with Scudamore, but denied that at the time of signing and delivery there was any payee named in the note or that it was payable at the First National Bank of Sebree, or that Scudamore before its maturity, had, for value, endorsed or delivered the same to the plaintiff, or that the plaintiff was the owner or holder of this note; and further averred that this note was signed and delivered by them to Scudamore for the purpose of being used by him for borrowing money from some bank in Nashville, Tennessee, with which to buy land for them in Florida; that the notes were signed and delivered to Scudamore with the name of the payee left blank, with the understanding that this blank should be filled in by the name of the bank lending the money for the purchase of the land which was the sole consideration for the execution of the note; that Scudamore did not purchase the land in Florida or borrow any money on the note for the defendants, and they never received any consideration therefor; that when Scudamore failed to discount the note for the purpose for which it was given he fraudulently and without defendants' knowledge inserted his own name as payee thereof and negotiated a loan for himself from the American National Bank of Nashville, Tennessee, and to secure such loan fraudulently hypothecated the note in suit as collateral security and endorsed the same without the knowledge or consent of the defendants; that this was the only endorsement which Scudamore ever made upon the notes and was made for this sole purpose; that thereafter said Scudamore paid his loan to said American National Bank and the note in suit which had been deposited by him as collateral was returned to him by said bank; that Scudamore had never delivered this note to the plaintiff and it had never owned said note or had it in its possession or any right, title or interest therein, and that if it had been delivered by Scudamore to the plaintiff it was delivered after its maturity, and only with the endorsement that he had originally made to the American National

Bank; and that it was at the date of such delivery a non-negotiable note subject to all defenses allowable against such note.

The plaintiff filed replies in the nature of a general denial of the matters in confession and avoidance relied on in the answers. The plaintiff subsequently filed a pleading entitled an "Amended Petition," in which "amending the petition to conform to the proof" it alleged that Scudamore (who is shown by the proof to have been the cashier of the plaintiff at the time of these transactions) had discharged his obligation to the American National Bank for which the note in suit had been deposited as collateral by his individual check drawn on the plaintiff, and that while he then had no funds to his credit with the plaintiff and the plaintiff was not indebted to him in any sum, had, without the knowledge and consent of the plaintiff, paid his said individual check to the American National Bank with the funds of the plaintiff and thereby discharged his obligation to the American National Bank and obtained the surrender of the note in suit deposited with it as collateral. This "Amended Petition" concludes: "Wherefore plaintiff prays as in the petition as amended." The answer of the defendants to this "Amended Petition" was in the nature of a general denial.

The material evidence introduced at the trial, so far as the same need be recited, was substantially as follows:

The original note, which was filed with the plaintiff's petition, was produced at the trial and exhibited in evidence. It has, by agreement, been sent up as a part of the record, and shows on its face that it was executed on a printed blank designating the Peoples' Bank of Sebree as the place of payment, but that the name "Peoples' Bank" has been erased by drawing an ink line through it and the name "First National Bank" inserted in lieu thereof, with a stamp. It was further shown by officers and employees of the American National Bank that this note was deposited with said bank as collateral by Scudamore on April 26, 1906, to secure a loan then made Scudamore by said bank; that this loan was finally paid by Scudamore on August 14, 1907, by check drawn on the plaintiff, the note in suit which had been deposited by him as collateral being then returned to him by the American National Bank.

There was also evidence, though of a somewhat indefinite character, as to the pledging by Scudamore to the plaintiff as security for loans made to him, of the defendants' note in suit before its maturity, with the other $5,000.00 note of the defendants originally sued on.

J. B. Perkins, who was plaintiff's cashier up to August 1, 1907, but who then resigned, returning as cashier about Thanksgiving, 1907, proved the execution by Scudamore of two notes to the plaintiff, one dated June 28, 1907, for $6,300.00 due ninety days after date, and the other dated November 2, 1907, for $5,500.00 due sixty days after date, and testified that Scudamore executed these notes for money which he borrowed from the plaintiff, and stated that he gave these notes "as collateral with" the "notes of R. E. Melton and others sued on in this case." He further states that he did not see the $5,000.00 collateral note at the time the bank took it, and first saw it in January, 1908.

George P. Wentworth, a director and member of the finance committee of the plaintiff, in answer to a request to state all the officers and representatives of the plaintiff who took part in the transaction with Scudamore at the time the defendants' two notes were pledged with the plaintiff as collateral security, stated that O. L. Bass, the president, and several other directors were present at the time these notes were pledged as surety; that Scudamore kept the records of the directors' meeting and they do not disclose the particular date on which the loan was acted on; that he had no knowledge that the name of the Peoples' Bank had been changed to the First National Bank in the note in suit, and first learned of the claim that there had been a change in the note when his attention was directed to it by a representative of the plaintiff after he had received a letter from one of the defendants, probably four or five months after they had taken the note as collateral.

O. L. Bass, president of the plaintiff, in answer to a similar question, stated that he took the notes and submitted them to a meeting of the directors of the plaintiff, but could not remember which directors were present on that afternoon; that he had no knowledge of the fact that the name of the Peoples' Bank had been changed to the First National Bank, that if any of the officers present at the time had such knowledge they did not make it known, and that he first learned of the claim that there had been a change some time during November, 1907.

It further appeared that at the time of the trial Scudamore had been adjudged insane and was then confined in the State Hospital for the Insane.

The several defendants, all of whom except J. H. Sharp, testified in their own behalf, stated that at the time they signed and delivered the note in suit to Scudamore it was payable at the Peoples' Bank of Sebree, and that the place of payment was thereafter changed without their knowledge and consent to the First National Bank of Sebree, and further that at the time the note was executed and delivered to Scudamore his name did not appear on it as payee. On their cross-examination, however, it was shown that the Peoples' Bank of Sebree had been a State bank; that it was changed from a State bank to a national bank, under the name of the First National Bank of Sebree, in 1904, about two years before the execution of this note, and that the First National Bank had continued in business with the same directors, the same officers and the same stockholders as the Peoples' Bank and did business in the same building in the town of Sebree, the name "Peoples' Bank" being still carved on the stone step of the First National Bank.

J. B. Ramsey, one of the defendants, and president of the First National Bank, testified that he and every one of the defendants knew at the time they signed the note where the Peoples' Bank of Sebree was or had been, knew it had gone out of business and been changed to the First National Bank, and that when the note was drawn on the old form of stationery and made payable at the Peoples' Bank he

knew what place was intended and was not misled by the change in the place of payment or deceived in any way.

The other defendants who testified also admitted in substance that they knew that the Peoples' Bank had been changed to the First National Bank and that the First National Bank was occupying the same building in which the Peoples' Bank had done business.

Under the foregoing testimony we are of opinion that there was substantial evidence sustaining the conclusion reached by the trial court in directing the verdict in favor of the plaintiff on the note in suit, and that this conclusion was not in conflict with any of the undisputed evidence in the case, for the following reasons:

[2] (1) The defendants having by their answer admitted the fact that Scudamore had signed his name as endorser of the note at the time he delivered it to the First National Bank proof of the fact of the endorsement which would otherwise have been indispensable (Collins v. Gilbert, 94 U. S. 753, 754, 24 L. Ed. 170), was thereby waived. See Mills v. United States Bank, 11 Wheat. 431, 439, 6 L. Ed. 512, Birket v. Elward, 68 Kan. 295, 74 Pac. 1100, 64 L. R. A. 568, 104 Am. St. Rep. 405, and New Haven Mfg. Co. v. Pulp & Board Co., 76 Conn. 126, 55 Atl. 604. [3] Therefore proof of the fact of endorsement not being required under the pleadings, the fact that the note was in the possession of the plaintiff, exhibited with its petition and offered in evidence, made out a prima facie case that the plaintiff had become its holder for value before maturity in the usual course of business, and without notice of anything to impeach its title. Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Collins v. Gilbert, 94 U. S. 753, 754, 24 L. Ed. 170; Hays v. Hathorn, 74 N. Y. 486, 491; McCarty v. Louisville Banking Co., 100 Ky. 4, 11, 37 S. W. 144; Hargis v. Louisville Trust Co., 30 S. W. 877, 17 Ky. Law Rep. 218, 219. Furthermore, while the evidence as to the actual pledging of this note by Scudamore to the plaintiff is meagre in detail and vague as to dates, we think that on the whole there is substantial evidence that the note in suit was in fact pledged as security for his note or notes, at some time prior to the maturity of the note in suit; and that, there being no evidence in the record either of want of consideration for the note, or of notice to the plaintiff thereof or of other defenses, the plaintiff must be held to have made out its case, not only prima facie, but under the greater weight of the evidence, as a holder of the note for value in due course of trade, before maturity, without notice of equities or defenses.

[4] As the proof shows that the note in suit was pledged to the plaintiff before its maturity, it is immaterial whether it was transferred as collateral to either of the Scudamore notes at the time the loan to him was made, or afterwards to secure his pre-existing indebtedness. The rule is well settled in the Federal Courts that the transfer of a negotiable paper by endorsement, before maturity, as security for an antecedent debt, is a transfer for value in due course of business. Railroad Co. v. National Bank, 102 U. S. 14, 23, 26 L. Ed. 61; American File Co. v. Garrett, 110 U. S. 288, 294, 4 Sup. Ct. 90, 28 L. Ed. 149; Hamilton v. Fowler (C. C. A. 6) 99 Fed. 18, 22,

40 C. C. A. 47; Scherer v. Everest (C. C. A. 8) 168 Fed. 822, 831, 94 C. C. A. 346; Doe v. Coal & Transportation Co. (C. C.) 78 Fed. 62, 68; D'Esterre v. City of Brooklyn (C. C.) 90 Fed. 586, 593. And see Swift v. Tyson, 16 Pet. 1, 15, 10 L. Ed. 865; Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386; McCarty v. Roots, 21 How. 432, 438, 16 L. Ed. 162; Sawyer v. Prickett, 19 Wall. 156, 166, 22 L. Ed. 105; Oates v. National Bank, 100 U. S. 239, 247, 25 L. Ed. 580. This is also the rule in the greater number of the States and in England. See cases collected in 7 Cyc. 932; 4 Am. & Eng. Enc. Law (2d Ed.) 290; and 1 Am. & Eng. Ann. Cas., p. 275, note. And recently the Supreme Court of Arkansas in Exchange Nat. Bank v. Coe, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, recognizing that the trend of modern decisions is in favor of the rule adopted in the Federal Courts as tending to promote uniformity in the several jurisdictions, has expressly adopted this rule and overruled dicta to the contrary in two earlier Arkansas cases.

And while it was formerly held by the Court of Appeals of Kentucky in Lee's Adm'r v. Smead, 1 Metc. (Ky.) 628, 71 Am. Dec. 494, that the taker of collateral for an antecedent debt without a new consideration did not become a holder for value in due course, not only is such holding on a question of general commercial law not binding on the Federal Courts (Swift v. Tyson, 16 Pet. 1, 15, 10 L. Ed. 865; Railroad Co. v. National Bank, 102 U. S. 14, 23, 26 L. Ed. 61), but the former law of Kentucky in this respect was changed by the enactment, in 1904, of a uniform Negotiable Instruments Act (Kentucky Acts 1904, c. 102, p. 213, Carroll's Kentucky Statutes 1909, § 3720b [Russell's St. §§ 1885, 1886]), which provides as follows:

Sec. 25. "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes a value, and is deemed such whether the instrument is payable on demand or at a future time."

Sec. 26. "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

It is clear that under these sections of the Act one who takes a note before maturity as collateral security for a pre-existing debt is a holder for value. In re Hoppner-Morgan Co. (D. C.) 154 Fed. 249, 253; Trust Co. v. Markee (C. C.) 179 Fed. 764. And in recent cases in States in which the Federal rule had not been previously followed, it is now recognized that by reason of the adoption of uniform negotiable instruments acts similar to that adopted in Kentucky, the assignee of a negotiable instrument taking the same before maturity as collateral security for a pre-existing debt is now to be regarded as a holder for value to the extent of the debt secured. Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822; Payne v. Zell, 98 Va. 294, 297, 36 S. E. 379. And see Bank v. Johnston, 105 Tenn. 521, 530, 59 S. W. 131.

[5] It is also well settled that a bona fide holder of a negotiable instrument who, for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, takes it by indorsement made before its maturity, holds the title unaffected by

these facts and may recover thereon, although as between the antecedent parties the transaction may be without legal validity. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Goodman v. Simonds, supra, 20 How. at page 367, 50 L. Ed. 934; Railroad Co. v. National Bank, supra, 102 U. S. at page 23, 26 L. Ed. 61; Hamilton v. Fowler (C. C. A. 6) 99 Fed. 18, 22, 40 C. C. A. 47; First National Bank v. Moore (C. C. A. 9) 148 Fed. 953, 78 C. C. A. 581.

And the Kentucky Negotiable Instruments Act, supra, provides to the same effect, as follows:

Sec. 52. "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Sec. 57. "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

[6] Furthermore, the pledgee of a note held as collateral being a bona fide holder for value, may maintain an action at law thereon in his own name. See McCarty v. Roots, supra; Railroad Co. v. National Bank, supra. And section 51 of the Kentucky Negotiable Instruments Act, supra, specifically provides that:

"The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument."

[7] (2) The fact that the name of the bank at which the note was payable was changed after execution from the Peoples' Bank to First National Bank, without the knowledge or consent of the defendants, does not, in our opinion, constitute a defense to the note. It is true that where no place of payment is designated in the note the subsequent insertion of a place of payment is a material alteration as against all parties not consenting thereto (2 Daniel Negot. Inst. [3d Ed.] § 1378; Whiteside v. Northern Bank of Kentucky, 10 Bush [Ky.] 501, 19 Am. Rep. 74), and that a change in the place of payment contained in a note as originally executed is a material alteration (Mitchell v. Reed, 106 S. W. 833, 32 Ky. Law Rep. 683). However, we cannot regard the change made in this case as amounting either to a change in the place of payment or the insertion of a place of payment where none had been originally specified. Under the note as originally written the place of payment was the Peoples' Bank of Sebree. This bank, as was known to most, if not all, of the makers, was a State bank, which had gone out of business as a State bank under that name about two years before, and had become the First National Bank of Sebree, which continued to do business as a national bank with the same officers, directors and stockholders as the former Peoples' Bank, and did business in the same banking house, with the old name of Peoples' Bank carved on its step. We are of opinion that, under these circumstances, the designation of the place of payment as the Peoples' Bank was equivalent to a designation of the First

National Bank as the place of payment, and that it must have been so intended by all the signers of the note; that, under the circumstances, even if the name had not been changed the note would have still been payable at the banking house of the First National Bank, the former place of business of the Peoples' Bank, and that as the change in the place of payment merely served to give a more technically accurate description of the same place of payment it cannot be held to be a material alteration. Thus in Metropolitan Bank v. Claggett, 141 U. S. 520, 527, 12 Sup. Ct. 60, 35 L. Ed. 841, it was held that the conversion of a State bank in New York to a national bank did not destroy its identity or corporate existence; that it simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction; that it remained one and the same bank and went on doing business uninterruptedly; and that it was not thereby discharged from its liability as a national bank on its outstanding circulation issued in accordance with the state law.

[8] (3) The fact that the name of the payee was blank at the time the note was signed by the defendants and delivered to Scudamore does not impeach its validity in the hands of the plaintiff. An implied authority was thereby given to Scudamore to fill in the name of the payee, and even if he filled it in with the wrong name, in violation of his agreement with the defendants (as to which there is no evidence in the record) this would not affect the title of the plaintiff, taking the note as holder for value before maturity, without notice. See, by analogy, in the case of filling in a blank date, Goodman v. Simonds, supra, 20 How. at page 361, 15 L. Ed. 934, and Androscoggin Bank v. Kimball, 10 Cush. (Mass.) 373, and other cases there cited as to the general authority given to fill up blanks, by signing and delivering to an agent of an instrument in which blanks are left.

[9] (4) The fact that Scudamore's name appears both as a maker and payee on the note does not destroy its validity as a negotiable instrument.

It is true that in Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 S. W. 675, 20 Ky. Law Rep. 773, it was held that the assignment of a note of two obligors to a firm of which one of them was a member operated to extinguish the debt as to the obligor who thus became both obligor and obligee, and hence released the other obligor from liability on the note; and that in Deavenport v. Deposit Bank, 138 Ky. 352, 128 S. W. 88, 137 Am. St. Rep. 386, it was held that where a firm note comes into the hands of an individual member by assignment this does not pass title but operates as an extinguishment of the note itself, although he may in such case enforce contribution by the other members of the firm.

However, section 8 of the Kentucky Negotiable Instruments Act, supra, specifically provides that a negotiable instrument may be drawn payable to the order of a payee who is its drawer or maker. Under this express provision of the Act, the character of the note in suit as a negotiable instrument, and its validity as between the plaintiff and

defendants is not affected by the fact that Scudamore, the payee, is also one of the makers.

[10] (5) We are furthermore of opinion that the filing of the last "Amended Petition" did not, as is earnestly insisted in behalf of the defendants, serve as an abandonment of the original cause of action, in which the plaintiff sought to recover as the legal holder of the note, and as a substitution of a merely equitable claim for recovery based upon the theory of subrogation through the misapplication by Scudamore of its funds to the payment of his obligation to the American National Bank for the security of which this note was held as collateral. While this pleading is inartificially framed and is improperly styled an amended petition instead of an amendment to the petition, yet, considering it as a whole, we are of opinion that it was not intended to set up the facts upon which the doctrine of subrogation could be based as a substitute for the original cause of action, but to state merely an additional or alternative cause of action resting upon the theory of subrogation. While we might have had some doubt on this question as an original proposition, we think it clear from the entire record that the pleadings were thus construed by all parties in the court below, and that neither that court nor any of the parties treated the case in the court below as resting solely upon the doctrine of subrogation, but on the contrary treated it as based primarily on the right of the plaintiff to recover as pledgee of the note in question. This was obviously the theory upon which the peremptory instructions were given by the court in the plaintiff's favor, as is clearly shown by the opinion filed by the court on the motion for new trial. Furthermore the objection which the defendant now seeks to raise that under this last "Amended Petition" the sole cause of action presented is one of an equitable nature based upon the doctrine of subrogation does not appear to have been made in the court below or in any manner called to the attention of the court. This objection does not appear among the grounds assigned for a new trial; nor does it specifically appear among any of the thirty-two grounds of error assigned in this court. On the other hand the plaintiff has in this court expressly disclaimed any right of recovery on the theory of subrogation, and rests its case solely upon its right as pledgee of the note. Therefore in this state of the record and without any assignment of error specifically raising this question, we deem it unnecessary to consider the question whether if the plaintiff was seeking a recovery upon the theory of subrogation any right so founded could be maintained in an action at law; but without consideration of this question rest our judgment upon the fact that under a fair construction of the pleadings and upon the theory upon which this case was evidently treated in the court below, it is to be considered in its first and essential aspect as an action at law based upon the plaintiff's legal title to the note obtained through endorsement and delivery by Scudamore. See Third Nat. Bank v. Nat. Bank (C. C. A. 5) 86 Fed. 852, 30 C. C. A. 436; Louisville & N. Ry. Co. v. Womack, 173 Fed. 753, 97 C. C. A. 559, and Chicago, R. I. & P. R. Co. v. Barrett, 190 Fed. 118, this day decided by this court.

On the whole, therefore, we conclude that under the pleadings and

proof, there was material evidence, not inconsistent with any undisputed evidence in the case, to support the action of the trial court in overruling the defendants' motion for peremptory instructions and in directing a verdict in plaintiff's favor, and therefore without determining whether the defendants would, but for their exception to the action of the trial court in overruling their motion be in a position, under the doctrine of Rodriguez v. United States, 198 U. S. 156, 165, 25 Sup. Ct. 617, 49 L. Ed. 994, to now question by assignment of error the direction of the verdict against them, conclude that, upon the merits, the several assignments of error relating to these matters should be overruled.

Second. There is also an assignment of error that the court below erred in refusing to allow the defendants "to show that they, nor any of them, ever received any consideration for the note sued on, and in refusing to allow them to prove, which they offered to do, that they never received any consideration for said note and in refusing to allow them to prove the exact transaction."

The briefs filed in this court in behalf of the defendants do not identify the evidence there alleged to have been offered and excluded, by reference either to the names of the witnesses or pages of the record, although rule 24 of this court requires that the brief for the plaintiff in error shall contain a "brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point (150 Fed. xciii, 79 C. C. A. xciii). However, on examining the record we find that the defendant, J. B. Ramsey, was asked various questions evidently relating to this matter, to which objections by the plaintiff were sustained, and exception reserved by the defendants, and that counsel for the defendants thereupon "avowed that if the witness had been permitted to answer, he would have stated that they received no part of the consideration of said notes; that the notes were executed to raise money to purchase land in Florida; that Scudamore said he would take the notes, and negotiate them and get the money on them at a bank in Nashville, Tennessee; and that he wrote them back that he had failed to get the money, and that he had destroyed the notes, and that they would have to get money from other people, and that they did, and paid for the land, and received no part of the consideration for those notes."

[11] Upon consideration of this avowal we are of opinion that no error appears in the exclusion of the testimony for two reasons: 1st, the defendants did not allege in their answer that the plaintiff had taken the note in suit with notice of the alleged want of consideration; and 2nd, the defendants did not otherwise show or offer to show by this avowal that the plaintiff had notice of the alleged want of consideration at the time it received the note as pledgee. This however was clearly essential to constitute a defense upon the note, and obviously even if the fact of notice was provable under the pleadings, the fact that Scudamore had knowledge of the alleged want of consideration would not be chargeable to the plaintiff even although he was its cashier at the time, since, in the matter of pledging these

notes to the plaintiff he was not acting in its behalf but was dealing at arm's length with the plaintiff and acting solely in his own interest. American Nat. Bank v. Miller, supra, 185 Fed. at page 343. The case here presented is obviously entirely different from that in Childers v. Billiter, 144 Ky. 53, 137 S. W. 795, in which the person who made the purchase of the note with knowledge of its infirmity was acting as the agent of the purchaser in the transaction.

Third. There are also numerous assignments of error relating to the action of the trial court in the admission of testimony. So far as the same require consideration they relate entirely to the admission of the evidence in reference to the change of the Peoples' Bank to the First National Bank, and the knowledge of that fact and of the attending circumstances which was possessed by the defendants at the time they signed the note in suit. This evidence related, in our opinion, to a matter which was obviously material under the issues in the case and was correctly admitted by the trial court. The assignments of error relating to this matter are without merit.

Fourth. Without stating in detail various other assignments of error, many of which are repetitions in various forms of the assignments of error already considered, or subdivisions thereof, it is sufficient to say that on a careful examination we find that they present no material questions which are not embraced in the consideration given to the assignments of error heretofore mentioned.

We find no prejudicial error in the record; and the judgment of the Circuit Court will accordingly be affirmed.

HALL et al. v. AMES et al. †

(Circuit Court of Appeals, First Circuit. May 18, 1911. On Motion for Restraining Order, June 28, 1911.)

No. 915.

1. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURTS—FEDERAL AND STATE COURTS—COMITY.

A Circuit Court of the United States is without authority on an independent original bill to review the proceedings, orders, and decrees of a state court of general jurisdiction made in a pending suit between the same parties, by which the state court determined the scope of its own jurisdiction and established rights in property which was the subject-matter of the litigation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1430; Dec. Dig. § 508.*

Lack of jurisdiction of United States Circuit Court, see note to Carnegie, Phipps & Co. v. Hulbert, 16 C. C. A. 507.]

2. INJUNCTION (§ 38*)—PROTECTION PENDING LITIGATION—INJUNCTION PENDING PROCEEDINGS FOR FURTHER REVIEW.

A motion in a Circuit Court of Appeals, after an affirmance in a suit to enjoin proceedings in a state court, in which the court below held that it was without jurisdiction, to enjoin appellees from availing themselves

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied June 24, 1911.

of rights given them by the decree of the state court until appellants could apply to the Supreme Court for a writ of certiorari, denied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86–90; Dec. Dig. § 38.*]

Appeal from the Circuit Court of the United States for the District of Maine.

Suit in equity by James M. W. Hall and others against Alfred K. Ames and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 182 Fed. 1008.

Burton E. Eames and Joseph W. Symonds (Tyler & Young, C. H. Tyler, O. D. Young, and Symonds, Snow, Cook & Hutchinson, on the brief), for appellants.

Herbert M. Heath (Heath & Andrews, on the brief), for appellees.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. [1] This case in effect raises the question whether the Circuit Court of the United States, under an independent and original bill, has authority, and ought, to review the proceedings, orders, and decrees of a state court of general jurisdiction, for the purpose of finding whether, in the course of the proceedings in that court, there was error in dealing with the subject-matter with which the litigation was concerned.

The opinion of the learned judge of the Circuit Court (182 Fed. 1008) shows an exhaustive examination of the questions now raised before us, and the treatment of these questions is so exhaustive that we might well rest our decision upon the reasoning of the opinion in the Circuit Court. We refer to that opinion for a more complete description of the subject-matter of the controversy and of the proceedings in the state court than we shall undertake to give, as reiteration is deemed unnecessary. We may, however, state that the parties plaintiff here were, upon an original bill by the senior Hall and upon intervening process by others, parties plaintiff in the state court of Maine, a court of general jurisdiction, in which they voluntarily submitted their rights to that court, and sought relief in respect to the stock of the Machias Lumber Company, a Maine corporation, in which they were interested as stockholders; that the proceeding in that court was concerned with a certain trust agreement, which contained certain provisions as to sales, and also with a stipulation filed under order of court pendente lite, to which considerable importance was apparently attached by the Maine court as extending its jurisdiction as to parties and the kind of relief which should be granted.

The defendants here are the same as the defendants in the proceeding in the state court, and the subject-matter is the same as in that court; and, while the case was still pending at the time the bill was filed in the Circuit Court, the cause had well advanced toward a final decree in the state court.

The plaintiffs in their bill in the Circuit Court ask for an injunc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion in respect to rights which the state court sought to establish in behalf of the defendants; and this means, if the relief is to be granted, that the merits must be re-examined, and that what was done in the state court must be undone, because, as alleged and argued, that court improperly sought to establish certain rights in respect to a sale of stock.

The general ground upon which relief is asked is that the state court undertook to establish property rights in respect to questions not in issue upon the pleadings, and in respect to property of persons who were not parties to the proceeding; but the particular ground is that what was done by the state court is a nullity because that court exceeded its authority.

There might be force in the argument upon the particular ground presented, that of alleged nullity, provided the orders and decrees of the state court, against which complaint is made, clearly assumed to deal with parties or with subject-matter not involved in the litigation before it. But here the parties are the same, and the res is the same; and the res must be accepted as at least constructively in the custody of the courts of the state of Maine.

If the subject-matter were distinctly different and the parties not the same, the proposition would be quite a different one; but, as that was not the case with which the Circuit Court had to deal, it is quite unnecessary that this court should undertake to determine what the power of the Circuit Court would be with respect to the rights of parties under process of a state court of general jurisdiction, expressly directed against property which was not in the litigation before it. In the particular situation which we have to consider, it goes without saying that, if it were within the powers of a Circuit Court of the United States to afford the relief sought, it could not be done without an investigation of questions relating to the merits of the controversy in respect to the subject-matter before the state court, and of questions relating to the regularity of the proceedings in that court.

At the arguments before us the views of the contending parties were stated with great force by able and experienced counsel; but, after all, nothing was urged which discloses any view not covered, and correctly covered, as we think, by the exhaustive opinion handed down in the Circuit Court.

If there is, under the federal Constitution, power in the United States courts to deal with a case in which it is claimed that the rights of persons have been invaded through the exercise of authority by state courts under erroneous construction of the laws of the state in respect to their own jurisdiction or under unwarranted interpretations of the scope of the issues before them, it is quite certain that such power does not vest in the Circuit Court, under an independent collateral proceeding to review a cause heard and determined by a state court of general jurisdiction, to the end that the results of a proceeding in that court shall be overthrown. Not only is there no such reasonable authority existing in the Circuit Court of the United States as a court of review, but considerations of comity forbid attempts by one court, which would have had jurisdiction of the subject-matter

and of the parties if relief had been first sought therein, to interfere with the proceedings of other courts of general jurisdiction established by other governments.

In Cornue v. Ingersoll, 176 Fed. 194, 99 C. C. A. 548, certain parties instituted proceedings in the state court to have the question tried as to their ownership of a certain fund in the custody of the probate court in Massachusetts, against which the Circuit Court of the United States, under a mandate from the Supreme Court, had already formulated a lien decree. The effect of that proceeding was to set up that the United States courts had assumed to establish rights with respect to property not in their custody and with respect to parties not before them; and it was held, among other things, that the decree could not be collaterally attacked by a suit in the state court; and that, if the case was one of judicial invasion of rights without notice, the grievance was one which did not require resort to independent process in another court—process which, in substance and effect, if maintained, must entirely ignore the intended operative effect of the decision of the Supreme Court affirming the proceedings in the Circuit Court, and that the rule which requires direct attack, and forbids collateral attack, upon final judgments and decrees, is a rule of public and judicial necessity, founded upon considerations which wholly exclude the idea of a laxity, as between courts of first instance general jurisdiction, which shall tolerate an independent collateral proceeding to disestablish in another court, and upon another trial, that which has been expressly established upon a former trial, upon the merits, in a court of general jurisdiction.

We see no reason why the same rule should not apply in this case. The Maine court was a court of general jurisdiction; and it assumed to establish certain property rights, and rights of sale, under its own ascertainment of its jurisdiction, resulting from the proceedings and the issues before it, and as enlarged by its own construction of a certain stipulation between the parties, which was made under an order of the court, and which was an incident of the equitable proceeding which it was considering.

The proposition of the complainant in the Circuit Court, and here, in effect involves the idea that the Circuit Court should review the controversy between the parties, including the questions in respect to the interpretation which the Maine court put upon its own powers as to the disposition of property constructively in its possession. The learned judge of the Circuit Court observed, and we think the observation sound, that that court could not on the record revise either directly or indirectly the proceedings of the Supreme Judicial Court of Maine. It was there said:

"The rules which govern us are precisely the same as would govern any court of superior and general equity jurisdiction, whether as between a federal court and a state court, or vice versa."

Again it was there said:

"But it is insisted that relief is sought for here which was not in issue before the Supreme Judicial Court of Maine, or not disposed of by it. All these propositions are met by the fundamental fact that we cannot get at those ad-

ditional issues without walking over the body of what has been decided by that court, or held in reserve by it. We are not at liberty to restrict in any way the powers of that court over the subject-matter involved here either directly or indirectly with reference to what has been done or has not been done, or by anticipating what may or may not be done."

It is quite true, as we think, in order to give the relief which the complainant seeks, and upon the ground upon which it is sought, that the Circuit Court would have to review the merits of the questions with reference to the subject-matter involved, the regularity of the proceedings in the state court, and the state court's interpretation of its jurisdiction and of the proceedings before it, together with its construction of the stipulation of the parties, which apparently, under the view of that court, enlarged its jurisdiction. The ground of the relief sought, therefore, necessarily contemplates that the Circuit Court shall review the whole situation, and disestablish rights which the state court has assumed to establish. This is something which we think the Circuit Court of the United States, under the judicial relations existing between the federal and the state governments, has no right to do.

In some of the cases relied upon by the complainants, who are seeking this relief, the rights involved had reference to judgments or decrees set up in legal bar by parties holding the judgments or decrees, and where the constitutional full faith and credit was therefore demanded; and in others the questions were directly raised in the same or ancillary proceedings. But here the Circuit Court, in an independent and collateral proceeding, is asked to seize upon a controversy pending in the state courts, and to make different findings in respect to jurisdictional facts, and to give affirmative relief, which, if granted, must necessarily be based upon an overthrow of rights already ascertained and established in that court. This plan involves a very different proposition from that in the cases relied upon by the complainants. The plan here suggested would be quite subversive of the rules of right, and of the rules of comity, existing between courts whose jurisdiction in respect to a given subject-matter depends altogether upon the fact as to which court first assumed jurisdiction and sought to ascertain and establish the rights in controversy between the parties.

We are not called upon to define the extent of the authority of the Supreme Court of the United States under the provisions of the federal Constitution in respect to the obligation of contracts, due process of law, and full faith and credit, an authority usually exercised by the Supreme Court upon writ of error to the state court, which, of course, is not a collateral but a direct proceeding in the same case to review the decision against which the attack is directed.

It is strongly urged that the Circuit Court had power to enjoin the parties from proceeding under the sale ordered by the state court, upon the ground that that court exceeded its authority in respect to the stock which was in controversy before it. But, under the particular circumstances of this case, the question whether the state court exceeded its authority could not be ascertained without a review of the state court's determination of questions of construction and in-

terpretation; and, if a Circuit Court of the United States has any authority whatever, in an independent proceeding, to determine an issue of nullity based upon alleged excessive assumption of jurisdiction by a state court, when such an issue in the slightest degree necessitates an exercise of supervisory jurisdiction or a review of a state court proceeding—a proposition which we do not here discuss—it is quite safe to say that at most it would be much less than that exercised by the Supreme Court.

In Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464, a writ of error from the Supreme Court of the United States to the Court of Chancery of the State of New Jersey, which involved an attack upon the decision of the New Jersey court upon the ground that that court had exceeded its jurisdiction because the judgment was not responsive to the issues presented by the pleadings, it was said, at page 268 of 140 U. S., at page 777 of 11 Sup. Ct. (35 L. Ed. 464):

"The inquiry is: Had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be in substance and effect within the issue."

Governed by the rule enunciated in Reynolds v. Stockton by a court of broader authority than the Circuit Court, no justification would be found for interfering in the present situation, because it appears from the record that the subject-matter of the litigation was before the state court, and that the state court ascertained and established rights under its own interpretation of the laws of Maine, and under its own construction of a stipulation filed by the parties. The parties and the property were thus before the court, and, upon the assumption that it had a right to do so, that court ordered a sale of the stock.

The wise and wholesome rules, in respect to right and comity, governing the various courts existing under our dual system, are stated in an opinion of the Supreme Court by Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 176, at page 182, 4 Sup. Ct. 355, at page 358, 28 L. Ed. 390:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on

the process, subsequent to the judgment, in which jurisdiction is to be exercised.'"

See, also, Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Randall v. Howard, 67 U. S. 585, 17 L. Ed. 269; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Leadville Coal Company v. McCreery, 141 U. S. 475, 12 Sup. Ct. 28, 35 L. Ed. 824; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Southern Bank & Trust Company v. Folsom, 75 Fed. 929, 21 C. C. A. 568.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

On Motion for Restraining Order.

Before COLT, Circuit Judge, and DODGE, District Judge.

PER CURIAM. [2] The original bill in this case asked the Circuit Court to enjoin the sale of 1,277 shares of stock of the Machias Lumber Company by the Merrill Trust Company, then holding them under a trust agreement; or that, in the event that such sale should be permitted, the respondents Ames and Wing be enjoined from bidding or purchasing at any such sale. The injunction asked for was denied November 23, 1910, on the ground that the Circuit Court was without jurisdiction. The final decree, dismissing the bill, was entered December 21, 1910.

The proposed sale referred to has since been made, and the 1,277 shares of stock bought by the respondent Wing. The stock has also been transferred. All this has been done under the authority of a decree by the Supreme Judicial Court of Maine, in which, according to the complainant's contention, that court exceeded its authority.

From the Circuit Court's denial of the injunction and dismissal of the bill the complainants appealed, but their appeal was dismissed by this court May 18, 1911.

Previous to the dismissal of their appeal, the complainants had applied to this court to enjoin the present owners of the stock referred to from voting upon it at the Machias Lumber Company's annual meeting on March 7, 1911, or any adjournment thereof. Notwithstanding the dismissal of their appeal, this motion is now pressed, upon the suggestion that the complainants desire a rehearing or an opportunity to apply for certiorari to the Supreme Court. The annual meeting referred to having been adjourned from time to time, the stock in question has not as yet been actually voted upon.

We shall assume, what does not seem to be strenuously denied, that this court has inherent power to make in its discretion such restraining orders as may be necessary to preserve the status quo between the parties until the final disposition of any pending appeal.

But the facts in the present case do not seem to us to afford sufficient justification for such a use of this discretionary power of the court as the complainants now request. As has been stated, the stock referred to has been sold under and according to decrees and orders of the Maine Supreme Court in litigation to which the complainants

were parties. There was no resort by them to the federal courts until after the result adverse to them in the state court.

The Circuit Court, and afterward this court on appeal, have determined, without hesitation or dissent, that the federal court is without jurisdiction to interfere between the parties in the manner requested by the complainants.

There is no appeal pending to which the complainants are entitled as of right, nor can there be any. Their petition for rehearing in this court has been denied since the hearing on their present motion. The possibility that a writ of certiorari might be ordered does not seem to us sufficient to justify us in further delaying the respondents.

We consider the risk of damage, loss, or inconvenience to the respondents involved in the issuance of such an order as is asked for, greater than the risk to which, in the absence of such an order, the complainants are exposed.

Under all the circumstances, we are unable to believe that the issuance of such an order would be justified.

The motion is denied.

GENERAL ELECTRIC CO. v. ALLIS-CHALMERS CO. et al.

(Circuit Court, D. New Jersey. June 12, 1911.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRICAL TRANSLATING DEVICE.

The Armstrong and Woodbridge patent, No. 726,391, for an electrical translating device, was not anticipated and discloses invention; also, *held*, on the evidence, not void for prior public use and infringed.

2. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO CALL WITNESS.

On an issue as to an alleged prior use of a patented device, the fact that defendant has failed, without cause shown, to take the testimony of the person best qualified to testify with intelligence and accuracy on the question, may properly be considered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

3. PATENTS (§ 259*)—CONTRIBUTORY INFRINGEMENT.

A corporation which manufactured under contract an electrical translating device which in operation infringed complainant's patent *held*, on the evidence, chargeable with contributory infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400-402; Dec. Dig. § 259.*

Contributory infringement of patents, see notes to Edison Electric L. Co. v. Peninsular Light, P. & H. Co., 43 C. C. A. 485; Æolian Co. v. Harry H. Juelg Co., 86 C. C. A. 206.]

In Equity. Suit by General Electric Company against the Allis-Chalmers Company and others. Decree for complainant.

L. F. H. Betts and Ramsay Hoguet, for complainant.

Thomas F. Sheridan, Clifton V. Edwards, and Lawrence K. Sager, for defendants.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CROSS, District Judge. [1] This suit in equity is for an injunction and accounting for alleged infringement of letters patent No. 726,391, for an improvement in means for varying delta-connected voltages, issued April 28, 1903, to Armstrong and Woodbridge, assignors to the complainant. The only claim involved is No. 1, which is as follows:

"The combination of a plurality of translating devices connected in delta, interior taps from said devices, and a plurality of conductors constituting a multiphase system of distribution connected to said taps."

The patentees describe the object of their invention in the following language:

"This invention relates to electrical translating devices which are connected in delta and has for its object the provision of means whereby fractions of the maximum voltage may readily be obtained without changing the connections between the several translating devices. We accomplish the desired result by bringing out interior taps from a plurality of translating devices permanently connected in delta and connecting the conductors of a multiphase system to the said taps or to certain of them. By an 'interior' tap is meant one which is not at an extremity of a winding. The devices may thus be connected in such manner as to produce a resultant voltage which is a fraction of the maximum, and by providing a number of taps from each device and furnishing switching mechanism to connect the conductors to different sets of taps successively various values of voltage may be obtained. We have chosen to illustrate our invention in connection with transformers in a three-phase system; but it may be applied to other translating devices and to a system of any number of phases. When we speak of windings as connected in delta, we do not intend to limit ourselves to three-phase connections, but mean to include any similar connection of any number of phase."

It thus appears that the patent describes a combination of elements by which full and fractional voltages adapted to starting and operating rotary converters are obtained "without changing the connections between the several translating devices" or transformers, which serve to raise or lower the voltage of the current. The transformer consists of an iron core, a coil of wire around the iron core, called the "primary" coil, which receives the electrical energy to be transformed, and a second coil of wire also around the iron core, called the "secondary" coil, which delivers the transformed energy. An alternating current system involving but a single pair of wires is called a "single phase" system. When more than one current is utilized, the system is called a "polyphase" system. The ordinary polyphase system is the three-phase system, in which three transmission wires are used, and in which there exists three phases of current in the system, which do not attain their maximum values at the same time, but are displaced, or out of the phase, so that their maximum values are successively attained. The Armstrong and Woodbridge patent involves a polyphase system connected in delta as contradistinguished from the star or Y connection. In the delta connection the coils are connected end to end, forming a closed circuit, while in the star or Y connection three ends of the coils are connected to a common point, and the other ends of the coils to the conducting wires of the circuit. The complainant charges the defendant, Allis-Chalmers Company, with

contributory infringement of the patent in suit, by reason of its manufacture and sale of an apparatus to the Ft. Wayne & Wabash Valley Traction Company, designed and intended by said defendant for use in the manner specified in the patent in suit, and which was installed at one of the substations of the traction company at or near Logansport. In modern practice in long-distant railway systems, the electrical energy is generated in the form of an alternating current at high voltage at a central station and then delivered to substations along the line, where the alternating current is converted by appropriate apparatus into direct current of suitable voltage, for supply to the wire of a trolley car system for operative use. The method just indicated was that adopted and applied by the traction company above mentioned. Much might be added to what has been said with respect to the method above indicated, but it seems unnecessary, notwithstanding counsel of both parties have furnished elaborate and instructive briefs in relation thereto, for which the court is much indebted. As already indicated, the rotary converter is a machine used for changing an alternating current into a direct current, and consists of two parts, an alternating current motor driven by the alternating current supply, and a direct current dynamo, which, in turn, is driven by the alternating current motor, which generates a direct current to be supplied to the trolley wire. The alternating current motor of the rotary converter is a synchronous machine; that is, it must operate at the same speed as the generator at the distant generating station. This is necessary in order to avoid shock and possible breakage to the mechanism when connection is made between them; hence, the synchronous motor or converter must be started from rest and speeded up to the speed of the distant generator before being connected therewith. In other words, they must be in step when the connection is made. Since the rotary converter operates both as an alternating current motor and as a direct current dynamo, it is necessary that some means be provided to start the converters at the substation, and get them up to synchronous speed with the distant generator, and it is claimed for the patent in suit that it does this in a simple, cheap, safe, and automatic way "by bringing out interior taps from a plurality of translating devices, permanently connected in delta, and connecting the conductors of a multiphase system to the said taps or to certain of them. By an 'interior tap' is meant one which is not at an extremity of a winding." The complainant's expert, speaking on this point, says:

"That the interior taps of the patent in suit are never at the extremities of windings and by means of said taps, variable voltages are obtained without altering the number of effective turns; that is, without cutting in and out turns, and thus without changing the voltage conversion ratio."

That is to say, it is claimed for the Armstrong and Woodbridge combination that all of the turns of all of the secondaries are in effective use all of the time, whether half or full voltage is desired, and that this constitutes a radically new system. When half voltage is desired, the patentees combine one half of one secondary with the next succeeding half of the other secondary, but continue nevertheless

to use all the turns of all the secondaries. This idea is expressed clearly, but somewhat more in detail, in the brief of counsel for the complainant, as follows:

"Armstrong and Woodbridge's new combination consists in (1) permanently connecting the secondaries of the three transformers in delta and (2) providing 'interior' taps from each of these permanently connected secondaries leading to (3) a suitable switching apparatus. (4) The permanently connected ends of the secondaries of the three transformers are connected to the same switching apparatus, and (5) the rotary converter or motor to be started is also connected to the switching apparatus.

"An operator by manipulating the switching apparatus can first allow a fraction of the full voltage to pass into the rotary converter or motor by merely moving his switch so that the contacts of the switch for the interior taps are in position.

"But in doing so all of the turns of all the secondaries are in use and are co-operating together to produce half voltage. When the rotary converter or motor has attained speed, the only thing that the operator has to do is to throw the switch so as to connect the contacts for the full voltage.

"Here again all of the turns of all the secondaries are in use but they have been combined together in a different way.

"The Armstrong and Woodbridge patent shows for the first time a system whereby lower voltages than the full voltages can be obtained from transformers or other translating devices, without changing the conversion ratio by cutting in or out a number of turns of either the primaries or the secondaries of each transformer."

During the entire operation the ends of the secondary of the transformers are "permanently connected in delta," and the circuit is not opened for obtaining either fractional or full voltages. This seems to be admitted by the defendant's expert, as will appear from the following question and answer:

"Q. That is, they mean by permanently connected in delta the secondary coils shall be connected one to the other so as to form a ring at all times, whether the voltage on the consumption circuit be maximum secondary voltage or less than maximum; is that correct? A. I understand this to be the meaning of the specification, as interpreted by the drawings of the patent."

In the prior art fractional voltages were secured either by increasing the number of turns of the primary of the transformer or decreasing the number of turns of the secondary of the transformer. This the patent in suit does not do, and hence avoids any change of ratio between the number of turns in the primary and secondary windings. By its method the circuit is not opened, nor is the number of effective turns varied.

It is contended, however, on behalf of the defendants that the patent in suit discloses nothing new, and that in view of the prior art Armstrong and Woodbridge did no more than any one skilled in the art would instinctively have done, and to sustain their position have cited and discussed a number of prior patents, some of which belong to the single phase, some to the two phase and some to the three phase system. It is apparent that the apparatus of the single phase and two phase systems can have but little relevancy, since the patent in suit relates to translating devices, permanently connected in delta, which implies at least a three-phase system. The patents of those groups do not therefore show the method of Armstrong and Wood-

bridge; and, while interesting as showing the progress of the art, they are not deemed worthy of protracted discussion. It may, however, be said of them in general that they show means of obtaining variable voltages by cutting turns in and out and thereby changing the conversion ratio, but do not, as just stated, relate to a delta connected transformer. The defendants insist, moreover, that there was no invention involved in making the connection in delta after it had been for a long time adopted and used in the Y-connection. This was likewise the opinion of the examiner in the Patent Office when the application for the patent in suit was under consideration by him, but, after argument by counsel and after a challenge by them to show a single instance where such a change had ever been made, he yielded the point and allowed the patent. This of itself is entitled to much weight in the resolution of the question now presented. One or two prior patents did, however, suggest that the connection might, if desired, be made in delta instead of in Y, but they neither did it, nor did they point out a way by which it might be done.

The first patent which will be specifically considered is a Swiss patent, No. 18,142, to Brown, Boveri & Co. In this case we have a Y-connected transformer, providing for a variation of secondary voltages, which, as the patentees in their specification say, "is best done by cutting in or out turns of the secondary winding." The defendant's expert admits that this is the case, and that by means of the different taps a number of sections of the coils in the secondary circuit are varied. This is his language:

"The arrangement of the coils and their connections is shown in Fig. 5 of the patent. It will be seen that a number of interior taps are brought out from each coil, and that contact devices operated by the switch shown in the other figures of the drawings make contact with different taps, and thus vary the number of sections of the coil in the secondary circuits."

He claims, however, that this is done by the use of "interior" taps as described in the patent. The taps as used, however, are at the extremities of the effective turns of the windings, whereas in the patent in suit the taps are interior taps which are not placed or used at the extremities of windings, or of effective turns of windings.

A German patent, No. 75,361, of 1894, also shows a Y-connected system in which the voltage is varied by cutting in and out turns of the secondary. Mr. Woodbridge, one of the patentees of the patent in suit, speaking of this German patent, says that it shows a Y-connected compensator for starting purposes exactly the same as the compensator which the complainant had used prior to the application for the patent in suit. It is, moreover, like the Swiss patent above mentioned, in that both change the conversion ratio of the windings cutting in and out turns thereof, which cannot be done if the transformers are permanently connected in delta. Of the Lamme, British patent No. 20,383, it is sufficient to say that this operates in the same manner as the Swiss and German patents just referred to. The Seimens Bros. & Co. patent. No. 6,058, of 1898, consists of a Y-connected system which obtains a change in phase without changing the voltage, but does it by cutting out turns. The distinctions between

it and the patent in suit are summed up by one of complainant's experts in the following language:

"On the other hand, in the Seimens apparatus, the transformer secondary windings are Y-connected, and provided with taps located at suitable points thereon, from which three-phase secondary voltages, not of variable, but of invariable value or amplitude, are obtained, the location of the taps on the windings being so chosen, and the switching mechanism for connecting different sets of taps with the distributing conductors so designed, as purposely to obtain a shifting in phase of the three-phase voltages, as a whole, without changing their amplitude; and in accomplishing this result, the number of effective turns in the windings in respect to the distributing conductors to which the secondary voltages are applied, is altered, and also the conversion ratio."

The Rice patent, No. 508,839, operates as a single-phase apparatus. It obtains six independent single-phase currents from a three-phase system. The defendant's expert admits that it differs from the patent in suit, in that the "taps" are not connected to form a three-phase system of distribution, although he adds that the art at the time knew how such connection could be made. It divides one single-phase voltage into two equal half voltages in phase with each other. In the patent in suit fractional voltages, as shown by complainant's expert, are obtained by combining the voltages as delivered from the transformers out of phase with each other to give a resultant voltage which is not the arithmetical sum or difference of the two component voltages. This the Rice patent does not do.

The Steimetz patent, No. 679,008, also shows a Y-connected transformer, and obtains half voltage by cutting in and out turns in the secondaries, and thereby altering the conversion ratio. This is disclosed by the specification, which reads:

"In order to vary the electromotive force of the direct-current terminals of the converter, I may, if desired, arrange the transformers so that their ratios of conversion may be varied. For this purpose each of the secondaries is provided with suitable switching mechanism for varying the number of effective turns."

Its inventor was an expert witness in the case on behalf of the complainant, and, speaking of his patent, says:

"This patent shows novel features of systems of distribution by rotary converters comprising the operation of such converters as six-phase machines and the variation of their voltage by changing their supply voltage by means of varying the number of effective turns of the supply transformer; that is, using all their turns or only a part thereof."

This is substantially admitted by the defendant's expert Dr. Duncan, as will appear from the following question and answer:

"Q. And in going from low to high voltage in the connections shown in Fig. 1 of the Steinmetz patent the ratio of conversion and the number of effective turns is changed when the switches are moved from one position to the other; is that not a fact? A. Yes."

The Spence patent, No. 6,774 of 1900, is claimed by the complainant to be too late, in that it was not sealed until some months after the date of the Armstrong and Woodbridge invention, and that it did not become effective until sealed. Ireson v. Pierce (C. C.) 39

Fed. 796, 798; Railway Register Co. v. Broadway, etc., Railway Co. (C. C.) 26 Fed. 522, 526. But, irrespective of the question of priority, it will be found upon examination that it does not show means for varying secondary voltages. It does not show translating devices connected in delta and furnished with interior taps for obtaining variable-delta connected voltages. In so far as it does or could vary the secondary voltages, it would be done by cutting in and out turns as in other Y-connected transformers. The patent in suit clearly shows invention. The prior art led away from its method. That art obtained fractional voltages by cutting in and out turns in the secondary windings thereby changing the conversion ratio. This was true of both the single-phase and two-phase systems, and the same method was naturally adopted and followed in the three-phase system. Variable voltages in the secondaries of transformers were obtained in the prior art, but they were not obtained from secondaries "permanently connected in delta" through a combination which used all of the turns of all of the secondaries all of the time as does the patent in suit. What might naturally have been expected in the development of the art is well, and I think truly, expressed by one of the complainant's experts as follows:

"What, then, would be the natural or obvious method pursued by an engineer in connection with a three-phase system prior to Armstrong and Woodbridge? The answer obviously is that he would vary the secondary voltage by cutting in and out turns of the secondary windings and changing the conversion ratio, as was done in the prior single-phase and two-phase systems. In order to do this, obviously the engineer would not naturally permanently connect the secondary windings in delta, but would choose or select a connection of the windings, such that the method of cutting in and out turns and changing the conversion ratio could be used. This connection is the star or Y-connection, because, if it were used, then the length of the secondary windings could be varied by cutting off more or less from the extremities of the Y, as I have previously explained. The engineer of that period was obliged to say to himself, 'If I wish to cut out turns from the end of a winding, obviously I must use a winding that has an end,' which would, of course, preclude the possibility of the idea of using a winding permanently connected in delta, occurring to him. And this is exactly what the different engineers and inventors did."

Application for the patent in suit was made December 16, 1901, but it is claimed on behalf of the complainant that the invention was made and reduced to practice several months prior thereto. Both the patentees have so testified, and their evidence is supported by that of several others to whom they disclosed it in August, 1900. A sketch is in evidence which is shown to have been made by Mr. Armstrong as early as August 25, 1900. That drawing is signed by him as of that date, and his signature witnessed by one Barry, who testifies that the invention was disclosed to him on that date, and that he then witnessed Mr. Armstrong's signature. Two days afterward, the invention was disclosed to a Mr. Davis of the General Electric Company, who swears that he then with the stamp of that company imprinted thereon the following inscription: "Received, General Electric Company, August 27, 1900, Albert G. Davis, Patent Department"—and, further, that he, Davis, wrote on it the following in-

scription, "Docket," with the following words added, "scheme for Variable secondary for delta transformers, Armstrong and Woodbridge." He explains that the word "docket" was written as an instruction to one of his subordinates to docket the case, so that an application for a patent might be prepared. Furthermore, the docketing clerk or chief clerk, one Hull, swears that he wrote on the sketch the following, "D. 1839, B. B. Hull, 8—28, 1900." The date of invention is further shown by important contemporary correspondence. The testimony thus given by several witnesses is so clear and explicit, and so well supported by documentary evidence, as to establish the fact that the invention was made and disclosed as early as August 25, 1900.

[2] The defendants claim, however, to have shown a prior use of the Armstrong and Woodbridge invention at Salt Lake City some time in 1898 or 1899 at the East side station of the Union Light & Power Company. This claim is sought to be established by the testimony of three witnesses. That of one of them is, however, quite inconsequential. He was in 1898 or 1899 little more than a laborer. In 1897 he was a groundman or laborer, and after that until well along in 1899 a lineman and lamp trimmer. Moreover, his testimony upon the point in dispute has but little bearing, and that of an indirect nature. Another of the witnesses testifies that in 1898 he was foreman of the line gang, and subsequently superintendent of construction for the above company. The person who was at the time its chief engineer was not called as a witness by the defendant, although it had sought and obtained permission of the court for that purpose. This circumstance is worthy of mention, since he of all others would seem to be the person who could have best and most intelligently and accurately testified in relation to the matter. Standard Sanitary Co. v. J. L. Mott Iron Works (C. C.) 152 Fed. 635; s. c. on appeal, 159 Fed. 135, 86 C. C. A. 325.

But considering such evidence as appears, and even assuming that to some extent it discloses a use of the apparatus of the invention, which, however, is denied by several witnesses, it falls far short of that clear and convincing testimony which the law properly demands for the establishment of a prior use. It does not show with definiteness when or how long the apparatus in question was in use. One of the witnesses says nothing upon the point, another "through that winter (1897) I believe about a year," and the third, "I can't remember now, the exact time, but some months." This testimony is consistent with, and might appropriately be referred to, an abandoned experiment; for, having once installed the apparatus in connection with a light and power plant, it is altogether unlikely that, if successful, it would have been so soon removed. Moreover, such facts as do appear in that connection are denied by the testimony of several witnesses, covering the entire period of the alleged use. This testimony is so at variance with that of the defendants' witnesses as materially to weaken, if not destroy, its probative force. Considering the entire evidence, it is insufficient to warrant the court in finding the existence of the alleged prior use. The main fact is left in

uncertainty. A prior use has not been established beyond a reasonable doubt. Almost any patent could be defeated if such evidence as here submitted were deemed adequate for the purpose. The conclusion thus arrived at renders it unnecessary to consider the alleged prior publication which appeared in the American Electrician in July, 1901. Upon the whole case I think the first claim of the patent in suit is valid.

Moreover, under the evidence, it is established that the installation at the Logansport substation of the above-mentioned traction company infringes the same claim. This could hardly be seriously disputed, and indeed is not, as appears from the following question and answer taken from the testimony of the defendant's expert:

"Q. Does the combination of apparatus shown in complainant's exhibit sketch of Logansport substation contain the following elements in combination: A plurality of translating devices connected in delta, interior taps in said devices, and a plurality of conductors a multiphase system of distribution connected to said taps? A. Although the apparatus of complainant's exhibit sketch Logansport substation differs in detail from the apparatus shown in the drawing of the Armstrong and Woodbridge patent, yet I consider that it contains the elements in combination recited in your question."

[3] The only question remaining for consideration therefore is whether the defendant Allis-Chalmers Company is guilty of contributory infringement in furnishing that apparatus with the intent that it should be installed and used in the manner above indicated. At this point it should be stated that for the purpose of this case it was admitted by counsel of the respective parties that in March, 1904, the defendant Allis-Chalmers Company acquired the ownership of a majority of the capital stock of the defendant Bullock Electric Manufacturing Company of Ohio; that it then acquired, and now has, control of all the property rights, assets, business, good will, plant, factories, tools, machinery, and stock on hand of that company, that since that time it has continuously controlled, operated, and conducted the plant and business of that company as the electric department of its own business, that in exercising its ownership and control of that company it authorized, directed, and controlled the manufacture and sale of the apparatus, the manufacture and sale of which is charged to be an infringement herein, and that it controls and directs the defense of this suit and is paying the expenses thereof. At the request of the complainant's counsel, counsel for the defendant also produced a contract subsequently offered in evidence between the Bullock Electric Manufacturing Company of Ohio, and the above-mentioned traction company, dated April 2, 1904, and it was thereupon further stipulated by counsel that in pursuance of that contract and between its date and the time of the filing of the bill of complaint herein it supplied the Ft. Wayne & Wabash Valley Traction Company with the apparatus called for by said contract, which apparatus was subsequently installed at the Logansport substation of said traction company; that the rotary converter described in said contract bore two name plates, each of which, besides other matters, had stamped thereon the name of the Bullock Electric Manufacturing Company,

Cincinnati, Ohio. The superintendent of power of the above-mentioned traction company was called as a witness for the complainant, and testified that when it was decided to install the apparatus in question bids therefor were solicited from the General Electric Company and the Bullock Electric Manufacturing Company of Ohio, that bids were submitted by those companies, and that of the Bullock Company was subsequently accepted.

The complainant also produced as a witness the chief engineer of the Bullock Electric Manufacturing Company, and who was the chief electrical engineer of the Allis-Chalmers Company, who testifed that the Bullock Electric Manufacturing Company of Ohio furnished a rotary converter and three transformers for the traction company for installation at its substation at Logansport, which rotary converter and transformers were designed in his department and under his direction. He also produced drawings showing the interior construction and connections of the transformers, and admitted that the rotary converter and transformers were to be used together, and further in relation to such use gave the following testimony:

"The high-tension connections of the three transformers, as well as the low-tension connections are made in delta. The low-tension connections are divided in the center and from those center points connections lead to the three terminals of the double throw three pole switch; the other three terminals of this switch being connected to the main terminals of the transformers. The joint terminals of the double throw three pole switch are connected to the slide rings of the rotary converter. Q. What was the purpose of such arrangement? A. The purpose of the arrangement is to reduce the voltage at starting by means of the intermediate terminals already referred to."

He also produced under subpœna duces tecum a blueprint drawing taken from the miscellaneous files of the Bullock Company, which drawing was marked, "Diagram of Connections Railway, Shunt Wound Rotary Converters, Bullock Elec. Mfg. Co. Apr. 22, 1904." A comparison of that diagram with one showing the installation at the Logansport substation shows that the apparatus and method of connection were substantially the same. Indeed, the superintendent of the traction company testified that the blueprint represented the installation made at the Logansport substation. The defendant's superintendent, however, disclaimed all knowledge of this drawing other than that it was not made under his direction, but, when asked the following question, "As an engineer you know that this drawing could only have been made for the purpose of instructing those who were wiring this plant (Logansport), how the connections should be made, do you not?" answered, "Yes," but some time later said that he should have qualified his answer by saying, "This or any other plant." He was manifestly an unwilling witness, and his answers were frequently captious, if not evasive, and lacking in that frankness which begets confidence in the sincerity of a witness. Moreover, the complainant has shown by expert testimony apparently uncontradicted that the apparatus called for by the contract between the Bullock Company and the traction company could be combined only by following the method of the patent in suit.

Without reference to other testimony, it is concluded that the defendant Allis-Chalmers Company, through the Bullock Company of Ohio, manufactured and sold to the traction company the infringing apparatus in question, with the intent and purpose that it should be connected and used at Logansport in the manner that it was, and that in so doing it became, and was, guilty of contributory infringement of claim 1 of the patent in suit.

No proofs have been offered against the Bullock Manufacturing Company of New Jersey, a defendant, and, since the Bullock Manufacturing Company of Ohio was not served with process and has not appeared herein, the bill of complaint will, as to those defendants, be dismissed, while as to the defendant Allis-Chalmers Company a decree in favor of the complainant will be entered pursuant to the prayer of the bill.

COMBUSTION UTILITIES CORPORATION et al. v. WORCESTER GASLIGHT CO.

(Circuit Court, D. Massachusetts. August 8, 1911. Defendant's Petition for Rehearing, August 26, 1911.)

No. 527.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF REGULATING TEMPERATURE OF COMBUSTION IN GAS PRODUCERS.

The Doherty patent, No. 829,105, for a process of regulating the temperature of combustion in gas producers by introducing to the grate a mixture in definite proportions of the waste products of combustion, including carbon dioxide, and of air at a designated temperature for the purpose of reducing the temperature of combustion and preventing the formation of clinkers, was not anticipated and discloses invention. Also, *held* infringed as to claims 7, 10, and 13.

2. PATENTS (§ 27*)—VALIDITY—THEORY OF OPERATION.

Whatever may be the correctness of the theory of operation of a patentee if a new application of old means is sufficiently described to enable those skilled in the art to produce a new and useful result, it is enough to sustain the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—COMBUSTION REGULATOR FOR FURNACES.

The Doherty patent, No. 844,504, for apparatus for regulating combustion in furnaces, claim 3, is for a true combination, was not anticipated, and discloses invention; also, *held* infringed.

Defendant's Petition for Rehearing.

4. PATENTS (§ 315*)—SUIT FOR INFRINGEMENT—REHEARING.

The discovery after final hearing and decision in an infringement suit of another patent claimed to anticipate the one in suit, particularly where it was referred to in defendant's record and brief, is not a sufficient ground for reopening the case.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 315.*]

In Equity. Suit by the Combustion Utilities Corporation and others against the Worcester Gaslight Company. On final hearing. Decree for complainants.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harold Binney and Odin Roberts, for complainants.

John H. Roney and Macleod, Calver, Copeland & Dike, for defendant.

BROWN, District Judge. The bill charges infringement of two letters patent to Henry L. Doherty; No. 829,105, August 21, 1906, for "process of regulating the temperature of combustion in gas producers," claims 7, 10, and 13; and No. 844,504, February 19, 1907, for "apparatus for regulating combustion in furnaces," claim 3.

[1] The Doherty process of regulating the temperature of combustion has as its object to prevent or minimize the formation of clinkers in the furnace and secure a saving in fuel. The formation of clinkers can be obviated by maintaining the combustion at a temperature lower than that required for the formation of the slag or flux.

Water and steam were used to reduce temperature and minimize the formation of clinkers, but with objectionable features. The Doherty invention does away with the use of steam and water. Instead, he says:

"I introduce into the bed of incandescent carbonaceous fuel a decomposable gas, preferably carbon dioxide (CO_2), which may be used either alone or mixed with other gases. * * * I have discovered that the temperature throughout the entire incandescent bed of fuel may be kept down to a point at which clinkering will not occur, by utilizing the heat absorbing effect occurring in the disassociation of the carbon dioxide," etc.

Doherty returns to the grates a part of the waste products of combustion, mixed with air, with the purpose and effect of a regulation of temperature so that slag is not formed.

The claims of the process patent in suit are:

"7. The hereinbefore-described process of making combustible producer gas, which consists in conducting combustion within a deep fuel bed by means of air and carbon dioxide, regulating the proportion between the quantity of air and carbon dioxide introduced into the producer, and regulating the amount of such mixture of air and carbon dioxide so as to avoid objectionable slagging of the fuel and conducting said gas unburned to the point of use."

"10. The herein-described process which consists in making producer gas from a deep bed of fuel with a draft current containing oxygen, nitrogen, and carbon dioxide and proportioning the carbon dioxide with reference to the temperature of the draft and the slagging qualities of the fuel to determine and maintain the temperature equilibrium occurring between the heat produced in the fuel bed by the reaction of the free oxygen and carbon mainly to produce carbon monoxide and the heat absorbed by the endothermic and physical actions at a temperature below the objectionable slagging or clinkering temperature of the fuel."

"13. The herein-described process of regulating and controlling combustion in making producer gas, which consists in conducting combustion of oxygen and carbonaceous fuel mainly to produce carbon monoxide in the presence of carbon dioxide, and in maintaining the temperature equilibrium occurring between the heat-producing and the heat-absorbing actions in the fuel bed at a temperature below the objectionable clinkering temperature of the fuel by introducing to a deep bed of the fuel a draft essentially of air and products of combustion and by so regulating and proportioning the ratio of products of combustion and air with reference to the temperature of the draft and the slagging qualities of the fuel, substantially as described, as to limit the temperature as aforesaid."

The practical success of this process or method and its value in obviating the production of clinkers and in saving fuel is established by convincing testimony.

The defendant, however, sets up anticipation by the prior art, and further contends that, if not fully anticipated, the difference from the prior art is so slight as not to involve the exercise of the inventive faculty. The defendant contends that, as a gas producer is an apparatus in which a combustible gas is generated from the slow and incomplete combustion of carbonaceous fuel, it is the familiar knowledge of the ordinary workman that in operating a gas producer he is not to treat it like a coal stove for the production of heat, with the consequent consumption of coal, but on the other hand is to keep the temperature of his producer as low as is possible, and thus save fuel; or, in other words, treat the producer as a distilling apparatus rather than a stove.

But this in no wise detracts from the novelty of the Doherty process. Though the specification says:

"The formation of clinkers can be obviated by maintaining the combustion at a temperature lower than that required for the formation of the slag or flux"

—this is referred to, not as a discovery, but as knowledge familiar to those in the prior art who employed water and steam to reduce the temperature of the fuel, and thus minimize the formation of clinkers.

The question of the novelty and patentability of the process depends upon the means employed by Doherty to reduce the temperature and the advantage over former means. The defendant contends that the prior art discloses the use of a draft current composed of air and carbon dioxide, i. e., the waste products of combustion, and cites specially in its brief the following patents: British letters patent No. 16,207, of 1890, to Frederick Siemens; British letters patent No. 4,644, of 1889, to the same inventor; British letters patent No. 20,083, of 1889, to the same inventor; United States letters patent No. 209,554, of 1878, to Eustis; United States letters patent No. 451,612, of 1891, to Biederman & Harvey; United States letters patent No. 442,600, of 1890, to the same inventor; United States letters patent No. 468,834, of 1892, to Frederick Siemens; United States letters patent No. 468,835, of 1892, to the same inventor; United States letters patent No. 692,257, of 1902, to B. E. Eldred.

The complainant concedes that the use of the products of combustion for the purpose of economy by restoring heat to the fuel bed was well known in the prior art. We may assume for the purposes of this case that it was old to return to the grate carbon dioxide, or the waste products of combustion, for the sake of the heat brought to the fuel bed, and that it was also old to introduce air to the grates together with the heated products of combustion. There is still to be considered the practical difference between heat production and heat regulation.

Heat regulation by draft regulation is, of course, obvious; but Doherty goes beyond this. His process clearly shows the conception of temperature regulation by a definitely regulated mixture of air and

products of combustion admitted to the fuel bed, for the definite purpose of operating a gas producer at a temperature lower than the slagging or fluxing point; or, as Doherty expresses it:

"The invention consists of a process of employing carbon dioxide for regulating the temperature of combustion in a gas producer furnace for heating retort ovens or other purposes."

Assuming that when, in the prior art, waste products were returned to the grate, the carbon dioxide did have the effect of reducing temperature, yet there was, so far as I have been able to learn from the prior patents, no one before Doherty who so employed this temperature-reducing effect of the waste products of combustion, or so regulated the proportion between such products and air, as to maintain a temperature suitable for a gas producer and such as practically obviated the formation of clinkers—a defect which previously was considered unavoidable and put up with as a necessary evil.

It is expressly conceded by defendant's expert that none of the patents of the prior art contains any direct statement regarding slagging or clinkering the fuel. There is no disclosure that anticipates Doherty's statement of what could be accomplished in heat regulation by the means described.

The complainant's propositions that prior to the inventions in suit clinkering was accepted as an unavoidable evil in furnaces and gas producers; that the only means previously employed to mitigate this was water or steam; and that the Doherty process both obviates the use of water or steam and so thoroughly prevents clinkering that the necessity of removing clinkers and of the accompanying chilling of the furnace by the admission of cold air is obviated—require careful attention.

It is true that Mr. George H. Benjamin, defendant's expert, testifies to a series of tests of the Biederman & Harvey construction for the purpose of determining the best temperature to prevent clinkering, and the best proportion of products of combustion and air for various purposes, and that there was no difficulty in operating the Biederman & Harvey furnace without the production of any perceptible amount of clinker. On the other hand, these tests tend to show that what could be accomplished in heat regulation by proper proportions of the products of combustion and of air was not a matter of familiar knowledge and was not obvious at the time of these experiments, which were made in England in 1884. But the defendant has failed to show that these experiments and the knowledge thereby acquired were ever applied to practical use, or became a part of the familiar knowledge of the practical art. As this record stands, Doherty produced a new result in the art, a practical nonclinkering gas producer furnace, and made an important contribution to the art by the disclosure of what could be practically accomplished by a new way of applying old means.

Stated in its simplest aspect, and disregarding the chemical theory of what occurs above the grates of a gas producer, it was the discovery that by introducing to the grate of a gas producer a mixture containing proper proportions of the waste products of combustion (containing carbon dioxide), and of air at a suitable temperature indicated

in his specification, the gas producer could be practically operated in a mannner new to the art and with results of commercial value.

Of claim 7 Mr. Benjamin says:

"This claim states the obvious. It is unreasonable to assume that any furnace manager would operate his producers so that large quantities of slag, objectionable quantities, would be produced."

But the preponderance of evidence is to the effect that furnaces were so operated, and the common use of water and steam is an indication that it was not known that temperature could be controlled and maintained below the slagging point merely by the careful use of the waste products of combustion mixed with air.

It is of course easy to say that the cause of clinkering was well known, i. e., a high temperature; that to reduce the temperature would be obvious; and that to control the supply to the grate of air and waste products of combustion would be an obvious means of reducing the temperature, and thus of preventing clinkering.

The answer to this is that none of the prior patentees cited disclosed this, and that so far as appears none of the many gas producers was so operated as to achieve the result which apparently is well recognized as new and useful in the practical art.

It follows from a view of the prior art that the defendant in operating its gas producer cannot be prevented from using the waste products of combustion for the purpose of restoring heat to the grates, and that the defendant may also introduce air with the products of combustion. As it was old in the art to introduce both air and carbon dioxide, the defendant cannot be held an infringer merely because of its temperature-reducing effect, since such effect was necessarily involved in the operation of furnaces of the prior art fed by air and carbon dioxide.

Where Doherty departs from the prior art, according to my understanding, is in mixing carefully and in carefully determined proportions the products of combustion and air, and in introducing this mixture at a moderate temperature, about 700 degrees Fahrenheit, as indicated by the specification; the heated mixture restoring some heat and thus assisting the generating of carbon monoxide, as in the prior art, but without introducing such an amount of heat as to produce the high temperature at which slagging occurs.

[2] Finding, as we must upon this record, that the effect of operating a gas producer by such a mixture resulted in the maintenance of an even temperature below the clinkering point, and that this was not known to those skilled in the art, the theory of the chemical reactions occurring within the gas producer is of minor consequence. Whatever may be the correctness of the theory of operation if a new application of old means is sufficiently described to enable those skilled in the art to produce a new and useful result, that is enough. Diamond Rubber Co. v. Consolidated Rubber Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527 (Sup. Ct. of U. S. April 10, 1911).

The defendant's superintendent, Mr. Barnum, testifies to the necessity of a very carefully proportioned mixture of the products of combustion and of air, and to the practical improvement of heat regula-

tion thereby. The testimony of this skilled and intelligent witness, however, as to the actual chemical reactions which occur in the defendant's producer, and the apparent divergence of expert opinion as to the chemical changes that occur during combustion, raises doubt whether the Doherty patents can be regarded as presenting either the correct chemical theory of operation or any novelty in the chemical changes above the grates.

To introduce carbon dioxide was not a new conception and as it was well known, as conceded by complainant's expert Mr. Queneau, that CO_2 reduced the temperature, we cannot concede that the conception of using carbon dioxide as a cooling agent is broadly new in the art.

It was doubtless familiar knowledge that carbon dioxide, a noncombustible gas, had chemically a cooling effect and not a temperature raising effect. It is urged by the complainant, however, that in the practice of the prior art it was introduced at so high a temperature as to offset any cooling effect from chemical reaction. Whether this is true with the Biederman & Harvey and Siemens structures and process is not clear upon the patents themselves.

There is, it must be confessed, great force in the defendant's argument that in the operation of any furnace, whether supplied with air alone or with air and the waste products of combustion, temperature regulation is implied, and that when in the prior art the products of combustion were supplied to the furnace they were necessarily accompanied by a regulated proportion of air; in other words, that there was necessarily a regulation of the respective amounts of air and of carbon dioxide in order to produce combustion and to generate carbon monoxide.

It is also apparent that in the operation of such furnaces the reduction of CO_2 to CO is endothermic or heat absorbing, and that whether the CO_2 was that resulting from combustion in the fuel bed, or that introduced in the draft current, the conversion of carbon dioxide to carbon monoxide was a cooling process.

It is fair to say that it is doubtful if the part of the specification relating to the heat absorption in the reduction of carbon dioxide to carbon monoxide is anything more than the description of chemical reactions that have necessarily occurred with all types of gas producers, whether supplied with a draft of air alone or with both air and carbon dioxide.

That the improvement in the Doherty process consists merely in regulation of temperature through the reduction to CO of that portion of CO_2 introduced into the mixture seems impossible to establish as a fact. To single out as the actual and dominant factor in maintaining a low temperature the heat absorption which results from CO_2 introduced in the draft current seems to give a fallacious emphasis to a part of what occurs above the grate.

That there is in a fuel bed operated with a Doherty regulator any novel chemical action is not established. The specification was fairly criticised by the examiner in this language:

"Applicant is not the inventor of any exothermic or exothermal or endothermic or endothermal reactions which may take place in the development

or absorption of heat in his process. This is all theory, and the lengthy statements therein are unnecessary to a proper understanding of the present invention."

As is frequently the case when a patentee attempts ex post facto a physical explanation of what he has found by experiment, a collateral issue is raised which diverts attention from what is more important—the means whereby he effects his result.

[3] What we are concerned with is the difference between what Doherty did and what was done by prior inventors. This may be seen by examination of the apparatus patent, No. 844,504, dated February 19, 1907, for "apparatus for regulating combustion in furnaces." Claim 3 is as follows:

"In apparatus of the character described, the combination of a gas producer, a combustion chamber, retorts therein, secondary air flues leading to the combustion chamber, return flues for products of combustion leading from the combustion chamber to the stack and arranged in proximity to the secondary air flues, primary air flues leading underneath the grate, an injector for conducting air and a portion of the products of combustion from the return flues to the grate, and means in addition to the injector for regulating the mixture of air and products of combustion."

The defendant contends that this claim is not for a true combination, but for a mere aggregation of devices; a gas producer and a retort bench which do not co-operate to produce the result of regulating combustion in furnaces.

It is quite true that the gas producer should be considered by itself, and that references in the prior art are equally valuable whether the combustion chambers contain retorts or other articles to be subjected to heat. The retorts wherein is distilled illuminating gas from coal have no function in the production of the gas from the "gas producer." It may be said, however, that the claim is more limited in scope than the invention described. The type of furnace shown, including a gas producer, combustion chamber, retorts therein, secondary air flues leading to the combustion chamber, return flues for products of combustion, primary air flues leading under the grate, is well represented in the prior art, and the invention relates to improvements which in the specification it is said "may be applied either to the form of furnace shown or to any other gas producing furnace, or they may be applied in connection with furnaces for steam boilers."

The fact that the element retorts, referring to the retorts wherein illuminating gas is distilled from coal, is included in the claim, is an insufficient reason for pronouncing the claim invalid as for a mere aggregation. The entire structure of the claim comprehends new elements applied to a structure of an old type. If in this claim the inventor, by including the words "retorts therein," has limited himself to a claim for his invention when applied to use in a structure of special type, it would be a harsh and unusual construction of his claim to say that, because he had unnecessarily limited himself to the use of his invention for the purpose of heating retorts, he should lose it altogether.

It is so generally the practice of patent solicitors to draw claims for an invention as applied to its most important use, and to file com-

bination claims which cover the invention in a special field of application, that the doctrine of "aggregation" should not be applied to defeat this claim merely because it includes a gas producer and a gas bench, with retorts heated by the combustion of gas generated by the producer, as well as Doherty's new regulating means, whereby the producer gas is generated more economically, and thus the illuminating gas is more cheaply generated from the retorts.

The two elements of claim 3 which require special consideration are:

"An injector for conducting air and a portion of the products of combustion from the return flues to the grate."

And:

"Means in addition to the injector for regulating the mixture of air and products of combustion."

Doherty shows in his drawings two forms of injectors and employs the word "injector" in the specification to describe equally an injector nozzle supplied with air or steam from a suitable source and an injector consisting of a power-driven fan. Though the defendant devotes a very considerable part of its brief to insistence that the patentee should be limited to the nozzle form of injector, and though a considerable amount of expert testimony is devoted to that question, I think to so limit it would do violence to the patent as issued; and I find nothing in the file wrapper which in my opinion amounts to a concession by the patentee that he had abandoned the fan injector so carefully described and illustrated. The fan type of injector is the one used by the defendant and the only one which will require consideration.

The fan injector by its motion sucks in the waste gases and also a portion of air which is regulated by a damper. The complainant contends that in view of the prior art nozzle injectors and fan injectors were well-known equivalents, and this seems to me clear. They were both used for producing motion of the waste products of combustion toward the grate.

The ordinary injector of the prior art was a means of conducting the products of combustion, and incidentally perhaps air, to the grate. In the prior art also there were means in addition to the injector for regulating the amount of air introduced with the products of combustion. The British patent to Siemens, No. 16,207, which was cited against the patentee in the Patent Office, has an injector shown by reference to character K, and means in addition to the injector for introducing more or less air in conjunction with the waste products of combustion are shown in a jet K and in doors M, M^1, and J.

Letters patent No. 468,834, to Siemens, February 16, 1892, disclosed similar means in addition to the injector. The Biederman & Harvey patents, numbered 442,600 and 451,612, disclose an injector for producing a movement of the waste products of combustion toward the grates, and also show means for introducing under the fuel bed more or less air. It is fundamental in a device of this character that more or less air be fed to the grates or to the fuel bed, and it is evident that devices of the injector type for propelling to the grates the waste

products of combustion would result in some mixing of the products of combustion and air; but the regulating means are rough compared with Doherty's means for close regulation, and indicate no knowledge of the value of more exact regulation.

It must be conceded that the prior art comes very close to the Doherty patent in respect to the general features of operating gas producers. By analysis of the structures of the prior art it is possible to point out one by one elements corresponding to the terms wherein the patentee in his claims has set forth his invention. Nevertheless these elements are not combined in any structure of the prior art as Doherty has combined them in his apparatus.

While the prior art has injectors, and has means other than the injector for introducing air, they are not in the same relation and are not so arranged as to co-operate, as in the Doherty apparatus, for the close regulation of the proportions of the mixture. The importance of this is conceded by Mr. Barnum, defendant's superintendent, who says that he has always operated defendant's structure with the gases thoroughly mixed and diffused.

In this and in the special manner in which the injector and dampers are conjointly used the defendant follows Doherty and not the structures of the prior art.

The defendant's fan injector is accurately described in the language of claim 3 as an injector for conducting air and a portion of the products of combustion to the grate, and it co-operates both with the damper for the admission of air and with the return flues, exactly as the fan injector of the Doherty apparatus patent.

Whether the capacity of the defendant's producer to operate without the production of clinkers is due entirely to the adoption of what was taught by Doherty we need not determine. It is enough that this is of substantial value in assisting to the result. If the use of shaking grates to automatically remove the ash before it is fused to slag is the efficient means of preventing clinkering, the defendant is at liberty to employ this means alone, without infringing the Doherty patents. If it be said that in mixing his waste products and air more thoroughly and in introducing the mixture cooler Doherty merely differed in degree from the practice of the prior art, yet this is a difference which is more than a mere difference in degree, and is brought into the field of invention and of patentability by showing novel and valuable results. Diamond Rubber Co. v. Consolidated Rubber Co., supra.

Though it may have been well known that slag is produced only at a high temperature and can be avoided by a low temperature, apparently it was not known in the practical art how to approach the maximum temperature desirable in gas producers without overstepping the line at which slagging is caused.

A very protracted and careful examination of the record convinces me that Doherty made a meritorious advance in the art; that he was the inventor both of an apparatus and of a new process. While there is much ground for discussion in that part of his specification which relates to the theory of operation, and in his claims, yet it seems reasonably free from doubt that Doherty's apparatus for regulating combustion was a new structure which is not anticipated in the prior art,

and that it embodies the discovery that by a definite control of the mixture of air and waste products of combustion, and by a definite regulation of the temperature of his mixture, he could accomplish a valuable result which could not be accomplished, and had not been accomplished, merely by using the waste products of combustion and air without regard to their exact proportions, the thoroughness of mixture, and the temperature at which the mixture should be introduced. Exact adjustment of these as means to the specific and novel end of maintaining temperature within a maximum limit, for the elimination of the undesirable slag which accompanies the use of the same means not exactly adjusted, and applied without regard to and without attaining this specific improvement, distinguishes Doherty broadly from the prior art.

While the general resemblance of the means of generating producer gas brings the prior art close to Doherty, yet in the specific feature of successfully eliminating the formation of slag while operating a gas producer, which is the subject of his invention, there is, so far as the patents in evidence are concerned, no prior disclosure and no prior art with means which resemble Doherty's.

The defense of noninfringement before the filing of the bill, based upon the fact that the plant was operated for about two months by the Riter-Conley Manufacturing Company, is, in my opinion, without merit. This operation was conducted in accordance with a contract whereby the defendant procured the Riter-Conley Company to construct the plant and to operate it for the purposes of defendant's business. Under such circumstances the defendant is directly responsible for the infringement.

To consider in detail the criticisms of the claims would uselessly prolong this opinion. Each claim of the process patent is expressly limited by the expression "the hereinbefore-described process," and when read in connection with the specification is intelligible, though claims 10 and 13 of the process patent are not clearly expressed.

I find claims 7, 10, and 13 of the process patent, No. 829,105, valid and infringed.

I find claim 3 of the apparatus patent, No. 844,504, valid and infringed.

A draft decree may be presented accordingly.

Odin Roberts and Harold Binney, for complainants.

Macleod, Calver, Copeland & Dike and Wm. A. Copeland, for Worcester Gaslight Co.

John H. Roney, for other defendants.

Defendant's Petition for Rehearing.

[4] After filing of an opinion in favor of the complainants, the defendant files a petition asking that the case be reopened in order that it may be permitted to introduce in evidence letters patent to Ellis, No. 790,253; and also for reconsideration of the case in view of proceedings in interference between Doherty, the inventor of the patents in suit, and Ellis, wherein it is claimed that certain concessions of priority were made by Doherty to Ellis. The discovery, after final

hearing and decision, of another United States patent, and particularly the discovery of a patent referred to in defendant's record, and specifically referred to in defendant's brief, is not, under the circumstances, a sufficient justification for reopening the case. In re Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, 20 C. C. A. 111; Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221; Lafferty Mfg. Co. v. Acme Ry. Signal & Mfg. Co., 143 Fed. 321, 74 C. C. A. 521; Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co., 98 Fed. 121, 38 C. C. A. 661.

Furthermore, the Ellis patent was granted in pursuance of an application of later date than the first Doherty patent, and, as the Doherty inventions are so closely related (see Steinmetz v. Allen, 192 U. S. 543, 559, 561, 24 Sup. Ct. 416, 48 L. Ed. 555), Ellis, upon the showing made by the petition, is later than Doherty. The petition does not indicate that a different result should have followed if the Ellis patent had been before the court at the final hearing. The concessions of Doherty to Ellis and of Ellis to Doherty for the purposes of an interference were upon the record in an exhibit offered by the defendant. It is doubtful if these concessions, made for the purposes of an interference, can create an estoppel upon Doherty as against a defendant who is not in privity with Ellis. As admissions, they have little force, in view of the concessions made by Ellis to Doherty and of the claims allowed to Doherty in interference. The argument that the concessions of Doherty to Ellis are destructive of Doherty's claims to priority seems equally applicable to show the destruction of Ellis' claims to priority by his concessions to Doherty. It is a question whether the mutual concessions are not so inconsistent as to neutralize each other However this may be, the defendant does not make a case which justifies the reopening and continuance of this already protracted litigation. The defendant has chosen the grounds upon which to contest the Doherty patent. This choice has shaped the course of the testimony, and the rule that the party who has his day in court must present his case, and not reserve arguments, then fully available, for use in case he shall not prevail upon his chosen defenses, seems specially applicable to the present petition.

Petition denied.

GENERAL ELECTRIC CO. v. ALLIS-CHALMERS CO.

(Circuit Court, D. New Jersey. June 5, 1911.)

1. PATENTS (§ 328*)—INVENTION—GOVERNOR FOR AIR COMPRESSING MOTOR.

The Stewart patent, No. 745,683, for a pneumatic governor for electrically driven air pumps or compressors, is void for lack of invention in view of the prior art.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GOVERNOR FOR AIR COMPRESSING MOTORS.

The Macloskie patent, No. 826,341, for a pneumatic governor for electrically driven air compressers, was not anticipated and discloses invention; the device being the first to be entirely commercially successful; also *held* infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 73*)—ANTICIPATION—DATE OF ANTICIPATING INVENTION.
The date when a patent is actually issued, rather than the date when the application therefor was filed, determines whether or not it anticipates another patent.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 73.*]

In Equity. Suit by the General Electric Company against Allis-Chalmers Company for infringement of two patents. Decree for defendant as to one patent, and for complainant as to the other.

L. F. H. Betts and James J. Cosgrove, for complainant.
Thomas F. Sheridan and Clifton V. Edwards, for defendant.

CROSS, District Judge. By the bill of complaint in this cause there is brought before the court for consideration two patents owned by the complainant, which, it is claimed, have been infringed by the defendant. The first, No. 745,683, was issued December 1, 1903, to Samuel B. Stewart, Jr., assignor to the complainant, the second, No. 826,341, was issued July 17, 1906, to George Macloskie, assignor to the complainant. Each of them is for a fluid pressure or pneumatic governor. They are designed to control the electric circuit of an electric motor, which drives an air compressor for the purpose of storing compressed air in a reservoir designed for that purpose, which air is used in operating the air brakes of an electric car or train of cars. For that purpose, the air pressure in the reservoir must be maintained within certain prescribed limits, say between 80 and 90 or 85 and 95 pounds pressure per square inch. If the air pressure were allowed to fall much below the minimum pressure indicated, it would be insufficient to effectively operate the air brakes, whereas, if allowed to greatly exceed the maximum pressure, the motor would be gradually slowed down and burned out. Hence a pneumatic governor is essential to open or close the electric current to stop or start the motor operating the air compressor when the maximum or minimum air pressure has been reached. The governor is designed to maintain the air pressure in the reservoir within certain defined limits. The testimony shows that it is desirable that the contacts of such a governor should be firmly pressed together when in their closed position, in order to avoid "chattering" which causes them to burn and pit or roughen as the result of arcing. The means for providing this constant pressure must be such, however, as will not prevent a quick opening of the switch at the proper time.

[1] The patents above mentioned will be considered in their order. Stewart described his invention in the following language:

"This invention relates to governors for electric motor-driven air pumps or compressors, the object being to maintain in an auxiliary reservoir or other holder for compressed air a pressure comparatively uniform and to cut in and out of operation the motor at determinate pressure-limits in the system. It is usual to cut in and out the electric motor which drives the pump after the pressure has fluctuated over a definite-operating range, ordinarily fixed at ten pounds. The working range of pressure is ordinarily from eighty to one hundred pounds, the governor being capable of adjustment so that the motor can be cut in when pressure declines to eighty or eighty-five pounds

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and cut out when it reaches ninety or ninety-five pounds. Various devices have heretofore been designed to control the pressure in this way, sometimes being mechanically actuated by air-pressure at both limits and sometimes being governed by electromagnets cut in by a fluctuation of pressure."

"My invention relates to a type in which the circuit-controller which governs the motor-circuit is mechanically actuated by a rise and decline of pressure in the system, the object of the invention being to render the arc at the opening points of contact harmless and to lock the movable parts of the apparatus against derangement by shocks, vibration, or other accidental causes. * * *

"One of the essential features of my invention consists in storing energy in a freely-movable contact while the pressure is fluctuating, which at a determinate position acts to open the circuit with great rapidity, as contradistinguished from a lock which prevents the movement of the contact until a definite position is reached."

He then indicates a distinction between the patent in suit and a prior patent of his for a circuit-controller. The patent under consideration has six claims, of which only 3 and 5 are in issue. They are as follows:

"3 A governor for an electrically-operated air pump comprising a pressure-flexed diaphragm, a movable circuit-controller, a controlling-spring operated by the diaphragm and adapted to be shifted off center to operate the controller, and means for engaging the controller-arm to mechanically force the contacts apart if fused or otherwise locked together."

"5. A governor for an electrically-operated air-pump comprising a pressure-operated piston, a movable circuit-controller a controlling-spring adapted to be shifted off center on determinate change of pressure to operate the circuit-controller, and a stop engaged by the piston if the spring fails to separate the contacts to positively separate them."

The defendant claims that the prior art anticipated this patent, or, if not, that the defendant's apparatus does not infringe it.

The complainant's expert practically admits that whatever of novelty is shown in this patent resides in the last clause of each of the claims. This is his language:

"To my way of thinking, the question of novelty or lack of novelty of the matter referred to in Stewart's claims 3 and 5 is simple and definite, depending largely upon the feature referred to in claim 3 as 'means for engaging the controller arm to mechanically force the contacts apart if fused or otherwise locked together,' or the corresponding feature referred to in claim 5 as 'a stop engaged by the piston if the spring fails to separate the contacts to positively separate them.'

"It seems to me a definite and explicit question whether such an emergency circuit-opener is or is not present in a governor such as Stewart's with a controller spring operated by the diaphragm and adapted to 'be shifted off center to operate controller,' it being understood that such a controller without the emergency circuit-opener was old prior to Stewart."

After an examination of the prior art, it seems to me that the foregoing admission was clearly justified. If the patent in question discloses novelty, it resides in the means provided for positively opening the circuit by forcing the contacts apart when fused or otherwise fastened together; but in my judgment this feature is wholly lacking in novelty and invention. In view of the disclosures of the prior art, it required no invention to provide means for positively effecting such a result. An application of ordinary mechanical skill was sufficient for the purpose. With the necessary power present and operat-

ing through the diaphragm, all that it required was an application of that power in some positive way, as, for instance, by an arm or rod or lever, to reach and force the contacts apart. Laying aside the disclosures of the prior art, this of itself would seem an easy problem and one capable of solution by an ordinarily skilled mechanic, and that, too, without making any heavy draft upon his inventive faculty, while, if he were instructed by that art, he would be able to solve it at sight. No special discussion of prior patents will be attempted. Reference is made, however to Binswanger, No. 485,028, 1892; Hewlett, 671,278, 1901; Bernardini, 620,839, 1899; Blake 520,722, 1894; Wilson, 588,306, 1897; and Whittier, 497,563, 1893.

The means adopted by Stewart for positively forcing the contacts apart is, at the most, but a mechanical variation of means which, if not obvious, had previously been both suggested and applied to accomplish the same purpose. This patent is invalid, and as to it the bill will be dismissed.

[2] The nature and object of the second patent in suit, that to Macloskie, is set forth by him in his specification in the following language:

"One of the distinguishing features of this type consists in having the arm which carries the movable contact connected to a strained spring, acting under either tension or compression, which may be carried on opposite sides of the pivoted point of the arm through the agency of a diaphragm or other means subjected to fluid-pressure. In governors of this type heretofore proposed the construction is such that the movements of the spring and diaphragm are substantially simultaneous. In the act of breaking the motor circuit this simultaneous movement causes the pressure between the controller-contacts to fall off some time before the actual break takes place. This is a serious objection, since it causes destructive pitting and fusing of the contacts. The principal object of the present invention is to provide a governor of this type in which when breaking the circuit, the pressure between the contacts of the controlling-switch will be maintained substantially uniform throughout practically the entire range of movement of the diaphragm. This is accomplished specifically by providing mechanism which will at first take up the movement of the diaphragm without changing the position of the tension spring and will cause the spring to move to a position to open the controlling-switch."

Of its ten claims, the first three only are in issue. They are as follows:

"In a switch mechanism, the combination of switch-contacts, a strained spring for maintaining a definite pressure between said contacts, a movable member, and means for transmitting motion from said member to said contacts by initially taking up the movement of said member without decreasing the pressure between said contacts and subsequently moving said spring to a position to separate said contacts.

"2. In a fluid-pressure governor, the combination of a pressure-diaphragm, a switch-arm, a strained spring tending to hold said arm in a definite position, and means for transmitting motion from said diaphragm to said arm by initially taking up the movement of said diaphragm without changing the position of said spring and subsequently moving said spring to a position to move said arm from its initial position.

"3. In a switch-mechanism, the combination of a pivoted switch-arm having a limited movement, a strained spring tending to hold said arm in either limiting position, a movable member, and motion-transmitting means operated by the movement of said member in one direction to initially take up said

movement without changing the position of said spring and subsequently to move said spring to a position to move said switch-arm and by the movement of said member in the opposite direction to move said spring to a position to return said switch-arm."

The device of the patent has proved to be commercially successful, and is the only one now used by the complainant. Several governors of types found in the prior art were from time to time manufactured and sold by it in the course of its business, but none of them, however, proved entirely satisfactory. Speaking of them and of the other patents in the prior art, the counsel of complainant makes the following claim:

"An examination of these prior paper patents and the prior unsuccessful commercial structures will show that Macloskie's three claims in suit are broadly new and that Macloskie was, in fact, the first in the art of governors to

"(1) Provide mechanism of any sort or description which would first 'take up' or compensate for the initial movements of the diaphragm and the creeping movement of the piston without changing the position of the switch-operating spring, and which mechanism would then cause the spring to move to another position to separate the contacts and abruptly open the controlling switch at the critical time.

"(2) The first to produce a pneumatic governor in which a definite, uniform and adequate pressure was maintained between the switch contacts throughout the period the circuit was required to be closed.

"(3) The first to produce an entirely commercially successful pneumatic governor."

The object of the patent under consideration cannot be more clearly stated than was done by Macloskie himself in the last paragraph above quoted from the specification. It should be additionally noted, however, at this point, that in such specification he also says:

"That the mechanism I have devised for operating the switch-arm is capable of general application to switches and should not be limited to those which are pneumatically operated, and that many modifications and alterations may be made in the specific form illustrated, and I therefore do not wish to be limited to such specific construction."

It is claimed on behalf of the defendant, however, that in view of the prior art the patent is invalid, or, if valid, that its claims must be so narrowly construed that they will not embrace the defendant's device. The patents upon which the defendant's expert chiefly relies to show anticipation, and the only ones which he discusses, are five in number, as follows: Dewson No. 798,270 of August 29, 1905, Cowles No. 681,625 of August 27, 1901, Libby and Potter No. 613,692 of November 8, 1898, Briggs No. 452,359 of May 19, 1891, and Merritt No. 571,600 of November 17, 1896, and in the progress of his examination, while claiming that the patents to Cowles, Dewson, and Briggs contain in substance the elements of the Macloskie claims, he admits that the Libby and Potter patent and the Merritt patent do not of themselves describe all of the elements of claims 1, 2, and 3 of the patent in suit. Under the circumstances, Libby and Potter and Merritt will not be considered further than to say that neither of them has any strained spring to operate the switch and maintain a constant pressure between the contacts. Libby and Potter shows a dead-centered

spring such as may be found in several patents in the prior art. Such a spring does not maintain adequate and uniform pressure upon the contacts, for the reason that, while it is being moved gradually towards a dead-center position, it gradually and necessarily loses its leverage and consequently its power to maintain adequate spring power and pressure between the contacts. In the Merritt patent there is also lacking the element of the strained spring of the claims in issue. He, moreover, operates his switch by a piston, whereas the strained spring of Macloskie both operates the switch and maintains pressure between the contacts.

[3] The complainant contends that the disclosure of the Dewson patent is too late to be considered as an anticipation, since, although his application was filed first, the patent itself was not issued until nearly two years after Macloskie's application was filed. Under the authorities, the date when a patent is actually issued, rather than the date when the application therefor was filed, determines whether or not it anticipates another patent. Diamond Drill Co. v. Kelly Bros. (C. C.) 120 Fed. 282, 287; Eck v. Kutz (C. C.) 132 Fed. 758, 764; Union Typewriter Co. v. Smith & Bros. (C. C.) 173 Fed. 288, 291; Ajax Metal Co. v. Brady Brass Co. (C. C.) 155 Fed. 409, 415; Barker v. Stowe, 15 Blatchf. 49, Fed. Cas. No. 994; Thomson-Houston Electric Co. v. Ohio Brass Co. (C. C.) 130 Fed. 542; Bates v. Coe, 98 U. S. 31, 33, 25 L. Ed. 68.

The rule referred to is founded on reason. The filing of an application without evidence of open use affords no element of publicity. But disregarding that point, and considering the Dewson patent as a part of the prior art, it will be found that it does not disclose the invention of Macloskie. The device of the Dewson patent is similar to those of the Merritt and Libby and Potter patents, in that the switch is operated by a piston within a cylinder, and the admission of air to that cylinder is controlled by another cylinder containing a pressure-actuated diaphragm. Macloskie has but one cylinder and diaphragm. Furthermore, Dewson uses a sliding contact switch or what is called a creeping contact, which the evidence shows is ineffective. He has no equivalent of the "strained spring" of the patent in suit. He, however, does show a spring which the defendant claims is the equivalent of the Macloskie strained spring, but as a matter of fact it does not perform the same function, nor does it operate in the same way. This is clearly demonstrated by one of the complainant's experts. This patent may be dismissed with the further remark that its spring moves slowly in step with the creeping movement of the diaphragm and piston, which is wholly unlike the action of the strained spring called for by the claims of the patent in suit.

The Cowles device, like Dewson, has two cylinders. The springs employed do not affect the pressure between the contacts. Furthermore, they move in step with the diaphragm and piston. It discloses no spring or springs which operate the contacts while at the same time uniform pressure is maintained between them.

The Briggs patent shows a manual switch of the ordinary knife-blade variety. It operates by means of a dead-center spring. It does not

have the strained spring of the patent in suit, nor is there any way provided whereby the gradual weakening of the operating spring as it approaches the dead-center position is counteracted. It differs from the Macloskie patent in substantially the same respects that the Cowles and Dewson patent differ from it. As already stated, numerous other patents of the prior art are claimed to be anticipations, but they will not be considered for the reason that no one of them discloses the features of the combination claims in issue. Moreover, Macloskie seems to have been the only one who successfully solved the problem in question.

The only point remaining for consideration is whether the defendant's device infringes the claims in issue. Defendant's expert admits that its device comes within the terms of such claims, but maintains nevertheless that the two types of apparatus, the complainant's and defendant's, are entirely different in their organization. The defendant has advertised its device in the following language:

"This new device, known as our type 'OB' pneumatic governor, is illustrated on the title page and shown in detail farther along. One of its chief merits is the simplicity of design. There are no small ports, slides or check valves such as have ever been a source of trouble in the ordinary automatic governor. It is also very positive in its operation. For example, the switch arm, engaged by the pressure piston is held in contact by our special spring device until the instant of the quick 'snap' break, and this, together with a powerful magnetic blow-out made in accordance with the latest designs, absolutely prevents sparking or burning of contacts and consequent pitting."

Its device has the strained spring of Macloskie, which, although attached differently, operates nevertheless to hold the switch-arm in a definite position, and maintain definite and uniform pressure between the contacts when the switch is closed. Moreover, it does not change its position during the slow movement of the piston until the time arrives for breaking the circuit. The defendant's expert admits this, as the following question and answer will show:

"In the defendant's structure does the lower compressed spiral spring strain or change its position in the initial movement of the diaphragm or the stem? A. No."

He also admits that when the time arrives for the switch to open the circuit that the switch then changes its position for that purpose. The similarity of the two devices is in a general way clearly stated by the complainant's expert in the following language:

"Macloskie's 'switch-contacts' are the contacts 22, 23 which obviously correspond to the 'main contacts' of the defendant. Macloskie's 'strained spring' is the spring 29 and in the defendant's device a corresponding one is the 'lower compressed spiral spring.' Macloskie's 'movable member' is one of the parts operated by the air pressure, for instance, the piston rod 20 which corresponds to the 'piston or stem' of the defendant."

"Macloskie's means for transmitting motion," etc., is the series of levers by which the movable member makes its initial movement without affecting the spring 29 and the action of the spring on the contacts, while in the defendant's governor the corresponding "means" is the system of levers by which the initial movement of the said movable mem-

ber is provided for without affecting the action of the strained spring upon the contacts. While these means are specifically different in the defendant's device from those of Macloskie, yet they are equivalent therefor and the actual resemblance is closer than appears at first glance, there being in each case a lever immediately acted upon by the piston-rod, to wit, rock lever 26 of Macloskie and lever 8 of defendant, which trips a second lever, to wit, the intermediate lever 27 of Macloskie and the hammer, lever, 7 of the defendant, while this second lever, in turn, trips the contact lever, which is the lever 28 Macloskie and the contact arm of the defendant.

The defendant's device embodies all the elements of the patent in suit, operating in substantially the same way to perform the same results. While the devices are not altogether similar in appearance, it is nevertheless true that wherein the defendant's differs from the complainant's it differs by the substitution of mechanical equivalents. It seems perfectly clear that what the defendant is using was not found in the prior art, but with immaterial and unimportant mechanical variations is found in, and was taken from the Macloskie patent. It is unnecessary to say more. The defendant has infringed claims 1, 2, and 3 of that patent, and as to it a decree will be entered in favor of the complainant, pursuant to the prayer of its bill of complaint, while as to the Stewart patent the bill will, as above stated, be dismissed.

LORD & BURNHAM CO. v. PAYNE.

(Circuit Court, D. New Jersey. July 10, 1911.)

1. PATENTS (§ 328*)—INVENTION—EAVE FOR GREENHOUSE.
The Burnham patent, No. 583,247, for a metal eave, specially designed for greenhouses, covers a device which in view of the prior art was the product of mechanical skill only, and is void for lack of invention.

2. PATENTS (§ 17*)—"INVENTION"—NATURE OF PATENTABLE INVENTION.
Every result obtained by deliberate reflection and experimentation with well-known appliances or parts thereof is not necessarily "invention" within the meaning of the patent laws, even if it produces a superior benefit or effects a complete change in the means theretofore used.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 4, pp. 3749–3754.]

3. PATENTS (§ 17*)—"INVENTION"—NATURE OF PATENTABLE INVENTION.
"Invention" is not the offspring of mere mechanical skill, no matter how highly developed it may be; and, while it may be said to be the product of the intellect as against mere handiness in the use of tools, it is not every new mental conception in a useful art which marks an advance in such art that will raise the mechanic into an inventor under the patent laws.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PATENTS (§§ 37, 46*)—INVENTION—NOVELTY AND UTILITY.

Novelty and utility are influential factors in determining invention when the mind is otherwise in doubt, but the resort to novelty and utility, however, is not to be made to create a doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 41–44, 54, 55; Dec. Dig. §§ 37, 46.*

Utility, extent of use and commercial success as evidence of invention, see note to Doig v. Morgan Mach. Co., 59 C. C. A. 620.]

In Equity. Suit by the Lord & Burnham Company against John A. Payne for infringement of letters patent No. 583,247, granted May 25, 1897, to William A. Burnham for improvements in metal eaves. On final hearing. Decree for defendant.

Macdonald & Macdonald, for complainant.
Edward C. Davidson, for defendant.

RELLSTAB, District Judge. The complainant, by mesne assignments, is the owner of the letters patent. The patentee was a designer and builder of greenhouses. The main problem sought to be solved by the patented device was to prevent the accumulation of ice and snow at the eaves, which at times would cause the ice to creep up the glazed roofs and to overhang the side walls in the form of icicles. Such accumulations of ice were detrimental to the plants, because they shaded and had a refrigerating effect upon the interior.

In describing the invention, the patentee states:

"My invention relates to an improved construction of eave adapted more especially for use on horticultural buildings, though it may be used on all classes of buildings, where such a construction is found advantageous; and my objects are to produce a simple and effective construction and to avoid the use of wood plates and gutters at that part of the structure which during the winter allow snow and ice to accumulate in or on them and thus prevents the perfect drain from the glass and the obtaining of an even temperature and sufficient light in the building.

"I accomplish the above objects by the use of an overhung metal piece which is placed between the side wall and the roof and so arranged that a portion of the metal is within the building so that it is affected by the temperature thereof. The heat of this part is conducted to the other part, which is outside of the building, so that it becomes heated and thus prevents any formation of icicles and the accumulation of snow.

"A further object of my invention is to provide a simple and effective construction for securing the several parts in a horticultural building at the junction of a rafter and the side wall, to serve as a means to carry the roof between rafters with the least possible obstruction of light."

The charge of infringement is limited to claim 1, which is as follows:

"A metal eave consisting of an angle iron, located between the side wall and the roof, and adapted to serve as a support for the edge of the roof and to have the side wall secured thereto, and said angle-iron arranged to have one member in substantially the same plane as the plane of the roof with the remainder thereof in the interior of the building so as to be affected by the temperature therein, substantially as shown and described."

[1] The prior art shows two general types of greenhouse—gutter and nongutter types—the former made of both wood and metal; the latter of wood only. Complainant's and defendant's are of the non-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gutter type. Both types were troubled with the accumulation of snow and ice at, above, and below the eaves, obstructing the sunlight and refrigerating the interior, with damaging effect upon the inclosed plants. Such accumulation of ice was not due alone to the freezing of the waters produced by the melting of snow, but also of the waters produced by the condensation, due to the difference of temperature between the inner and outer sides of the glass roof, and which would pass through the laps of the panes of glass and flow down the roof till it reached the eave or gutter, where it, because of the lower temperature there prevailing, would freeze, obstructing the further flow and contributing to the further accumulation and backing up of ice on the roof and the forming of large icicles hanging over the eaves or gutter, resulting in added darkening and refrigeration within. Such accumulation of ice and snow, because of the weight or pressure resulting therefrom, caused the frequent breakage of the panes of glass at the eaves. The wood structures—eave or gutter—lasted but a short time, the natural decay being accelerated by their frequent saturation with the water resulting from the condensation referred to. The gutter type—wood or metal—by reason of its more bulky construction produced more shade than the eave plates, with retarding and frequent injurious effect upon the growth and bloom of the plants. To prevent such effects was, as already stated, the problem confronting the commercial grower of horticultural products. This prevention, complainant claims, was intended and accomplished by his patented contrivance.

The invention claimed has but one element—a metal eave. It is in form an angle-iron. It is located between the roof and the side walls, extending the entire length of the building. It is adapted to support the edge of the roof and to have the side walls secured thereto. It is so arranged that one of its members projects outwardly in the plane of the roof, overhanging the side wall. The remaining member extends inwardly, is exposed to the heat of the building's interior, and conveys or conducts it outwardly to and through its outer member. The patentee does not limit the term "angle-iron" to its ordinary definition; but in defining it says:

> "It will be understood that by use of the term 'angle-iron' I mean to include not only the bar which in cross-section forms two sides of a triangle, but all of the other shapes, such as I and T iron, channel iron, &c."

The drawings, so far as applicable to claim 1, show an angle-iron with an inward member extending downward at right angles to the outer member. Two new and useful purposes are said to be served by this device: First, it secures by a simple and effective contrivance the roof to the side walls of the greenhouse, with but little obstruction to light; second, it prevents the accumulation of snow and ice on the roof and from overhanging the side walls, thus avoiding additional obstruction to light from without and a resultant reduction of temperature within.

The defendant's structure alleged to be an infringement is made up of two angle-iron bars, riveted together in reverse positions. One of these is entirely within the building; the other, like complainant's device, is located between the roof and side wall, serving as an eave

plate and support for the edge of the roof and to which the side walls may be secured. It has one of its members or plates projecting outwardly in the plane of the roof, and overhanging the side wall; the other member, like complainant's device, extending inward and downward, receiving the heat from the interior of the building, and transmitting it outwardly through its other member. It is to this inward-extending member that the other angle-iron is riveted, the two overlapping and forming a drawn out "z": ⌇

While one or more of the uses made of the inner angle-iron of the defendant is different from that of the complainant, yet it, in coaction with the other angle-iron which extends to the outside of the building, performs the same function, viz., transmission of heat through the inner member to the outer and projecting member, as the angle-iron of the complainant. The defenses are noninfringement, anticipation, and mechanical suggestion. If complainant's device shows invention, the defendant's device is a clear infringement. Complainant's device practically superseded the former structures with the commercial grower, as it greatly minimized the accumulation of snow and ice at the places mentioned, and the resultant damage to the glazed roof and the plants within the building, and because it was more durable and cast considerably less shade into the interior of the greenhouse.

A number of patents have been cited as anticipations. No one of them is a complete disclosure of the idea of means embodying the complainant's device. Their teachings, however, plus the matter resting in public knowledge and use, negative invention in complainant's device. Burnham was thoroughly conversant with the then developed greenhouse art, as well as the detriment resulting from the continued presence of snow and ice at the eaves, and the benefit to be derived in preventing or minimizing the shading and refrigerating due thereto. He had previously secured patents Nos. 535,049 and 535,091, dated March 5, 1895, involving the gutter type construction in such art. That wood was a nonconductor of heat was well known, and Gibbons in his patent, No. 471,356, dated March 22, 1892, using the metal gutter, taught the art, if it needed teaching, that the heat from the interior of the greenhouse could be conducted to the outside, and utilized to prevent or lessen such accumulations—the very purpose contemplated by the patent in suit. That Gibbons had this purpose in mind is manifested by his specifications, wherein he said (page 1, lines 9–13):

"The object of my invention is to provide an arrangement of the roof and side walls of a building so that I may expose a portion of the eaves gutter to the heat from the interior, as will hereinafter be more fully described."

And at lines 65–69:

"It will thus be seen that there is a portion e^3 which is exposed to the heat from the interior, thereby preventing the water from freezing in the gutter and clogging the same."

Gibbons' device, though it tended to loosen up the ice in the gutter and cause it to melt, did not achieve a quick disposal of the water that flowed into the gutter. This gutter being separated from the glazed roof by a wood strip, the heat from the interior would have no prevent-

ative effect on the accumulation of the ice and snow at the edges of the roof, with the result that ice and snow did accumulate at that part of the roof and had a tendency to creep thereup and to run over the gutter overhanging the side walls. This construction, because of its bulkiness at the junction of the roof and walls, created as much, if not more, shade than the wood eave structure, and also contributed to the breakage of glass, for the same reasons applicable to the earlier structures. The Burnham gutter constructions were not only exposed to the interior heat, but dispensed with the strip of wood between the roof and gutter by employing an angle-iron interposed between the side walls and roof, thus avoiding the resultant damages due to such a nonconductor being located at such junction; yet it afforded no speedy shedding of the waters, and did not prevent or greatly lessen the accumulation of ice and snow in such gutters. The bulky construction of such gutter structures created as much, if not more, shade as their eave plate predecessors, and neither they nor the Gibbons' device entirely displaced such type with the commercial grower. What was needed was to dispense with such gutters and permit of a quick disposal of the waters from the eave. These gutter constructions, however, taught how to take advantage of and transmit the interior heat to the outside of the greenhouse. In this respect they anticipate the claim of the patent in suit, which refers to the inner member of the angle-iron broadly as in the interior of the building, so as to be affected by the temperature therein. True, the precise form and location of the angle-iron of the patent in suit is not carried out either within or without the building, but the constructions are capable of performing and do perform the function of appropriating the heat from within and transmitting it outward.

The patent in suit has no gutter. The metal eave, however, was not new. The prior art, as illustrated by the Snead patent, No. 112,644, dated March 14, 1871, disclosed it. Snead's eave construction shows, in the language of complainant's claim, "one member in substantially the same plane as the plane of the roof with the remainder thereof in the interior of the building so as to be affected by the temperature therein." The inner member of the Snead construction extends first downward practically at right angles to the outer member; then, second, curves upward forming a gutter. Adopting the language of the defendant's expert, Abbott:

"It is located between the side wall and the roof precisely as the claim requires. It is not only adapted to serve as a support for the edge of the roof, but as a matter of fact does so support it. It has itself, of course, to be supported, the same as the angle-iron of the patent; but the claim makes no requirement in this respect. It may be supported in any preferred way, depending upon the preferences of the constructor or the special kind of building in which this metal eave is used. * * * The side wall is not only adapted to be secured to the angle-iron of Snead, but as a matter of fact is so secured. * * *"

The angle-iron of Snead has one member arranged not only substantially in the plane of the roof, but exactly in that plane, and the glass rests upon it, precisely as in the patent in suit; and the remainder of Snead's angle-iron—that is to say, the other member or

plate thereof—is within the interior of the building, and is affected by the temperature therein, and does transmit it to the part which is outside the building. The Snead patent is an improvement in skylights—glazed roof—a part of the same art as greenhouses, and was so considered in the Patent Office. The patentee makes no reference to the inner member's exposure to the interior heat of the building, but it is so exposed, and it will perform the function of taking and transmitting outward the interior heat just as ascribed to the angle-iron of the patent in suit.

Wood, in his patent No. 293,696, dated February 19, 1884, improvement in greenhouses, shows an angle-iron in shape and disposition of its members substantially identical with that of the patent in suit. Perhaps it does not extend along the entire length of the greenhouse, but, short or long, it is interposed between the side wall and the roof, supports the edge of the roof, and straddles the side wall, which is beveled to permit of a snug fit. With the disclosure of the Burnham gutter patents of the eave plate 4 running longitudinally under the edge of the roof, and exposed to the interior heat the whole length of the building, it would be but a mechanical act to lengthen the angle-iron disclosed by the Wood patent (if it needed lengthening) and to extend both members thereof so that the inner one would take and conduct heat from the interior and through the other member to the outside of the building, and that the outer member could shed the water away from the side walls.

Burnham's gutter constructions, a part of the prior art as already stated, eliminate the nonconducting glazed plate at the edge of the roof, substituting therefor a part of its gutter construction, which at such edge is in form of an angle-iron, and which by being interposed between the side wall and the roof supports the edge of such roof. This angle iron at the edge of the glazed roof serves as an eave plate, and, having a large exposure to the inner heat, is capable of transmitting it outward and applying it at the place where, in my judgment, it will be the most effective in preventing the waters flowing down the roof from freezing, thus preventing the accumulation of ice at the very place where, in the prior structures, such ice was bound to accumulate, and from which horticulturalists experienced the greatest damage to the plants.

With these disclosures of the prior art, was the idea of means embodied in the patent in suit, by which the patentee's object was achieved, the result of anything more than mechanical suggestion? The outer member of the complainant's angle-iron—his eave plate—which shed the waters from the roof, possessed nothing new in form or material. In form it was but the counterpart of the wood eave long used in the construction of greenhouses. And Snead and Wood show it in iron. But, if it had not been shown in iron in a prior patent, the using iron in place of wood would not be invention. Iron as a conductor, and wood as a nonconductor, of heat, were well known, and such substitution would be readily suggested to one who knew the detrimental results of the using of wood at the junction of the roof and wall, and the beneficial results derived from the use of iron in transmitting the heat from

within outward, as shown by the prior devices. The use of angle-iron located between the side wall and roof adapted to support the edge of the roof and to have the side wall secured thereto, arranged as to have one member substantially in the same plane as the roof, and the other member extending inwardly substantially at right angles to the other member, and the conducting of heat by the use of iron from within outward for the purpose of preventing the formation of ice, being old in the art, nothing more was required than that quality of mental operation that occurs to the ordinarily skilled mechanic made acquainted with the problem to be solved and the state of the art bearing upon that problem, to produce by experiment an extension and readjustment of such members of the angle-iron within and without—within to present a greater exposure to the heat, without to produce a shed beyond the side walls, so as to produce the equivalent of the device in suit.

[2] It is said that an additional object obtained by complainant's device is a simple and effective construction at the junction of the rafters and side walls with a minimum obstruction of light. But this is but incidental, and does not make the structure any less the product of mechanical skill as distinguished from invention. Every result obtained by deliberate reflection and experimentation, with well-known applicances, or parts thereof, is not necessarily invention within the meaning of our patent laws. They are not necessarily such even if they produce a superior benefit or effect a complete change in the means theretofore used in obtaining the same or a better result. Judge Phillips, in Tiemann v. Kraatz, 85 Fed. 439, 29 C. C. A. 257, in applying Atlantic Works v. Brady, 107 U. S. 199, 2 Sup. Ct. 225, 27 L. Ed. 438, used language so apt to the question now being considered that a verbatim quotation is justified:

"In this day of increasing demand for new and enlarged mechanical appliances, the first natural result is the production of a large class of skilled and experienced mechanics and artisans, and, second, a more studious and constant development in applied mechanics. And, as such advance plainly points out to the attentive and assiduous workman the natural, larger, practical adaptation of existing known mechanical devices, to invest each one of these developments with the immunity of a monopolizing patent would not only be a perversion of the term 'invention,' but would utterly extinguish the doctrine of mechanical equivalents."

[3] Invention is not the offspring of mere mechanical skill, no matter how highly developed it may be. And, while it may be said to be the product of the intellect as against mere handiness in the use of tools, it is not every new mental conception in a useful art, which marks an advance in such art, that steps the mechanic into an inventor under our law. I cannot subscribe to the doctrine that mechanical skill does not require thought or that thinking out a mechanical problem to a satisfactory solution necessarily involves the exercise of the inventive faculty. A skilled mechanic can produce devices that are new and useful, but under the patent laws, unless they are also inventions, they are not patentable. Neither the constitutional provision nor the patent statute is intended to give a monopoly for a mere mechanical device, no matter how novel or useful it may be. It must be inventively

new and useful. To be entitled to a monopoly, the patentee must show that his device is the mechanical embodiment of a new mental conception, the result of mental explorations, which carries him beyond the boundary lines of the field or scope of ordinary mechanical or engineering skill.

[4] This boundary, of course, is hard of demarcation, and, because it is so, novelty and utility are influential factors in determining invention, when the mind, seeking a pronouncement by applying the ordinary tests, is in doubt. The resort to novelty and utility, however, is not to be made to create a doubt. Such qualities cannot serve as both creator and solver of doubt. It is only when the mind is in doubt upon the consideration of the evidence affecting the question of invention as against mechanical suggestion, without regard to the thing being new and useful, that such latter qualities are available to throw the balance in favor of invention. Invention being put in doubt in the manner stated, then evidence that such a device was long sought for, that the problem had attracted many, and that others than the patentee had made barren efforts to secure a solution, and that upon the appearance of the patented device it promptly displaced other structures, will usually justify the finding of invention. But neither the ordinary tests of exclusion nor of utility and novelty are conclusive. Presumably every patent presents a new creation, and each record a distinct problem. All tests are but guideposts—means to an end—and the end is never to be sacrificed to the means. The purpose of the patent law is not to promote every advance in the mechanical arts into invention. To reward every such achievement with a monopoly would be to exact tribute from the general public where none is due, to dampen, if it did not stifle, what would otherwise be a steady advance in mechanics, and hamper rather than stimulate the very progress of the useful arts intended to be promoted by the patent laws.

After giving this subject the best thought of which I am capable, and more time than is perhaps justifiable, considering the other cases pressing for decision, I am constrained to the conclusion that, in spite of the apparent novelty and utility of the complainant's device, it, in view of the prior art, is the product of mechanical skill, and not invention.

The bill is therefore dismissed, with costs.

TABOR MFG. CO. v. E. H. MUMFORD CO. et al. (two cases).

(Circuit Court, E. D. Pennsylvania. May 8, 1911.)

Nos. 15, 16.

PATENTS (§ 328*)—INFRINGEMENT—MOLDING APPARATUS.

The Tabor patent, No. 533,401, for improvements in molding apparatus, the Tabor-Mumford patent, No. 582,325, for improvements in metal-founding machines, and the Tabor-Mumford patent, No. 654,292, for improvements in molding machinery, all relating to the making of sand molds for use in foundries, and covering combinations of devices intended to facilitate the withdrawal of the pattern without defacing the mold, construed, and *held* not infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Two suits by the Tabor Manufacturing Company against E. H. Mumford Company, Edgar H. Mumford, Rose S. Mumford, Joseph P. Mumford, Clifford S. Lovell, and Edwin Harrington, Son & Co., Incorporated. Suits dismissed.

John E. Hubbell and Francis T. Chambers, for complainant.
Paul Synnestvedt, for respondents.

HOLLAND, District Judge. In this controversy there are two separate suits brought for the infringement by defendants of patents owned by complainant.

No. 15, one of the patents in suit, is the Tabor patent No. 533,401, granted January 29, 1895, to Tabor Manufacturing Company, assignor of Harris Tabor. Complainant acquired the same by mesne assignments to and from one Frederick H. Colvin. This patent will hereinafter be referred to as the "Tabor Patent."

The second patent in suit, No. 15, is No. 582,325, granted May 11, 1897, directly to complainant as assignee of Harris Tabor and Edgar H. Mumford, the inventors. This patent will hereinafter be referred to as the "Tabor-Mumford Patent."

The third patent, which is made the subject of a separate suit, No. 16, is patent No. 654,292, granted July 24, 1900, directly to the complainant as assignee of Harris Tabor and Edgar H. Mumford, the inventors. This will hereinafter be referred to as the "Tabor-Mumford Patent (1900)."

The first is for "improvements in molding apparatus"; the second for "improvements in metal-founding machines"; the third for "improvements in molding machinery."

It is charged by the complainant in both cases that the infringement is the result of a plot devised by one of the defendants, Edgar H. Mumford, to infringe the complainant's patents, and to wreck its business, and that at the time of the formation of this plot, he was a responsible executive officer of the complainant company, intimately connected with every part of the business; that he had not only been a joint applicant and assignee to the complainant of the two last patents named, but had been a large stockholder in the complainant company, and instrumental in interesting the present holders of the controlling interest of its stock; that about the beginning of the year 1905 he had practically divested himself of all his stock in the complainant company, and then conspired with the other defendants to infringe complainant's patents and to wreck its business. This is denied by the defendants, and an examination of the proofs upon this point leads to the conclusion that while there was much friction and disagreement between the stockholders of the complainant company and Edgar H. Mumford at the time he resigned and went into a similar business on his own account, with the other defendants, his primary purpose was the ordinary one of establishing a business for profit. The defenses are invalidity of the patent, noninfringement, and laches of complainant. It is, however, contended that Edgar H. Mumford is estopped from raising the question of patentability of the two last-mentioned patents because he was one of the patentees; but, as we

view both cases, it will be unnecessary to consider this because the defense of noninfringement is amply sustained as to all of the patents in suit.

These patents have to do with molding machinery—that is, machinery for the purpose of making sand molds for use in foundries—and in making the sand molds the sand in the flask is compacted around a pattern having the form of the casting to be made in the mold, and then the pattern is withdrawn leaving a cavity in the mold. In the operation of withdrawing the pattern in the old form, there was always danger of defacing the mold by the adherence of sand to the pattern and its consequent breaking away from the mold, a thing which is peculiarly apt to occur at the edge of the mold cavity, but which may occur at any point where the sand is in contact with the pattern. A commonly used but expensive and troublesome device for preventing the breaking of the edges of the same, was the stripping plate, viz., a flat plate nicely fitted to the contour of the pattern and held on the flat face of the mold while the pattern was being withdrawn. Another plan for preventing adherence of sand to the pattern mentioned in the patent, consisted in warming the pattern when in use so as to expand it, and permitting it to cool and contract before it was withdrawn from the same. Another plan, which was commonly used by molders, was to strike with a hammer, or other device, the molder's bench on which the molds were supported, or the molds themselves, for the purpose of loosening the adhering sand from the pattern by the jar of the blow or blows, and it appears, in some instances, the jarring hammer was mechanically actuated by hand, subsequently by various other means until finally rapping mechanisms were finally actuated by power devices, as used in the Teetor patents, numbered, respectively, 397,316 and 495,570, Moore and Clark patent No. 463,160, and the pneumatic actuated rapping machine of the Crane Company—the apparatus used by the Crane Company of Chicago prior to the filing date of the patent. And here, we will state that, upon the proofs submitted, the court is convinced that the Crane Company of Chicago did use the pneumatic actuated rapping mechanism claimed to have been made and used at or about the time of the World's Fair in 1893, which was prior to the filing date of this patent, and that the proof of the making of these rapping machines at that time is so conclusive that the court has no doubt of the fact, as claimed by the defendants, in regard to the time when the Crane Company first put this class of rapping machines into use.

This general type of machine is old in the art, as set forth in the specifications of the patent in question. It is there stated that:

"In order to illustrate my improvements and their application, I have selected a power molding machine, the general construction and operation of which is similar to that shown and described in letters patent of the United States granted to me March 17, 1891, and numbered 448,596, though said improvements may be applied to machines differently constructed."

The patentee claims that:

"The improvements consist in providing the apparatus with machines for slightly agitating the patterns with relation to the sand in the flask, in order to free the patterns from the clinging particles of sand, when the

patterns are to be withdrawn from the molds, thereby doing away with any necessity of a stripping plate."

And:

"In mounting the pattern plate upon a yielding support, in order that such agitation may be the more effective, and the molds be left in better condition when the patterns are withdrawn."

There are other improvements with which we are not concerned. Claim 1 is the only one alleged to be infringed. It is as follows:

"In a molding apparatus, the combination of a flask-supporting frame, a pattern-holding plate independent thereof and movable laterally in a horizontal plane with relation thereto; and a power device for agitating the plate and frame relatively to each other, substantially as and for the purposes specified."

These molding machines were old and in use long prior to the application for patent No. 533,401, in which the flask supporting frame, a pattern holding plate and a power device, practically speaking, were all old in the art. The only new element introduced in the defendant's machine is the yielding support of the pattern plate resulting from the springs upon which it is set. It is described in the specification as follows:

"In order that the rapping may be more effective for the purpose described, I prefer to mount the pattern plate upon a yielding support. Such a support is shown in Figures 1, 4, and 5, to consist of springs 33, which are placed in sockets in the head of 50, the springs bearing on their upper ends upon the frame, 47, to which the pattern plate is secured, as hereinbefore described. This yielding support for the pattern plate performs a further useful office, which will now be explained."

This improvement in making effective the rapping operation to loosen the sand from the molds by a lateral or horizontal movement of the pattern holding plate is secured in claim 1 for a pattern holding plate "movable laterally in a horizontal plane with relation thereto," that is with relation to the flask supporting frame. The validity of this patent can be maintained if it be restricted to the specific construction claimed for it at the time it was granted, to wit, the movability of the pattern holding plate in a horizontal plane, as set forth in claim 1. An examination of the history of the case through the Patent Office shows that it was granted because of this new feature. It had been refused, and the claims modified by the application so as to restrict it to the yielding support shown by the springs upon which the pattern holding plate is secured.

The defendants' machine does not have this feature. The pattern holding plate is rigidly and firmly bolted down to a frame, which in turn is securely and rigidly bolted down to upright posts that are integral with the heavier casting. So that, instead of the yielding support of the pattern plate, which is the new feature of the complainant's structure, the defendants' pattern plate is rigidly supported, as rigid as the same can be made, and not "movable laterally in a horizontal plane."

The defendants are charged with infringing claims 8 to 12, inclusive, of the patent No. 582,325. This is the Tabor-Mumford invention, and

it is essentially an improvement on the Tabor machine, which was a device primarily to provide a means for successfully drawing the patterns without the use of the expensive and troublesome "stripping plate." Stripping plates were required to fit exactly around the entire mold for the purpose of preserving the sharp edges of the mold cavity in the sand while the patterns are being withdrawn. This was a very expensive operation, and the improvement made substituted patches at various places away from the patterns. Where it was found that extra support of the sand was necessary the pattern plate was morticed, and these mortices were then filled by correspondingly shaped patches resting on the stool plate (a plate which is suspended and secured to the flask supporting frame so as to always remain in fixed position relative thereto), and free for movement through the mortices. The general idea is that, after finding points over any portion of the pattern plate which require extra support for the sand, to put a hole or mortice through the pattern plate at that point and provide a patch for such hole or mortice with its upper surface in position to support the sand at this point when the pattern separates from the sand; but all these patches are morticed in the pattern plate so that the patch plate is in such a position that its "edges are entirely away from the edges of the pattern."

All of the claims 8 to 11 are practically the same, and are all restricted to the feature that the patch plates are "away from the margins of the patterns."

The defendants' machine does not infringe claims 8, 9, 10, or 11, because the defendants in its structure uses a modified form of the stripping plate, bringing the straight edges of each patch or plate to accurately and practically coincide with the adjoining straight portion of the periphery of the pattern. In other words, the complainant's patches are "away from the margin of the patterns," and the defendants' coincide with the margin of the patterns.

As to claim 12, we do not think there is any similarity at all in the guard strips used by the complainant and defendants, and we find no infringement.

In the second suit, the bill charges an infringement of claims 9, 10, and 11 of the Tabor-Mumford patent (1900) No. 654,292. These claims are as follows:

"9. The combination of a mold-frame, a pattern, a pattern carrier, a vibrator, and means for maintaining said carrier and pattern in parallelism with themselves and for preventing lateral motion of translation thereof during the drawing of the pattern and the operation of said vibrator, substantially as described.

"10. The combination of a mold-frame, a pattern, a pattern carrier, a vibrator connected to said carrier, and means for maintaining said carrier and pattern in parallelism with themselves as the pattern is drawn and for preventing lateral motion of translation of the carrier and pattern during the operation of the vibrator, substantially as described.

"11. The combination of an open or half-mold frame, a pattern carrier, a vibrator connected with said carrier, and means for maintaining said carrier and pattern in parallelism with themselves as the pattern is drawn and for preventing lateral motion of translation of the carrier and the pattern during the operation of the vibrator, substantially as described."

The evidence of the experts shows that all the elements of this patent are old, and that the only novel feature is the "improvements for maintaining said carrier and pattern in parallelism with themselves and for preventing lateral motion of translation of the carrier and the pattern during the operation (i. e., the drawing of the pattern) and during the operation of the vibrator." And in order to accomplish this and to avoid tilting, "long, close fitting V-shaped bearings" or guides were used; but it is insisted that the language of claims 9, 10, and 11 is sufficiently broad to cover round "long, close fitting bearings." Even if this be so, we do not think that the defendants' device, as constructed, infringes any of these claims, because it is the guide old in the art, and does not have the function of preventing tilting of the plate when the withdrawing operation is taking place, and this is established by one of the complainant's witnesses, in answer to this question:

"Please examine this plate, marked 'Complainant's Exhibit,' defendants' machine, and state whether or not, in your opinion, the short bearing in this plate would serve the purpose of V-shaped pins? Answer: No, it would not."

As the defendants' machine lacks the only novel function of the complainant's patent upon which the patent was granted, the short bearings or short guides in the defendants' machine failing to answer the purpose of the novel feature and being old in the art, is not an infringement.

The conclusion of the court is that the defense set up by the defendant of noninfringement of claim 1 of the Tabor patent, No. 533,401, and of claims 8, 9, 10, 11, and 12 of the Tabor-Mumford patent, No. 582,325, and of claims 9, 10, and 11 of the Tabor-Mumford patent (1900), No. 654,292, is, in every instance, sustained, and both suits are dismissed at the cost of complainant.

LABOMBARDE v. LORD BALTIMORE PRESS, Inc.

(Circuit Court, D. Maryland. June 29, 1911.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING PAPER BOXES.

The Labombarde patent, No. 960,348, for a machine for making pasteboard boxes, construed, and *held* valid; also infringed as to claims 1, 7, and 8, but not infringed as to claims 9, 10, and 11.

In Equity. Suit by Elie W. Labombarde against the Lord Baltimore Press, Incorporated. On final hearing. Decree for complainant.

William Quinby, for plaintiff.
A. C. Paul and Roger W. Cull, for defendant.

ROSE, District Judge. This is a patent case. The patent in suit is No. 960,348, issued June 7, 1910. It will be called the patent. The plaintiff is the inventor and patentee. He is a citizen of New Hampshire. He will be called the plaintiff. The defendant on the record

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is the Lord Baltimore Press, Incorporated. It is a Delaware corporation. It has its principal place of business in Baltimore, in this district. The plaintiff says that the Lord Baltimore Press here infringes his patent by using a machine made by the E. G. Staude Company of Minneapolis, Minn. The last-named corporation is not formally a party to the suit. It has, however, put on the record the statement that it is defending the case. It regularly manufactures and sells machines of the kind here alleged to infringe the plaintiff's patent. Both parties agree that it is the real defendant in interest. To save circumlocution, it will accordingly be called the defendant.

The patent is for a machine for making pasteboard boxes. The defendant's machine makes such boxes. The raw material of each machine is the same. Each takes hold of what is technically called a scored blank. A scored blank is a piece of pasteboard cut to the proper size and shape. It is scored or creased on lines at which it is intended the board shall bend to make the box. Each machine turns out the box with its sides properly glued or pasted together. In each when a box comes from the machine it is in a flattened condition. It can easily be opened, and the bottom and top closed by hand at the time the box is filled. It follows that the raw material and the finished product of each machine is identical. Each can make boxes of different sizes. Broadly speaking, the same operations are performed in each machine. These operations follow one another in the same order. Every machine which turns a scored blank into a pasted and flattened box must in some way do certain things. It is most convenient, if not necessary, that these steps shall follow each other in the same order of time. Paste or glue must be put at or near one edge of one of the sides. Each of the two opposite sides of the blank must be turned through an angle of 180 degrees from a position in which it lies horizontally extended from the middle portion of the blank to a position in which it lies horizontally flattened upon that middle portion. The side upon which the glue or paste has been placed must be brought down to its final position before the other side is turned down. This is necessary in order that the unpasted side may come down upon the pasted. After it is brought down upon the pasted side, the downward pressure upon it must be continued for some little while. If this pressure is released before the paste or glue has had time to set or harden, the natural elasticity of the blank will tend to tear the edges apart. Each of the machines has devices for feeding the blanks to the machine, for putting the paste or glue upon the blanks, and also for stacking or piling the blanks after they leave the machine. It is not alleged that the defendant's machine infringes the plaintiff's in any of these respects. The controversy relates to those portions of the machine which do the work of turning the edges up and then down.

The plaintiff's patent is issued upon an application which formally dates from 1906. In point of fact, however, the plaintiff described the invention covered by the patent in an application made May 16, 1903. After such application had been pending in the Patent Office for some years, the office required a division of it. It was admitted at the argument that the application of May 16, 1903, disclosed the same

invention for which the patent in suit was issued. The long delay of seven years in the Patent Office was due, not to any material change in the drawings or description of the invention, but to a prolonged controversy as to the wording of the claims. The plaintiff's original claims were worded very broadly and generally. As a result of the proceedings in the Patent Office those found in the issued patent are much more limited and specific.

The patent as issued contained 11 claims. Of these the second to the sixth, inclusive, are not in issue in this case. The plaintiff alleges that the defendant does infringe the other six, viz., claims 1, 7, 8, 9, 10, and 11. All these claims are claims for combinations. I find nothing in the prior art which so clearly anticipates them as to overcome the presumption in their favor resulting from their grant by the Patent Office. Much of the discussion, both as to the validity of these claims and as to whether they have or have not been infringed, appears to me beside the mark. It is not material that particular elements of any of the combinations described in these six claims are old or that all of them are old. If the plaintiff was the first one to put them together to produce a useful result, and his putting them together involved invention, no one else has the right to put the old things together in plaintiff's way to do plaintiff's work. If he can do such work without using some one of the elements which go to make up plaintiff's combination, plaintiff cannot complain.

It appears from the testimony that plaintiff's machines, made in accordance with the description contained in plaintiff's patent, were in commercial use as early as the spring of 1904. The defendant says that machines made by Mr. Staude, who is the inventor of its machine, were in successful operation some years earlier. It is admitted that defendant afterwards altered, and as it seems to me materially altered, the construction of these machines. If the earlier types of machine had operated successfully, it would have been easy for defendant to have put on the stand some of the people who had operated such machine. It did not do so. Its present type of machine, it is admitted, was not made until after plaintiff's machines were on the market. It is the present type which is alleged to infringe. There is no evidence in the record that any of the machines described in the patents issued to other persons were commercial successes, and indeed no evidence that they were ever used at all, although it is not impossible that they were. It is certain, however, that plaintiff's machine in all material respects substantially as it was described in 1903 and put in commercial operation in 1904 is now in extensive use. The plaintiff's machine and the defendant's alike are adapted to run at high speed. Each can perhaps turn out 50,000 small sized boxes an hour, or more than 800 a minute.

The first claim of the patent in suit is for a combination of seven elements. It will be convenient in quoting them to number these elements separately.

The claim reads as follows:

"In a machine of the character described, the combination (1) with a lower carrier comprising a pair of lower belts having upper horizontal stretches to engage a blank and (2) means for actuating said belts, (3) of an

upper carrier comprising a pair of upper pressers extending partway of the length of the horizontal stretches of the lower belts and directly above the upper stretches of the lower belts, (4) flap-elevating inclines arranged adjacent the outside edges of said belts, (5) folding-belts beyond the upper pressers arranged to overlap the said lower carrier to fold down the flaps of the blanks elevated by said inclines, (6) and shoes for pressing the blanks against the lower belts, said shoes extending from the upper pressers to the folding-belts, (7) said pressers, belts, and shoes being laterally adjustable to accommodate blanks of greatly varying widths."

It is admitted that the first, second, fourth, and seventh elements of this combination are found in defendant's machine. The defendant says that its device does not include the third, the fifth, or the sixth. The third element is an upper carrier comprising a pair of upper pressers extending part way of the length of the lower belts, and directly above them. The defendant says in its machine there are no upper pressers. The plaintiff never has more than two lower belts. Over each of these and brought by pressure in readily yielding contact with it, is an upper belt. The patent states the purpose of the upper belt to be to hold the blank between the belts to keep it from twisting. Defendant's machine is equipped with three lower belts. It has one upper belt directly over the central lower belt. Over each of the side lower belts is a bar. The distance of this bar from the lower belt is adjustable. In practice defendant says that one end of it touches the belt. The other is an eighth of an inch above the belt. So adjusted, it would seem to serve the purpose of guiding the blank and keeping it from raising or twisting. When defendant's machine is being operated to make large boxes, all three lower belts are used. The center of the blank then passes under the upper belt of the defendant, and is gripped between it and the lower belt immediately under it. Each side of the blank is held between one of the bars and the lower belt immediately under such bar. When defendant's machine is working on smaller boxes, one or the other of the lower side belts and the bar over it is taken off. The blank is fed through the machine in such manner that one side of it is gripped between one of the lower carrying belts and the upper belt. The other side passes between the other lower belt and the bar above it. The defendant apparently has in its machine at all times a pair of upper pressers. It sometimes uses three upper pressers, but, when it uses three, of course, it uses a pair as part of the three. The bars appear to be upper pressers. The upper belt and each of the bars extend partway of the length of the lower belts. The upper belt is directly over the central lower belt. Each bar is directly over one of the lower side belts.

It is said that the proceedings of the Patent Office estopped plaintiff from claiming that either of his upper pressers can be anything but a movable belt. I do not think so. The different wording of the first and seventh claims from the ninth, tenth, and eleventh would indicate that, while the ninth, tenth, and eleventh claims are limited to pressers which are belts, the first and seventh have no such limitation.

There is really very little controversy as to the fifth element. Defendant admits that what are called the pressing belts in its machine do complete the process of folding. They are therefore folding belts.

The sixth element consists of shoes for pressing the blanks against the lower belts, said shoes extending from the upper pressers to the folding belts. In plaintiff's machine these shoes are separate pieces of metal placed on the machine to perform the work above mentioned. In defendant's machine the same purpose is accomplished by extending a portion of the upper frame of the machine in which small rolls are mounted to constitute one shoe and by extending one or the other of the forming bars to make the other. These extensions hold the blanks down until they are gripped by the folding, or, what the defendant calls, the pressing, belts. I am therefore of opinion that the defendant uses a combination which contains every element of that secured to the plaintiff by his first claim. At the argument it was admitted by both sides that there was no substantial difference between the first and seventh claims, and, if the first claim is valid and infringed, the seventh claim is also valid and infringed.

The eighth claim is as follows, a number being given to each element of the combination claimed therein:

"In a machine of the character described the combination of (1) a lower carrier, (2) flap-folding belts, (3) a horizontal pulley for each of said belts lying across said lower carrier, (4) an adjustable pulley for the other end of each belt, (5) an intermediate guide for the acting stretch of each belt, said intermediate guides being located close to the lower carrier to hold the portions of the belts which are between them and the horizontal pulleys substantially parallel with said carrier, (6) and the adjustable pulleys being variable to different positions to change the angles of those portions of the belts which are between them and the said intermediate guides relatively to said lower carrier."

It is not disputed that defendant's machine contains the first element, nor is it disputed that, if it has the second element, it has the third, for there is a horizontal pulley for each of the belts in defendant's machine which plaintiff says are flap-folding belts, but which defendant claims are pressing belts.

In the discussion of the same element in the first claim it was held that defendant's belts were folding belts. It is not questioned that there is an adjustable pulley for the other end of each of defendant's belts, but it is said it is not adjustable in the sense in which the plaintiff uses the word adjustable. It is true that plaintiff's adjustment can be made in various ways. The defendant's apparently only vertically. The pulley remains an adjustable pulley. Its adjustment will adapt its machine to deal with blanks or boxes of different thicknesses, and which reach the belts with the sides at varying angles to each other. If it has the other elements of plaintiff's claim, it has an intermediate guide.

It may very well be that plaintiff did not have before his mind when he worded his description or his claim the arrangement of belts which defendant has devised, but those belts operate in substantially the same way to produce the same result, and the eighth claim of the plaintiff's patent may be read on defendant's construction. I therefore find the eighth claim of the plaintiff's patent infringed.

The plaintiff says that the defendant infringes his ninth, tenth, and eleventh claims. Two upper belts which move in the same direction

and at the same rate of speed as the lower carrier belts are elements in each of these claims. It is admitted that the defendant has only one upper carrier belt. This moves in unison in the same direction, and with the same rate of speed as the lower carrier belts. Plaintiff says defendant has the equivalent of another carrier belt in the fixed bar in its machine. In passing on the first and seventh claims, it has been held that this bar is introduced for the same purpose and accomplishes the same function as one of the plaintiff's movable upper belts. It remains true that the bar is not a moving belt. Plaintiff has so phrased his ninth, tenth, and eleventh claims that no one of them is infringed by any machine which does not contain two upper belts which move in the same direction and at the same rate of speed as the lower carrier belts. It therefore follows that the ninth, tenth, and eleventh claims of the plaintiff's patent are not infringed by the defendant.

I find that the first, seventh, eight, ninth, tenth, and eleventh claims of the plaintiff's patent in suit are valid, that the first, seventh, and eighth are infringed by the defendant, and that the ninth, tenth, and eleventh are not infringed. The usual decree may be entered for an injunction and accounting as to the claims held valid and infringed

---

WEBER v. AUTOMOBILE & ACCESSORIES MFG. CO.

(Circuit Court, D. Maryland. July 5, 1911.)

1. PATENTS (§ 238*)—INFRINGEMENT—CHANGE IN FORM OF CONSTRUCTION.
   Infringement of a patent is not avoided by making in one piece what the inventor made in several, when in practical operation it makes no difference whether one form of construction or the other is used.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 376; Dec. Dig. § 238.*]

2. PATENTS (§ 141*)—REISSUES—VALIDITY.
   A reissue is not necessarily void because it contains broadened claims or claims which more accurately and precisely cover the invention as described in the original patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206-213; Dec. Dig. § 141.*
   Grounds for reissue of patent, see note to General Electric Co. v. Richmond St. & I. Ry. Co., 102 C. C. A. 145.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMOBILE TRUCK.
   The Weber reissue patent, No. 12,430 (original No. 772,014), for an automobile truck, *held* valid and infringed.

4. PATENTS (§ 314*)—SUIT FOR INFRINGEMENT—ORDER OF PROOF.
   That the complainant in a suit for infringement of a patent did not prove the marking of the articles made under his patent until his rebuttal testimony will not deprive him of the right to an accounting where the fact was undisputed, and the delay not prejudicial to defendant.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 314.*]

In Equity. Suit by Herman Weber against the Automobile & Accessories Manufacturing Company. On final hearing Decree for complainant.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. A. Snow & Co. and Richard Bernard & Son (C. E. Doyle and W. H. C. Clarke, of counsel), for complainant.
William Nevarre Cromwell, for defendant.

ROSE, District Judge. This is a suit for infringement of reissue patent No. 12,430, January 2, 1906. It will be called the reissue. The original patent was No. 772,014, October 11, 1904. It will be called the original. The complainant, Herman Weber, lives at Colorado Springs, Colo. He is the patentee. He will be called the plaintiff. The defendant is the Automobile & Accessories Manufacturing Company, a Maryland corporation. It has a regular and established place of business in Baltimore, in this district, and there committed the acts charged to be infringements. It will be called the defendant.

The alleged infringing device originated with one John E. Norwood. At or about the time at which he says he conceived the idea he organized a company known as the Auto Supply & Storage Company. This company he controlled. Plaintiff filed a bill against it for infringing his reissue. The Auto Supply & Storage Company went into receiver's hands while the suit was pending. It was wound up by receivers and the defendant was thereupon organized. It is also controlled by Norwood. It bought the business of the Auto Supply & Storage Company. It made and used Norwood's device. Plaintiff brought this suit.

The patented thing is a small truck. It is to be used in handling automobiles where there is not room enough to move them by their own machinery in the way in which you want them to move. For brevity an automobile will be called a car. In a small or crowded garage, on docks and wharves, or the decks of vessels, on station platforms, or in freight cars it is often desirable and frequently necessary that cars shall be moved in a direction other than forward or backward. There is use for a cheap, simple, light, and easily handled tool for doing this work. The thing to be used must be readily movable in any direction. Plaintiff put his truck on casters. When not in use, it must take up little room. Car wheels are usually independently mounted. A truck which would hold more than one wheel would be large, heavy and complicated. There would be little call for a truck which could not be handled by one man. Plaintiff's truck will hold but one car wheel. Within a considerable number of degrees car wheels turn easily. Plaintiff's truck holds a car wheel in substantially a fixed angle to the load-supporting portion of the truck. The truck will be useless for the purpose if the car wheel can be pulled off of it sideways. Plaintiff's truck has a wheel-supporting channel deep enough to prevent anything of the kind. To make it useful, one man without the aid of other appliances must be able to place a car wheel upon it. Plaintiff's truck has a projecting inclined plane up which the car wheel can be readily moved. The truck must be one out of which the car cannot without the will of the operator easily roll either forward or backward. Plaintiff dishes the platform of his truck so that when the car wheel settles down upon it gravity holds it firmly. The truck must be one which will not let the car turn over, or which will not itself tilt up. Plaintiff places the load-supporting platform of his truck adjacent to the floor, so that the weight will not rest upon a plane above that of the casters.

The truck is a simple thing. It meets the obvious necessities of the situation. It is easy to say that its way of meeting those necessities is as obvious as the necessities themselves. Defendant does say it. Its answer cites 66 prior patents. Its expert comments on 32 of them. Those discussed include patents for roller skates, sewing machine and stove leg casters, sled runners, garbage carts, see-saw lifting jacks, and barrel, sleigh, baggage, rocking chair, grain binder, and vehicle trucks. As the sum of many hours of testifying and of many pages of recorded testimony, the same very accomplished expert concludes that the nearest anticipation to the claims of plaintiff's reissue is to be found in a patent for casters to be permanently screwed on each leg of a sewing machine. No one other than a highly trained patent expert would be likely to seek for an anticipation of a movable truck for a car wheel in a fixed caster and frame intended to be screwed permanently on the foot of a sewing machine. Before the plaintiff had made his truck, it is not probable that anybody, not even the patent expert, would have gotten any light on how to make it from a most careful study of a sewing machine caster. The court is much indebted to Mr. Greeley's study of the art. After reading what he has to say, it is possible to feel certain that every reference which could anticipate or limit the claims of the plaintiff has been found and cited. The sewing machine caster is the net result. Under such conditions there can be little question of the novelty of plaintiff's device. Defendant's failure to find any more pertinent reference in the prior art is sufficient answer to its contention that the claims of the reissue are too broad. Both sides have proved that there was great need for such device. Before it came upon the market all sorts of inconvenient, troublesome and objectionable expedients were resorted to. Oil was poured on the floor to make easier the sideways dragging of a car over it, a piece of scantling was used to pry the car over, and so on.

Plaintiff's trucks were put upon the market in 1904. There was at once a wide-spread demand for them. Inquiries and orders came from all sections of the United States and from many European countries. Plaintiff testified that he had sold 6,000 of them. He says defendant infringes the first, second, and third claims of his reissue. Defendant says it infringes none of them. The first claim is for "a truck comprising (1) casters, (2) a drop-frame extending transversely of the truck and connecting the casters, (3) said frame being permanently secured to and serving to maintain the casters in fixed relative positions, (4) and a fixed load-receiving platform supported by said drop-frame." The casters are found in plaintiff's and defendant's truck alike. In each of them a drop-frame extends transversely of the truck and connects the casters. In each of them that frame maintains the casters in fixed relative positions. In each of them there is a fixed load-receiving platform. In each of them that load-receiving platform is supported by the thing which also connects the casters. The only difference is that defendant makes the whole of its truck, except the casters, out of one piece of metal. Plaintiff usually makes his truck out of several pieces of wood or metal. Defendant's expert admits that if plaintiff's claim can be read upon a truck, all of which is made

in one piece, defendant's truck infringes. There is nothing in the claim that expressly negatives the making of the truck in one piece. Defendant's expert, to justify his contention that the claim requires the truck to be made in several pieces, goes into minute questions of punctuation. He reviews the history of the prior art, and asserts that, if the claim is to be so construed as to include a single piece truck, it is anticipated by the sewing machine casters. Such limitation upon the ordinary import of the language of this claim does not seem to be justified either by its punctuation or by anything in the prior art. He argues that the plaintiff's claim necessarily implies a drop-frame which is no part of the load-receiving platform. He admits, as, of course, he must, that before the truck can be put in use the load-receiving platform must be firmly secured to the drop-frame. He does not say that it makes any difference whatever in the way in which the truck is used—whether it was originally made in one piece or several pieces.

[1] It is scarcely necessary to cite authorities to the effect that infringement cannot be avoided by making in one piece something that the inventor made in several, when in practical operation it does not make the slightest difference whether one form of construction or the other is adopted. Such contention may be dealt with as briefly as it was by the Circuit Court of Appeals for the Second Circuit in Capital Cash Register Co. v. National Cash Register Co., 70 Fed. 709, 17 C. C. A. 355.

It is unnecessary to quote the plaintiff's second and third claims. It is admitted that those claims are infringed if infringement cannot be escaped by making in one piece that which patentee made in several. How unsubstantial the contention that there is any difference whether the machine is made in one piece or in three is demonstrated by this record. Norwood has made his truck in several pieces and in one piece. Plaintiff has made his truck in one piece and in several pieces. The defendant claims that it is making its truck under a certain patent issued to Norwood. This patent is junior to that of the plaintiff. It may contain some improvements or additions to the plaintiff's patent. That will not justify the defendant in using what is plaintiff's. Morley v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715.

Defendant says plaintiff's reissue is for a different invention than that described in his original patent. If that be true, the reissue is void. It does not appear to be true. Every element claimed in the reissue is clearly shown in the original. A drop-frame and drop-frame bar in the sense and in the connection they are used in the original and the reissue mean the same thing. They are described and their use pointed out in the original as clearly as in the reissue. A loading-member extending from one end of the platform proper to a point beyond the casters is shown in the original. The use to which it is to be put is there told. One form of such loading-platform is claimed in the original. The original distinctly specifies that the bends of the frame bars shall be disposed adjacent to the floor or the ground in order to facilitate the positioning of the vehicle upon the structure. This arrangement of the bars involves the same form of construction which is described in the third claim of the reissue as a "dished load-receiving

surface disposed approximately in the horizontal plane of the revoluble elements of the casters."

Defendant relies upon Marvel Buckle Co. v. Alma Manufacturing Co. (C. C.) 180 Fed. 1002. There in his original patent the inventor said he wanted to make a buckle that would not tear a trousers strap, and would not form a hump. In his reissue he claimed a buckle which was less liable to be broken in the process of manufacture. This, it was held, he could not do. In the case at bar the plaintiff in the original described a truck intended to support and move a car wheel. The precise construction of the truck is both told and shown. How and why it is to be so made is set forth. Some of its characteristic features were not embodied in precise language in the original claims.

[2] A reissue is not necessarily void because it contains broadened claims, or because it contains claims which more accurately and precisely cover the invention as described in the original patent. Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72.

[3] A period of seven months elapsed between the original and the application for the reissue. Defendant says Norwood acquired rights in that time of which the reissue cannot deprive him. It says it has succeeded to those rights. The defendant has failed to prove beyond reasonable doubt the existence of the facts upon which such rights rest. Assuming, however, that all the testimony it has given on this subject is true, what happened was this: About two months before plaintiff applied for his reissue Norwood made two trucks. In those trucks the frame bars and the loading platform were made separately, and they were afterwards fastened together. Norwood was then about to organize the first of his companies. The company was formed for the purpose of manufacturing, buying, selling, hiring, storing, repairing, and conducting generally the wholesale and retail business of trading and dealing in automobiles and automobile supplies, and conducting and carrying on the business of delivering and transferring of merchandise, parcels, etc., and the business of conveying passengers for hire in automobiles and otherwise, and for buying, selling, and dealing in patents and patent rights, and for buying, selling, mortgaging, leasing, improving, disposing of, or otherwise dealing in lands in Maryland. One gentleman testified that he became an incorporator and stockholder in this company, and that Norwood at the time he asked him to go into the company showed him one of these trucks, and told him that he would let the company manufacture it on a royalty. The witness thought it would be valuable. This company was formed in the latter part of March, 1905. The only Norwood trucks then in existence, or which up to that time ever had been made, or which were made at any time before the plaintiff applied for his reissue, were two. Norwood says that any bargain he had with the company as to these trucks was verbal. He thinks they paid him 50 cents apiece for the right to use them; that is, $1 in all. No more trucks were made by Norwood or by anybody under his design until the end of July, 1905. That was two months after the reissue had been applied for. These trucks were made a few days after Norwood had written to the plain-

tiff for a description of plaintiff's trucks. None of the Norwood trucks were sold to anybody else until the latter part of 1905 or early in 1906. If the defendant or Norwood have any intervening rights, they rest upon the above facts, and upon no others.

In the case of the Crown Cork & Seal Co. v. Aluminum Stopper Co., supra, the alleged infringer, Hall, had actually applied for his patent before the issue of the Painter original patent, and nearly two years before the application for reissue. Much had been done by Hall and his associate, Keizer, and by the Aluminum Stopper Company they formed to develop this invention. Much money had been spent on it and many stoppers put upon the market. What was done by Norwood cannot be seriously compared with what was done by Hall. The Circuit Court of Appeals for this circuit decided that all that Hall had done had not given him any rights which enabled him to escape from the charge of infringing the Painter reissue. The validity of the reissue patent in this case has been already once adjudicated in the United States Circuit Court for the District of Colorado in the case of Herman Weber v. Pikes Peak Mfg. Co. & Stean B. Mansfield (no opinion filed). The defendant contends that the prior state of the art was not laid before the court in that case, and that no such vigorous defense as has here been made was there set up. I have accordingly dealt with the record here as if there had been no prior adjudication. Having so done, I have reached the same conclusion as Judge Lewis did in that case.

[4] The defendant says that in any event there can be no decree for an accounting. Plaintiff did not in his direct testimony prove that his devices were marked "patented," or that he gave notice to the defendant to cease infringement. Such facts were developed during plaintiff's cross-examination of defendant's witnesses, and were proved by plaintiff when offering his testimony in rebuttal. Plaintiff should have given this evidence in chief. Defendant has not asked permission to show that the facts are not as plaintiff in rebuttal claims them to be. That the proper evidence on this subject was not given by the plaintiff in his opening was obviously an oversight. It takes something more than the failure of a solicitor to prove an undisputed fact at the right time to justify a court of equity in forfeiting important rights. If anybody has been prejudiced by the mistake, the party responsible must stand the consequence. In this case there seems to have been no possible harm to anybody. Upon application at any time the court would have given permission to plaintiff to offer the necessary proof. It is immaterial that it was offered without asking permission.

There will be a decree for an injunction and an accounting in the usual form.

ADRIAN WIRE FENCE CO. v. JACKSON FENCE CO.

(Circuit Court, E. D. Michigan, S. D. May 17, 1911.)

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.
A patent for a peculiar form of wire knot and one for a machine or die to make such knot may both be infringed by the same act, and a bill charging such infringement is not multifarious.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.
A patent for a generic form of wire knot and one for an included specific form may both be infringed by the same structure, and a bill alleging such construction of the patents and such infringement is not demurrable for multifariousness.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

3. PATENTS (§ 72*)—DOUBLE PATENTING—IDENTITY OF INVENTION.
A patent for a die for forming a wire knot and one for the knot formed by such die, but which may be otherwise formed, are not for the same invention, and the later is not void for double patenting.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 72.*]

4. PATENTS (§ 328*)—VALIDITY—KNOT FOR WIRE FENCE.
The Williams patent, No. 533,403, for a knot for the intersecting strands of a wire fence, *held* not invalid on its face for lack of invention.

5. PATENTS (§ 328*)—VALIDITY—DIE FOR MAKING WIRE KNOT.
The Tiffany patent, No. 755,187, for a die for making a wire knot, *held* not invalid on its face for lack of invention.

In Equity. Suit by the Adrian Wire Fence Company against the Jackson Fence Company. On demurrer to bill. Overruled.

Rector, Hibben, Davis & Macauley, for complainant.
Albert H. Bates, for defendant.

DENISON, District Judge. This suit is upon three patents: Williams, 533,403, for a knot or tie for the intersecting strands of a wire fence; Tiffany, 774,210, for a knot of the same general class; and Tiffany, 755,187, for a die for making such knots. The demurrer alleges: (1) That the bill is multifarious for lack of conjoint use of the three patents; (2) that the two Tiffany patents involve double patenting; (3) that each of the three patents is void for lack of invention.

I. Multifariousness.

[1] The bill alleges that all three patents are capable of conjoint use, and are, in fact, conjointly employed by the defendant in a single structure. The defendant argues this may mean that they are used in the different parts of the same fence. This is not the fair meaning of the language; and it is apparent enough that complainant intends to charge they are all used in connection with one single knot or tie. In spite of this allegation, it is well settled that we may look into the patents themselves to see whether the patents are fairly capable of such use.

A patent for a peculiarly twisted and formed piece of wire, and a patent for a die in which the forming and twisting are done, are

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

patents for the apparatus and for the product, in close analogy to those for process and product. It seems clear that it is proper to join, in one suit, two such patents, since both are infringed by the same act. This consideration justifies joining Tiffany, knot, and Tiffany, die.

[2] If the two knot patents were for two specific and varying forms for the same structure, obviously they could not be joined, because they could not be conjointly used in the same structure. If they are relatively generic and specific, then they may both be infringed by the same structure, and joinder may be proper. It is complainant's theory that the Williams patent is relatively generic; and, upon demurrer, I cannot say this theory is wrong. The first claim of Williams is capable of such construction, or, to speak more accurately, may, upon final hearing, be thought capable of such construction.

The question whether Williams, knot, and Tiffany, die, can be joined depends also on whether Williams is relatively generic. If a knot made in a Tiffany die infringes the Williams patent, then these two patents may be joined.

2. Double Patenting.

[3] Tiffany, knot, was applied for May 29, 1903, and issued November 8, 1904. Tiffany, die, was applied for June 19, 1903, and issued March 22, 1904.

If these were for one invention—i. e., if the machine would produce only the product and the product could be constructed only by the machine—it might follow that the later patent was invalid, under the rule of the Mosler Case, 127 U. S. 355, 8 Sup. Ct. 1148, 32 L. Ed. 182; but this does not seem to be the case. The knot can be made by hand, or by any suitable shaping mechanism. It is, therefore, an independent invention. Normally, process and product form two inventions; not one. Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805.

Hence the validity of neither Tiffany patent is affected by the existence of the other.

3. Patentability.

[4] A. Williams. With the broad construction claimed for this patent, the query arises whether it is not a patent for a knot made of wire, instead of from string. On its face, and with the construction necessary to make it cover the Tiffany knot, it has that aspect. There are said to be merit and novelty in using a prepared staple as the starting point of the construction. This may be, although it is not now clear to me; and it should be said that complainant has not attempted to present that question fully. On final hearing, evidence of utility, commercial acceptance, previous failures, etc., may be thought of controlling force. It is not obvious just what mechanical problems arise in dealing with this kind of material, and I am satisfied that I should not, on a demurrer hearing, hold the patent invalid.

B. Tiffany, knot. This structure, as claimed, is a duplicate of Williams', except as to the form and placing of the ends of the staple;

and in these respects, the differences seem mechanical only, remembering that we must consider, not the method of construction (which may involve valuable invention), but only the finished product, however made. The prior Williams patent, pleaded in the same bill, may be considered in determining whether the later Tiffany patent, on its face, shows invention. If the suit was planted on this Tiffany patent alone, I should be inclined to sustain the demurrer on the ground of invalidity; but as this demurrer is to be otherwise overruled, and proofs must be taken and final hearing had on the other two patents, no additional delay and little, if any, additional proof will be required as to this patent, and the practical considerations, sometimes persuasive in sustaining a demurrer in a patent case, are not present. On the other hand, if sustaining the demurrer was, on appeal, held erroneous, there would be what would correspond to a mistrial at law, and the case would have to come back for further hearing on this point. Under such circumstances, it seems best to overrule the demurrer on this point also.

C. Tiffany, die. I am not impressed by the attack made upon the prima facie validity of this patent; indeed, the argument rests upon the assumption of a knowledge of the art of die making, which knowledge the court does not judicially have.

Upon the whole case, an order will be entered overruling the demurrer and giving the defendant 20 days in which to plead or answer.

JACKSON SKIRT & NOVELTY CO. v. ROSENBAUM et al.

(Circuit Court, W. D. Michigan, S. D. May 24, 1911.)

1. PATENTS (§ 328*)—VALIDITY—SKIRT.
   The Smith and Malnight patent, No. 750,234, for a skirt, *held* not invalid on its face for lack of invention.

2. EQUITY (§ 244*)—FEDERAL PROCEDURE—RIGHT TO ANSWER AFTER OVERRULING OF DEMURRER.
   Under equity rule 34, after the overruling of a demurrer the defendant has an absolute right to answer, and the court has no power to impose arbitrary conditions.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 519; Dec. Dig. § 244.*]

3. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEA.
   Where a bill for infringement of a patent, brought against individual defendants and a corporation, alleges that the individual defendants have jointly and severally and as copartners infringed, a plea setting up that such defendants are not partners, and were not at the time of the alleged infringement, but that they are officers of the defendant corporation, should be overruled, as the defense may be fully saved by an answer.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. Suit by the Jackson Skirt & Novelty Company against Louis Rosenbaum and others. On demurrer and plea. Overruled.

W. H. C. Clarke and C. A. Snow & Co., for complainant.
Chappell & Earl, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DENISON, District Judge. The bill is for infringement of patent to Smith and Malnight, January 19, 1904, No. 750,234.

[1] The demurrer raises the question of the patentability of the combination described in the single claim. The patent impresses me as one of those which now seem to be a rather obvious expedient, as compared with other well-known forms, but which, nevertheless, may, upon final hearing, be shown to have such commercial merit, and to have been so far "the last step" in a search for exactly the right thing, as to have validity. If the claim is read literally and closely, it is extremely limited in form; and there must be more hesitation in sustaining a demurrer to a claim capable of such construction than there may be in cases where the claim is very broad. Upon the whole, I think the case is one which ought to be held for final hearing.

[2] I am asked to apply the rule announced in the case of Merrimac Mattress Mfg. Co. v. Schlesinger et al. (C. C.) 124 Fed. 237, to require the defendant to pay a special allowance to complainant's counsel for services and traveling expenses as a condition of permitting the defendant to answer. The circumstances of this case do not call for the imposition of any penalty, as I have no doubt whatever that the demurrer was interposed in good faith; but I understand that under general equity rule 34, and after the overruling of a demurrer, the defendant has an absolute right to answer, and a court has no power to impose arbitrary conditions. It would seem that, if a court is satisfied that counsel appearing in court has falsely certified that a demurrer was interposed in good faith and not for delay, a requirement that the clients should be penalized may not be the most appropriate remedy.

[3] The plea has to do with the association of the defendants. The bill, in its opening paragraph, alleges that it is brought against the three individual defendants "jointly and severally and as copartners, trading and doing business under the firm name and style of the Henrietta Skirt Company," and against Samuel Rosenbaum & Sons Company, a Michigan corporation, "and against all of said defendants jointly and severally." A later paragraph alleges that the defendants "are now jointly infringing said letters patent."

The plea sets up that the individual defendants are not, and for several years have not been, partners as the Henrietta Skirt Company, or partners at all, but that their only connection with the subject-matter is as officers or employés of the defendant corporation, which corporation is using the trade-name "Henrietta Skirt Company." I think that the allegation in the bill that the three individual defendants are partners under the specified trade-name is, when taken in addition to the statement that they are jointly and severally infringing, surplusage, and does not tender an issue to which a good plea may be interposed.

In its further aspect, the plea is, substantially, that the individual defendants have not infringed, unless by reason of their connection with the corporation; and then, to make the plea complete, we must consider in this connection the fact that the bill does not allege an infringement by them as officers of the corporation. In other words,

the plea is that the defendants are not liable for the reason alleged in the bill, though they may be liable for another reason. In a case where the defense may be fully saved in connection with an answer and on final hearing, and where the relations of the parties are as they seem here to be, I think a plea resting on such a basis should not be sustained. It will, accordingly, be overruled.

It is apparent, however, from statements of counsel upon the argument, that the bill may require amendment. This action is one of tort, not of contract. The complainant, therefore, cannot recover against the individual defendants as partners, on the ground that they have been held out at one time as partners, and that the holding out had not been recalled. If, therefore, it should appear that these defendants are not in fact partners, but that their only connection with the matter is as officers of the corporation, then the complainants would fail, because there would be no allegations in the bill upon which these defendants could be held through the corporation. Complainant can meet this situation by an additional allegation that these defendants claim to be acting only as officers or employés of the corporation, and that, if so, their acts and conduct have been such as to make them personally liable. These acts and conduct may be described in such detail as may be necessary to make the basis for personal liability under the rule existing in this circuit, and at the same time complainant can retain its allegation of a supposed partnership, or other individual acts, to rely upon if the same can be established.

The order will be that the demurrer and the plea be overruled; that the complainant have 20 days in which to amend the bill of complaint as it may be advised; that, in case of such amendment, the defendants have 20 days thereafter in which to answer; and that, in case complainant does not amend within said 20 days, the defendants have 10 days after the expiration of such time in which to answer.

The clerk will enter the order immediately.

HAVENS et al. v. W. R. OSTRANDER & CO.

(Circuit Court, S. D. New York. May 31, 1911.)

1. PATENTS (§ 328*)—DESIGNS—BRANCH BOX FOR ELECTRIC WIRES.
The Havens design patent, No. 39,767, for a design for a branch box for insulated electric wires, is not void on its face, because the article is not a proper subject for a design patent, for anticipation, nor for lack of invention.

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DEMURRER TO BILL.
A prior patent not set out in the bill cannot be considered as part of the record on demurrer.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

3. PATENTS (§ 290*)—SUIT FOR INFRINGEMENT—PARTIES.
In a suit by an exclusive licensee for infringement of a patent, it is not prejudicial error to join the patentee as a complainant.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 290.*
Persons entitled to sue for infringement, see note to Snead v. Scheble, 99 C. C. A. 583.]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Morton Havens and another against W. R. Ostrander & Co. On demurrer to bill. Overruled.

Parsons, Hall & Bodell, for complainant.
Robert S. Allyn, for defendant.

LACOMBE, Circuit Judge. The patent sued upon is No. 39,767, for a design for branch box for insulated electric wires issued January 12, 1909. The specification states that:

"This design for branch boxes comprises an elongated body having a closure on one side constituting a continuation of the lines of the body and having nipples projecting from each end of the body. The bottom of the body is curved, and all parts of the device are joined by gradual curves so as to produce an ornamental effect."

The accompanying drawing has two figures giving perspective views of the box.

[1] The first ground of demurrer is that it appears upon the face of the patent that the subject-matter thereof is not the proper subject-matter for a design patent. Reference is made to Williams Calk Co. v. Kemmerer, 145 Fed. 928, 76 C. C. A. 466 (the calk on a horse-shoe), and to Bradley v. Eccles, 126 Fed. 945, 61 C. C. A. 669 (the washer for a thill-coupling). But in the authorities cited the court was sufficiently familiar with the art to take judicial notice that the horse-shoe calk and the thill-washer were so used that their particular design was unimportant. This court, however, knows nothing about the art of branch boxes for electric wires, and without some testimony cannot form an opinion as to whether they are or are not so used as to leave some scope for designing them.

The next ground of demurrer is that the patent is void on its face for lack of invention in view of common public knowledge. It is true that the design as illustrated in the figures seems to be a simple one, but this court has no "common knowledge" of the particular art either as to prior designs for such devices or as to possible difficulties to be overcome in constructing the pipe and closure and putting them in place, and at the same time giving them an attractive appearance. "In patent causes there is always the chance that evidence as to conditions prior and subsequent to the patentee's publication may be introduced, which would induce the reversal even of a very strong impression formed merely from a perusal of the patent in the light of common knowledge." Stillwell v. McPherson (C. C. A., Second Circuit) 183 Fed. 586, November 7, 1910.

[2] It is next contended that the design patent is anticipated by a mechanical patent to the same inventor, No. 775,037, reissued April 23, 1907, No. 1,264. This patent, however, is not set forth in the bill. The mere fact that it is, with many others, referred to in a license agreement which is annexed to the bill does not make profert of it so that it may be considered as a part of the record on demurrer.

[3] It is next contended that there is an improper joinder of parties, the complainants being the patentee and the holder of an exclusive license. The patentee may not be a necessary party, but it is not error

to join him as a party plaintiff. Defendant is in no way prejudiced thereby.

The other two grounds of demurrer are not warranted by the language of the bill, and need not be discussed.

The demurrer is overruled, with leave to answer in 20 days.

COMMERCIAL ACETYLENE CO. et al. v. WIDRIG et al.

(Circuit Court, E. D. Michigan, S. D. June 9, 1910.)

No. 4,046.

PATENTS (§ 328*)—INFRINGEMENT—ACETYLENE GAS TANKS.

The Claude & Hess patent, No. 664,383, for an acetylene gas tank, covers as the patented package the tank charged with acetylene gas, and one who recharges such tanks in violation of a notice thereon stating that they are licensed for use only when filled by the seller, and with full knowledge of such contract, is an infringer of the patent.

In Equity. Suit by the Commercial Acetylene Company and the Prest-O-Lite Company against Arthur S. Widrig and Perry G. Robinson. On motion for preliminary injunction. Motion granted.

Jno. P. Bartlett, Winter & Winter, and J. J. Gafill, Jr., for complainants.

Jno. Faust, for defendants.

DENISON, District Judge. This is a motion for preliminary injunction (under patent No. 664,383) to prevent defendants from refilling the "Prest-O-Lite" tanks, now in common use upon automobiles for supplying acetylene gas to the burners.

The general legal principles involved are settled, as to one branch of the case, by the Morgan Envelope Case, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500, and the familiar line of cases applying that rule, and as to another branch of the case, so far as the Sixth circuit is concerned, by the two button-fastener cases (Heaton-Peninsular Company v. Eureka, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and Elliott v. Rupp, 131 Fed. 730). These principles have been applied to the patent here involved, and to somewhat similar circumstances, by Judge Quarles in Commercial Acetylene Company v. Avery, 166 Fed. 907, and in Commercial Acetylene Company v. Auto-Lux Company, 181 Fed. 387.

If the only question involved were whether an outright purchaser of one of these tanks infringed the patent by recharging it with acetylene gas, I should hesitate, except for the effect of Judge Quarles' opinion, to direct a preliminary injunction. The tanks, fully charged, are sold by complainants for about $16, and are recharged for $2. The gas which is contained in them is thus evidently only a small fraction of their total value. They are mere containers for the gas. They are sold for the very purpose of having the contained gas used, and if no contract was involved in each case, except the ordinary contract of sale, there would be strong reasons for urging that such sale implied

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the right to continue to use in the only possible manner, viz., by recharging.

On the other branch of the case, I have no doubt whatever. The special contract, by which the otherwise general sale becomes restricted and constitutes a conditional license, is sufficiently made out by the plates attached to the devices, and by the general and well-known system which has been in use now for three years. It may be that an individual purchaser, who did not notice the plate, and who supposed that he was buying an unrestricted title, might so excuse his oversight that he would have a special and individual right to disregard the restriction; but no such fact appears here. The defendants have been themselves for a long time fully advised of the system, and they do not represent any tank purchaser with this special equity.

It is urged that acetylene gas is a staple commodity, and that, therefore, no monopoly in its sale should be permitted to be indirectly accomplished; and reference is made to arguments of this character in one or two recent opinions. I doubt whether acetylene gas is sufficiently a mere commodity to have the benefit of this rule in any case; but I regard the controlling question as one of intent, and in this case the intent to add the acetylene, to make up the complete patented combination, is perfectly clear. Where the article sold is staple, it has so many lawful uses that perhaps sometimes no presumption can be drawn or permitted of an intent to use unlawfully; but here no such presumption is necessary. The fact appears.

As to the tanks which do not bear the restricting plate, and which are, therefore, the absolute property of the owners, an injunction must depend upon the bare question of infringement; and while, as above stated, I have some doubt on this question, yet, in view of Judge Quarles' opinion and of the fact, stated on the arguments, that comparatively few of these earlier tanks not so restricted remain in use, there is not sufficient reason for introducing confusion in the execution of the order by excepting such tanks.

Therefore a preliminary injunction will issue as requested.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. TRANSIT DEVELOPMENT CO.

SAME v. NASSAU ELECTRIC R. CO.

(Circuit Court, E. D. New York. May 3, 1911.)

COURTS (§ 351*)—FEDERAL COURTS—PRACTICE OF STATE COURTS—DISCOVERY.

The federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), which provides that the "practice, pleadings and forms and modes of proceeding" in the federal courts shall conform as near as may be to those of the state courts, does not make Code Civ. Proc. N. Y. § 803, available to a party in a federal court to obtain an inspection of property alleged to be in the possession of the adverse party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. § 351.*

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by the Cheatham Electric Switching Device Company against the Transit Development Company, and by the same against the Nassau Electric Railroad Company. On motion for examination of property. Granted in part.

O. Ellery Edwards, Jr., for plaintiff.
Kiddle & Wendell, for defendants.

CHATFIELD, District Judge. The plaintiff has made a motion to examine certain devices which it alleges are in the control of the defendants, evidence as to which it wishes to introduce in an action at law for alleged infringement of patents.

Under section 803 of the Code of Civil Procedure of New York (which the plaintiff urges is made applicable by section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 684]), an inspection of the devices might be ordered, although the plaintiff does not set forth sufficient facts to satisfy the court that there is reasonable ground to believe the device to be in use. But the court cannot hold this statute available. Beardsley v. Littell, 14 Blatchf. 104, Fed. Cas. No. 1,185; In re Fiske, 113 U. S. 721, 5 Sup. Ct. 724, 28 L. Ed. 1117; Mutual Life Ins. Co. v. Griesa (C. C.) 156 Fed. 398.

Section 866, as amended by Act March 9, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 664), provides for the use of state methods in taking depositions, but does not enlarge the cases in which depositions may be allowed; and section 914, R. S., while applicable to the federal jurisdiction over patent cases (Campbell v. Haverhill, 155 U. S. 610, 15 Sup. Ct. 2175, 39 L. Ed. 280), does not change the methods of trial of an issue at law under section 861, R. S. (U. S. Comp. St. 1901, p. 661), which requires a motion under section 724, R. S. (U. S. Comp. St. 1901, p. 583), or a bill of discovery, to obtain the relief given in the New York courts by section 803 of the New York Code of Civil Procedure, including the examination of property.

The defendant in each case is alleged to be a user, and not a manufacturer, of the device. In the Manufacturer's Catalogue the defendant is recited as one of those making use of the devices in question, and the plaintiff would seem to be able to show sources of information and grounds of belief sufficient to bring itself within the rule, if the present papers were criticised only upon that ground. Inasmuch, therefore, as an amendment of the moving papers would avail nothing, and as the defendants have blue prints showing the devices as to which examination is asked, the present motion will be granted as to the papers and books necessary for the purpose.

The defendant Transit Development Company will be directed to produce a copy of the contract desired, and both defendants will be directed to produce the blue prints showing the device which they have in use, with copies of their records showing where the device portrayed in the blue prints has been installed, and file the same with the clerk of this court, under the provisions of section 724, R. S. The clerk of the court will hold these papers as exhibits, to be available to either side, but under such restrictions, as to examination of all or any part of the contract, as may be ordered by the court before inspection by the plaintiff.

BURROWES et al. v. CARROM-ARCHARENA CO. et al.

(Circuit Court, W. D. Michigan, S. D. May 10, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 92*)—SUIT FOR UNFAIR COMPETITION—SUFFICIENCY OF BILL.

A bill *held* not to state a cause of action for unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DEMURRER TO BILL.

A demurrer to a bill for infringement on the ground that the patent is void on its face is good only where it is clear that the patent cannot be sustained by any evidence that might be produced on final hearing.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. Suit by Edward T. Burrowes and others against the Carrom-Archarena Company and others. On demurrers to bill. Sustained in part, and overruled in part.

L. S. Bacon and James Whittemore, for complainants.
Chappell & Earl, for defendants.

DENISON, District Judge. This is a bill for patent infringement and unfair competition. Defendants demur, because the only two claims of the patent upon which reliance is now placed obviously do not involve any patentable invention, and because no facts are stated sufficient to make a case of unfair competition.

[1] Upon the latter subject, I find nothing in the bill which can distinguish this case from the decision of the Court of Appeals in Globe-Wernicke Company v. Macey, 119 Fed. 696, 56 C. C. A. 304. So much of the demurrer as pertains to this subject will therefore be sustained.

[2] Claims 5 and 6, if given the broadest scope which their language would permit, go down very near to, if they do not cross, the lower border line of the field of invention. On the other hand, if they can be considered to be limited to a table with folding legs and with the described cross-bars, which make pockets for receiving, wholly within the frame, the legs when folded, the court would not be justified in sustaining the demurrer. The presence of other claims tends to support the argument that these claims were not intended to be limited in the manner suggested; but I have concluded that I cannot say that the court may not, on final hearing, give these claims such a construction as will make them valid.

For these reasons, and under the well-settled rule that such a demurrer is good only where it is clear that the claim cannot be sustained upon final hearing, so much of the demurrer as pertains to the question of patent infringement will be overruled.

Counsel may prepare an order.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AUTOMATIC PENCIL SHARPENER CO. v. GOLDSMITH BROS.

(Circuit Court, S. D. New York. July 25, 1911.)

PATENTS (§ 257*)—INFRINGEMENT—VIOLATION OF CONDITIONS ATTACHED TO LICENSE.

The owner of a patent may sell the patented article under restrictions as to the price at which it shall be resold, and is entitled to an injunction to restrain a violation of such restrictions by one having full knowledge of them as an infringement of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 257.*]

In Equity. Suit by the Automatic Pencil Sharpener Company against Goldsmith Bros. On motion for preliminary injunction. Motion granted.

Breed, Abbott & Morgan, for complainant.
Milton Dammann, for defendant.

LACOMBE, Circuit Judge. This is a motion for preliminary injunction to restrain the sale at cut rates of patented machines bought under restrictions as to price of which defendant had full knowledge. The machines and boxes also bore marks, numbers, and notices which defendant mutilated and erased before offering for sale at the cut rate. There are no affidavits submitted by defendant and is no dispute as to the facts.

This case is not to be distinguished from the many cases decided in various Circuit Courts of Appeals holding that complainant is entitled to an injunction under the circumstances disclosed in this case. Heaton-Peninsular Company v. Eureka Specialty Company, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671; Victor Talking Machine Company v. The Fair, 123 Fed. 424, 61 C. C. A. 58; The Fair v. Dover Manufacturing Company, 166 Fed. 117, 92 C. C. A. 43. I find nothing in Bobbs-Merrill Company v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, and Dr. Miles Medical Company v. Jaynes Drug Company (C. C.) 149 Fed. 838, that deprive these cases of authority in patent causes. The court in this district will follow the Circuit Court of Appeals for the Second Circuit. Cortelyou v. Lowe, supra.

Injunction is granted as prayed for.

GEORGE T. BISEL CO. v. BENDER et al.

(Circuit Court, N. D. New York. July 17, 1911.)

COPYRIGHTS (§ 85*)—INFRINGEMENT—EVIDENCE—INJUNCTION.

In a suit for infringement of a copyright, evidence of copying *held* sufficient to justify continuance of a temporary injunction against the sale of defendant's work until final hearing.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

In Equity. Suit by George T. Bisel Company against Matthew Bender and others, trading as Matthew Bender & Co., and De Witt C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Moore. On application to continue a temporary injunction until final hearing. Granted.

Suit to restrain infringement of copyrighted book "Interstate Commerce Act," Drinker, in two volumes with a supplement making three volumes, entitled "A Treatise on the Interstate Commerce Act and Digest of Decisions Construing the Same," copyrighted as to the first two volumes in March, 1909, by George T. Bisel Company. Henry S. Drinker, Jr., is the author thereof. The defendant, De Witt C. Moore, is the author, and defendant Matthew Bender & Co., the publisher, of a work in one volume entitled "The Law of Interstate Commerce and Federal Regulation thereof, including the Mann-Elkins Amendments of 1900, and the Sherman Anti-Trust Act of 1890," copyrighted in 1910, by Matthew Bender & Co.,

Risley & Love (Samuel Dickson and Henry S. Drinker, of counsel), for complainant.

Melvin Bender, for defendant M. Bender & Co.

De Witt C. Moore, in pro. per.

RAY, District Judge (after stating the facts as above). By comparing the alleged infringing book, Moore on "Interstate Commerce," with the book, "The Interstate Commerce Act," Drinker, vol. 1, it is evident that Moore in effect copied the general style of treating the subject adopted by Drinker although he had much new matter. Moore follows the chapter headings and method of treating the subject adopted by Drinker, commencing with chapter 4 of Moore and chapter 2 of Drinker. Moore in chapter 1 treats of "What constitutes commerce," in chapter 2 of "Federal regulations of interstate commerce," and in chapter 3 of "Nature of interstate commerce." Drinker in volume 1 gives the acts and then in part 1, chapter 1, treats of "the substantive requirements of the act." Then chapter 2 is headed "Scope of the act, purpose, rules of construction applicable, general considerations." Subheadings are:

19. Expressions by Commissioners and Courts as to the Purpose of the Act.
20. General Rules of Construction Applicable to the Act.
21. Judge Jackson's Dictum in the Kentucky Bridge Case.
22. The Act did not Create New Powers in the Carriers.
23. The Act Applies only to the Carrier's Duties toward Shippers and Passengers.
24. Duty to Provide Adequate Service and Facilities—Through Routes, Joint Rates and Switch Connections.
25. Charges for Incidental Services.

Moore in chapter 4 heads the chapter "Purpose of the interstate commerce act." His subheadings are:

Section
16. Scope and effect of the Act.
17. Construction of the Act.
18. Rights and powers of carriers not enlarged by the Act.
19. The provisions as to discriminations and preferences apply only to the carrier's duty as a common carrier.
20. Carrier's duty to provide reasonable facilities and adequate service.
21. All interstate commerce not included.

Going through these chapters respectively we find the following subheadings:

Drinker.

19. Expressions by Commissioners and Courts as to the Purpose of the Act.
20. General Rules of Construction Applicable to the Act.
21. Judge Jackson's Dictum in the Kentucky Bridge Case.
22. The Act did not Create New Powers in the Carriers.
23. The Act Applies only to the Carrier's Duties toward Shippers and Passengers.
24. Duty to Provide Adequate Service and Facilities—Through Routes, Joint Rates and Switch Connections.
25. Charges for Incidental Services.

Moore.

§ 16. Scope and effect of the Act.
§ 17. Construction of the Act.
§ 18. Rights and powers of carriers not enlarged by the Act.
§ 19. The provisions as to discriminations and preferences apply only to the carrier's duty as a common carrier.
§ 20. Carrier's duty to provide reasonable facilities and adequate service.
§ 21. All interstate commerce not included.

This is a fair illustration of what follows in the succeeding chapters. Take the same chapters above referred to, and we find great similarity of language and expression and substantially the same citation of cases with the same errors in reference almost without exception. Overruled and reversed cases are in many cases cited by Moore as authority without any reference to such facts, and this is true when the change in the decision of the case was after the publication of Drinker and prior to that of Moore. Errors in spelling names and in reference to pages are identical in numerous instances.

In volume 1, Drinker, p. 67, he says:

"The purpose of the Act with regard to its effect on competition between railroads was thus stated by Commissioner Veazey: [3] 'To preserve legitimate competition between public carriers, and to prevent that competition which is illegitimate, that is, competition which is not contrary to the public interest, or in other words, opposed to the public welfare, is precisely that which among other things, the law undertakes to accomplish.'"

The reference "[3]" of Drinker in a note is:

[3] "Gerke Brewing Co. v. Louisville & N. R. Co., 5 Interst. Com. Comm. R. 596, 606."

This is a misquotation, does injustice to Commissioner Veazey, and human intelligence is startled to find one of the commissioners declaring that "illegitimate competition" is that competition which is not contrary to the public interest and not opposed to the public welfare; that is, competition which is in the interest of the public and not opposed to the public welfare. This is a new and a somewhat startling definition of "illegitimate competition," and necessarily involves the proposition that all competition which is contrary to the public interest and opposed to the public welfare is legitimate. What Commissioner Veazey declared in the case cited is:

"To preserve legitimate competition between public carriers, that is, competition which is not contrary to the public interest and to prevent

that competition which is illegitimate, or in other words, opposed to the public welfare is precisely that which," etc.

If Moore had read the case before or while writing his work he would not have thus misquoted and misrepresented Commissioner Veazey, and given aid and encouragement to Drinker in thus confusing, if not confounding, the legal fraternity. But on page 37 of his work (without giving Drinker credit) he blindly copies the exact words found in Drinker and in a note (15) cites the same case. Drinker threw the responsibility for the statement on Commissioner Veazey, by purporting to quote but in fact misquoting, while Moore does not purport to quote, but adopts this erroneous definition and statement as his own, and assumes the responsibility, thus doing himself injustice. Instances of this kind where infringement by copying is charged are persuasive evidence, as they tend to show mere copying, an absence of independent examination and of study and reflection.

It is easy to account for the misquotation in Drinker as that of the copyist who omitted and then inserted the omitted words in the wrong place, but Moore undoubtedly copied, as he would never have made the statement on reflection or an examination of the case cited.

I am of the opinion from the books and affidavits presented that Moore took volume 1 of Drinker and from the point indicated followed him, changing the language generally, but not always, and making some additions, and using his references without much, if any, independent examination. There is no probability or possibility that the one book would be mistaken for the other, but Moore, being later and in one volume, would be liable to supersede Drinker to quite an extent. There is no evidence of much independent thought or reasoning in either work. Both writers have confined themselves substantially to a recital of what the various courts have held or indicated on the various subjects. When two writers on the same subject follow this course the result is a sort of digest of decisions, and there is liable to be much similarity of statement, and in numerous instances a use of the same language and expressions as taken from the syllabi of the cases or from the language of the judges. Each writer has the undoubted right to copy the syllabi and extracts from the opinions, as between themselves, but where one has made an abstract of the one or the other, or of both, partially or wholly in language of his own, the other has no right to copy it into a work of his. In this case there are not many instances where Moore has copied Drinker, but his language is so clearly like that of Drinker, there being minor changes only, that one cannot escape the conclusion that Moore did vastly more than read Drinker, the decisions, and other works, and then frame a chapter or a paragraph of his own. It is also shown that in a number of instances Drinker copied from prior writers on the same subject, and as Moore has the same language in his book the charge is made that this is evidence of infringement by mere copying. To my mind this is no evidence of any wrong, but is evidence of mere copying in connection with the other facts. Moore had the same right to copy from prior authors, from the opinions of judges, and from the headnotes of reported cases that Drinker had. Drinker

could not pre-empt the field in these regards. But I think the inherent evidences are that Moore went beyond this—quite far beyond what he had a right to do in gathering information from Drinker and using it in writing his book. If Moore had done nothing beyond following the general arrangement of subjects adopted by Drinker I should fail to find infringement. Moore had the same right as Drinker to write on this subject. If Drinker has adopted the best and most orderly and connected mode of treating these subjects, step by step, I know of no reason why Moore should resort to a disorderly and disconnected mode of treating them. Drinker, we will assume, taught Moore and others the best and most orderly mode of treating the subject. Must Moore be charged with infringement if he avails himself of the knowledge thus gained? I think not. There has been time enough since the bringing of this action in which to have taken the evidence of all the witnesses, where cross-examination probably would have thrown light on most if not all the disputed questions, and submit the case on final hearing. Cross-examination is one of the surest modes of ascertaining the exact truth. However, this has not been done. As the case stands, on the affidavits presented, I am of the opinion the preliminary injunction should be continued until the determination on final hearing. Moore claims, in substance, that he did in fact examine all the cases and that he directed the omission of many cases and the substitution of others, but that his stenographer or clerks failed to follow instructions. But can he be permitted to avoid the charge of infringement by placing the responsibility for the copying on his agents and servants? Moore also failed to properly treat the subject in view of the amendments. In certain matters where the amendments, subsequent to Drinker, had changed the law, Moore ignored them and wrote, in imitation of Drinker, as if they had not been made. As a work written or purporting to have been written after the amendments it ought to be revised and corrected before being placed on the market. Of course this court cannot assume to continue the injunction for the protection of the legal profession. It is the Bisel Company which complains, but the general public will not suffer by the action of the court in continuing this injunction until a final hearing where all disputed points may be fully explained.

There will be an order accordingly.

In re BRENNER.

(District Court, M. D. Pennsylvania. September 13, 1911.)

No. 1,829.

1. BANKRUPTCY (§ 136*)—REFEREES—AUTHORITY TO RECONSIDER ORDER.

Where an order of a referee requiring a bankrupt to turn over property to his trustee was based on a mistake of fact, he has power, on petition of the bankrupt, filed within the time limited for review of his decision, and the mistake being shown, to reconsider and set aside such order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 228*)—FINDINGS OF REFEREE—REVIEW.

Findings of a referee, based on the testimony of witnesses appearing before him, should not be overruled, unless manifestly erroneous and flagrantly against the weight of testimony.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.*]

In the matter of James N. Brenner, bankrupt. On review of order of referee, made on petition to require the bankrupt to turn over property to his trustee. Affirmed.

Myer Rosenbush, for petitioner.

Elmer W. Ehler and W. Justin Carter, opposed.

WITMER, District Judge. The referee on June 3, 1911, made and filed an order requiring the bankrupt to pay over $2,000 to the trustee. This order was based upon the assumption of the fact, forming the basis of the calculation upon which the referee rested his order, that certain claims filed with the referee, up to February 25, 1911, for merchandise sold to bankrupt and delivered to him since September 1, 1910, aggregated $9,200. This total or calculation of such claims was offered by one of the creditors and accepted by all parties in interest without verification, and adopted by the referee in his calculation, as follows:

Stock of merchandise found by referee August, 1910	$ 2,000 00
Merchandise received from September 1, 1910, to January 27, 1911, as shown by claims filed up to February 25	9,200 00
Merchandise purchased since September 1, 1910, as shown by claims filed since February 25, 1911	2,081 93
Total of merchandise shown to have been in possession of bankrupt since September 1, 1910	$13,281 93
The referee finds that the bankrupt has accounted for assets of this total	10,347 37
Leaving to account for a balance	$ 2,934 56

After the filing of the order, but within the period allowed by rule for review, the bankrupt, on June 13, 1911, filed with the referee his petition for review of such order, and likewise filed a motion for the opening of the order, averring that the total of claims filed with the referee, up to date, for merchandise delivered to him since September 1, 1911, as appeared by a strict footing of all such bills filed, showed only an aggregate or total of $9,174.30, and not the sum of $13,281.93, as supposed.

[1] At a hearing before the referee on June 17th it was found by the referee, and conceded by the trustee and his counsel, who also then, as now, represents the petitioning creditors, that, in the language of the referee, "the merchandise claims filed up to February 25, 1911, amount to $6,162.42, and not $9,200, as heretofore accepted by everybody concerned." The referee in his report further says, "And the trustee and his counsel admitted the above statements to be correct," concluding as follows:

"The referee having found that the bankrupt had failed to account for $2,934.56, and it now being shown that he was improperly charged with over

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

$3,000 more merchandise than the claims actually show, the structure based on such error, being now deprived of its foundation, falls. I am not unmindful of the character of the bankrupt's testimony, and the facts and circumstances alluded to in the former opinion, and I have not changed my opinion therein; but a surcharge, if made, must be based on substantial evidence, not on suspicion, however strong, nor by way of punishment. Neither do I think that the few claims filed since the calculation, nor the few that remain unfiled, would add such sufficient amount to warrant an order requiring the bankrupt to pay over. Under this state of facts, where a clear, palpable error has been made, and, the truth being made known, an entirely different result appears, ought the judge to be burdened with the work of reviewing this case and reversing the order made by the referee, which action I should recommend, or has the referee the power to open and set aside his former order? I believe the latter course is the proper practice under the circumstances disclosed herein, and I will adopt it. It is accordingly ordered that the petition for review of the order of the referee herein, requiring the bankrupt to pay the sum of $2,000 to his trustee, which was filed June 8, 1911, be denied, and that the motion to open the said order be and the same is hereby granted, that the said order be and the same is hereby set aside and annulled, and the prayer of the petition that the bankrupt be surcharged is hereby refused."

We are not convinced that the referee exceeded his authority in correcting, in manner appearing, the order made and entered, based on facts in his possession clearly showing to have been founded on palpable error induced by parties other than the person aggrieved. In this conclusion we are strengthened, bearing in mind that the party aggrieved moved the referee to the effect within the time limited for review of his decision by the District Judge. Furthermore, the admissions and conclusions of the parties, before the referee, referring to this vital and most flagrant error, practically amounted to an agreement calling for the revocation of the order, and the exercise, I take it, of such equitable relief as the circumstances of the case required.

The District Judge would surely not hesitate to annul or set aside an order founded on admitted mistake of facts; and, being groundless, it was practically no order at all. It will be remembered, furthermore, that the bankruptcy court is a court of equity in matters over which it exercises jurisdiction (In re Huddleston, 1 Am. Bankr. Rep. 572), and that equity will interfere in cases of mistake in judgment and other matters of record injurious to the rights of the parties. Gump's Appeal, 65 Pa. 476; 1 Story's Eq. Jur. § 166; Colwell v. Warner, 36 Conn. 224; Wheeler v. Kirtland, 23 N. J. Eq. 13, 15.

Again, where the bankruptcy court has jurisdiction, the referee has also jurisdiction, except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt, or seeks a discharge from bankruptcy. Bankruptcy Act July 1, 1898, c. 541, § 38 (4), 30 Stat. 555 (U. S. Comp. St. 1901, p. 3436).

The court is further requested to determine whether, under all the circumstances and facts of the case, any order ought to be made requiring the bankrupt to pay a sum of money to his trustee for the value of assets alleged to be withheld.

It is insisted that the referee has erred in his conclusion that the stock of merchandise on hand August, 1910, was of the value of but $2,000, claiming that such stock far exceeded this amount. This, in-

deed, is the only serious dispute now remaining to be noted. Referring to this subject, the referee says:

"This is the crucial point in the case, and I will proceed to examine carefully all the evidence thereon."

After a full rehearsal of the testimony, he concludes:

"The trustee asks that the value be fixed at $5,000, and it may well be that the evidence would justify such finding; but giving the bankrupt the benefit of every doubt, giving full weight to his statement that he had sold goods below cost, allowing liberally for depreciation, it seems to be impossible that the bankrupt could have had less than $2,000 worth of stock August, 1910, and in all probability he had more; and the referee will find said value to be the sum of $2,000."

[2] Applying here the rule that findings of a referee, drawn from the testimony of witnesses appearing before him, should not be overruled, unless manifestly erroneous and flagrantly against the weight of the testimony, influences the court by no means to change the learned referee's conclusions. It is true that the conduct of the bankrupt as a witness cannot be justified; but it does not appear that his testimony influenced to any degree the findings of the referee. It no doubt excites suspicion, but it does not amount to proof of property in his possession warranting an order that may result in imprisonment for contempt.

The order of the referee is affirmed.

DEPOT CARRIAGE & BAGGAGE CO. v. KANSAS CITY TERMINAL RY. CO. et al.

KANSAS CITY TERMINAL RY. CO. v. DEPOT CARRIAGE & BAGGAGE CO.

(Circuit Court, W. D. Missouri, W. D. July 7, 1911.)

1. CARRIERS (§ 14*)—DEPOT PRIVILEGES—DISCRIMINATION—STATE STATUTES.
The Missouri statute against discrimination has no application to a suit by a transfer company to compel a terminal railway and union depot company of a city to grant to it the right to maintain a booth and stand within the depot for the transaction of its business and to solicit the transfer of passengers and baggage, the greater part of which was interstate business.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 14.*

Use of carrier's premises by hack and cab drivers, hotel runners, etc., see note to Donovan v. Pennsylvania Co., 57 C. C. A. 367.]

2. CARRIERS (§ 14*)—DEPOTS—TRANSFER BUSINESS—DISCRIMINATION.
A union depot company in a city has a right to make an exclusive contract with a concern for the transfer of passengers in that city, and may lawfully refuse to grant others engaged in the same business an opportunity to use the depot and adjacent grounds to solicit patronage on equal terms.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 28-30; Dec. Dig. § 14.*]

In Equity. Suits by the Depot Carriage & Baggage Company against the Kansas City Terminal Railway Company and Union Depot

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company, and cross-action by the Kansas City Terminal Railway Company against the Depot Carriage & Baggage Company. Decree for defendant and cross-complainant.

Samuel W. Moore and Samuel W. Sawyer, for Terminal Railway Co. and Union Depot Co.

H. E. Longenecker, for Depot Carriage & Baggage Co.

SMITH McPHERSON, District Judge. This is an application for a temporary injunction by the Kansas City Terminal Railway Company against the Depot Carriage & Baggage Company. The Carriage & Baggage Company for several years had a contract for an agreed rental to maintain a booth and stand inside of the Union Depot at Kansas City, Mo., for the sale of tickets and soliciting of business for the transfer of baggage and passengers from one depot to another, and between the Union Depot and hotels and residences in both Kansas City, Mo., and Kansas City, Kan. The greater part of this business was interstate business, as by far the larger per cent. of passengers, and the baggage thus desiring conveniences were and are of interstate passengers.

[1] The Carriage Company insists that, under a Missouri statute against discrimination, it has the same rights as any other person or company to maintain a booth and stand within the depot for the transaction of its business and soliciting the same. It is my opinion that such statute has no application whatever to the facts presented by this controversy. Railroad companies and union depot companies are engaged in business both for profit, and in a sense are private concerns. But in a much larger sense they are doing business of a public character and for the general public. The rights of the public are paramount to the rights of all other parties. All passengers demeaning themselves as they should have the right to ingress and egress to railway trains and all conveniences pertaining thereto, provided they pay the usual and customary and legal fares therefor. But it is both the moral duty, as it is the legal duty, of the railway companies and depot companies to adopt such reasonable rules and regulations as will provide for the comfort and convenience and transportation of the general public.

The Depot Carriage Company had a valid contract which was exclusive in its character, giving to it a monopoly of such business, and all other parties were prevented from having such conveniences or in any way enjoying any part of the said monopoly. The Depot Company claimed that the Carriage Company was not properly serving the public. This question is not ruled on because it is not the question. That contract was canceled by the Depot Company by giving 30 days' notice of its expiration, according to the terms and conditions of the contract. Thereupon a contract was made with the Blue Taxicab Company to furnish taxicabs and carriages and wagons for the transfer of baggage and persons as aforesaid, giving the Blue Taxicab Company the right to maintain a booth or stand within the depot and solicit the business of transferring passengers and baggage.

The Carriage Company insists that it is entitled to have an equal

privilege under a similar contract, by tendering and paying the rental therefor.

[2] The question is as to the right of the Depot Company to make a single contract with a single concern for the transaction of this business. It is a matter of general knowledge that it is exceedingly annoying to have a multitude of soliciting agents harassing passengers for transportation. Many of such soliciting agents are rough and uncouth, and become exceedingly offensive in their solicitations. Persons who travel but little are so bewildered as not to know what to do. Excessive charges are imposed upon them, and they are subjected to many inconveniences, and sometimes grievous annoyances, and often insults and greater wrongs. The general public has the right to be free from all these things.

The Supreme Court of the United States has determined these questions. The Express Cases, in 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, and Donovan v. Pennsylvania Company, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192, have put these questions beyond debate. Transportation companies, such as express or carriage companies, do not have the rights, which must be enjoyed by the public at large, of being allowed egress and ingress at the railway stations. The railway company has the right to make the one contract with one concern to serve the general public at fixed and certain and reasonable charges for the transportation of persons and baggage from one depot to another, and from depots to hotels and residences and business houses. Under these decisions the question is not longer debatable.

The Depot Company and Terminal Company are awarded an order vacating the temporary injunction heretofore issued against them and are entitled to and will receive a temporary injunction preventing the Baggage Company from pursuing their vocation in and about the depot and its adjacent premises.

SMITH v. STALEY.

(District Court, W. D. New York. June 7, 1911.)

SHIPPING (§ 71*)—MASTER—ACTION AGAINST FOR NEGLIGENCE.

Evidence considered in an action in personam against the master of a tug for the death of libelant's intestate alleged to have been drowned through the negligent navigation of the tug by respondent and *held* not to sustain such allegation.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 71.*]

In Admiralty. Suit in personam by Thomas Smith, administrator of Thomas E. Smith, deceased, against Simeon Staley. Decree for respondent.

Hoyt & Spratt and H. E. Rourke, for libelant.

Clinton B. Gibbs, for respondent.

HAZEL, District Judge. The libel alleges that the decedent was drowned on October 23, 1905, on account of the careless and negligent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

navigation of the steam tug Hudson by her master, the respondent, and, further, that the tug was unseaworthy, and that the steamer Huron which came in collision with said tugboat in Buffalo river was also negligently navigated. The owner of the Huron has not been served with process. No testimony was given to show that the machinery of the tug was defective or that she was unseaworthy. The material facts briefly stated are as follows:

The freight steamer Huron came into Buffalo river under her own power unassisted by a tug and navigating just prior to the collision at about 3 or 4 miles an hour. There was a strong gale from the southwest blowing approximately 40 miles an hour. At the place of collision, where the river is about 230 feet wide, the steamer Ramapo was moored to the Lackawanna dock with her bow towards Commercial Slip and about 50 feet southerly therefrom. Across the river moored to the shore one behind the other were two other vessels, leaving a passway of about 125 feet of water space. There is a bend in the river below Commercial Slip, and it became necessary for the steamer in turning to swing on her port wheel and then kick ahead at full speed to straighten in her course. The respondent claims that as the steamer Huron approached the Commercial Slip the tugboat turned into the river, going in the same direction; that the steamer passed the tug, and in her efforts to straighten up in her course she crowded the tug against the steamer Ramapo, impinging her, in consequence of which she immediately sank to the bottom of the river. The decedent, who had previously entered the after cabin of the tugboat, was drowned. The evidence is conflicting as to whether the steamer passed the tug, or whether the tugboat overtook the steamer and attempted within narrow water space to "glide between the Huron and the Ramapo."

Libelant's claim of negligence on the part of the master of the tugboat is not satisfactorily supported, and I do not believe that the collisions were due to any inattention on his part. It would undoubtedly have been a fault in the tug, in view of the severity of the wind, to go so near the Huron, had she been ahead, as to be unable to avoid her when she came to make the turn in the bend of the river, and, moreover, it would also have been a fault to have attempted to pass the steamer without blowing a proper signal and receiving her consent, as provided by rule 25 of the White Law and rule 9 of the Pilot Rules, but such alleged acts of want of proper precaution are not proven by a fair preponderance of the evidence. The weight of the evidence is to the contrary. The witness Quilligan, master of the Ramapo, who was in an excellent position to observe the maneuvers of the steamer and tug, testified that the rate of speed of the Huron after he first observed her was from three to four miles an hour, which was reduced to two miles an hour at the time the turn in the bend of the river was made; that there was sufficient room for the two boats to pass side by side and pass the Ramapo. He testified that he saw the Huron sheering and there was imminent danger of her coming in contact with the Ramapo. He was unable to state whether the tug or the steamer was ahead. Although the credible facts are meager we may indulge in

the probability that the steamer was slightly ahead and that in turning she sheered into the tug, such sheer being undoubtedly caused by the severity of the wind. This probability finds support, it seems to me, in the fact that the steamer was light forward and loaded aft, making it difficult to break the sheer. In proceeding alongside the steamer the tugboat was not in a dangerous position. She had a right to leave Commercial Slip irrespective of whether the bow of the Huron was ahead at the time she left, or whether her bow was 60 or 70 feet to the rear. It seems to me on the evidence presented that the respondent had the right to presume that the steamer would proceed in her course and safely make the turn in the river.

The libel is dismissed, with costs.

THE ESTER.

(District Court, E. D. South Carolina. July 31, 1911.)

1. ADMIRALTY (§ 5*)—WHAT LAW GOVERNS—ALIEN SEAMAN ON FOREIGN SHIP.
A German, on being duly enrolled and signing articles as a seaman on a Swedish ship, became for the time being, for all purposes of consideration by the courts of the United States in his relations to the ship, a subject of the Kingdom of Sweden.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 5.*]

2. ADMIRALTY (§ 6*)—VESSELS IN FOREIGN PORT—LAW GOVERNING.
The merchant vessels of one country visiting the ports of another country for the purposes of trade subject themselves to the laws which govern the port they visit so long as they remain.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 6.*]

3. ADMIRALTY (§ 5*)—JURISDICTION—FOREIGN VESSELS.
In the absence of treaty stipulations, the courts of admiralty have civil jurisdiction in all matters appertaining to a foreign ship while in port, and also in certain cases when the court has the vessel in its territorial jurisdiction, although the cause of action arose on the high seas.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. § 5.*]

4. ADMIRALTY (§ 5*)—JURISDICTION—CONTROVERSIES BETWEEN FOREIGN VESSELS AND SUBJECTS—DISCRETION.
The exercise of civil jurisdiction by courts of admiralty of the United States, where those concerned are all citizens of the same foreign state and the cause of action arose on or with regard to a ship of such state, is not imperative but discretionary, and where the controversy involves matters arising beyond the territorial jurisdiction of this country, or relates to differences between master and crew, or the crew and shipowners, the court, on general principles of comity, will not take jurisdiction unless there is special reason for doing so, and will require the consul of such country to be notified, and, although not absolutely bound by, will pay respect to, his wishes. But where special circumstances exist, as where the voyage is ended or seamen have been dismissed or treated with great cruelty, the courts, in the absence of treaty stipulations, will entertain jurisdiction, even against the protests of the consul.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. ADMIRALTY (§ 5*)—JURISDICTION—FOREIGN SHIPS—EFFECT OF TREATY PROVISIONS.

Where treaty stipulations exist with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and crew of ships of such country or other matters occurring on the ship, such stipulations are the law of the land and must be faithfully and fairly observed.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 5.*]

6. TREATIES (§ 11*)—CONFLICT BETWEEN TREATY AND STATUTE.

Congress has power to regulate matters affecting foreign seamen and foreign vessels, and foreigners generally, when within the ports of this country, by making their entrance subject to such conditions as it may impose, or wholly withdrawing its consent to permit them to enter, and, where it has passed an act which may conflict with prior treaty stipulations, it is the duty of the courts to uphold the later statute if clear and explicit, even in contravention of express stipulations in an earlier treaty.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. § 11.*]

7. ADMIRALTY (§ 5*)—DISCRETIONARY JURISDICTION—FOREIGN VESSELS AND CREWS.

What circumstances will influence a court of admiralty to take jurisdiction of a suit between a foreign seaman and a foreign vessel, in the absence of applicable treaty stipulations, over the protest of the consul of the country to which the vessel belongs, is a matter to be determined on the particular facts of each case.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. § 5.*]

8. ADMIRALTY (§ 5*)—JURISDICTION—FOREIGN SHIPS AND CREWS—TREATIES.

Where special treaty stipulations exist with a foreign country which on their face exclude the jurisdiction of a court of admiralty over a cause and vest it in a consul of such country, the court is not empowered to proceed and take jurisdiction because there is no such consul within the district nor because of any other special circumstances.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 5.*]

9. ADMIRALTY (§ 5*)—JURISDICTION—FOREIGN VESSELS—TREATY PROVISIONS.

Rev. St. §§ 4079–4081 (U. S. Comp. St. 1901, pp. 2766, 2767), which provide the mode by which foreign consuls shall exercise the exclusive jurisdiction vested in them by special treaty stipulations in controversies between masters and crews of foreign vessels, do not affect the force of the treaty provisions excluding the admiralty courts from jurisdiction in case a consul does not follow such mode.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 5.*]

10. ADMIRALTY (§ 20*)—JURISDICTION—CONSTRUCTION OF TREATY—"DIFFERENCES" BETWEEN OFFICERS AND CREW.

Under the provisions of the treaty of July 4, 1827, between Sweden and Norway and the United States (8 Stat. 352, art. 13), and that of June 1, 1910, between Sweden and the United States, both of which vest in the consular officers of each country exclusive jurisdiction to hear and determine "differences" which may arise between the officers and crews of merchant vessels of such country either at sea or in port without interference by the local authorities unless in case of breach of the peace, etc., a court of admiralty of the United States is without jurisdiction of a suit by a foreign seaman on a Swedish vessel against such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vessel based on the alleged negligence of the master by which libelant was injured in an American port and compelled to leave the vessel.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 3, p. 2064.

Admiralty jurisdiction of suits between foreigners, see note to 87 C. C. A. 193.]

11. ADMIRALTY (§ 5*)—JURISDICTION—FOREIGN VESSELS—RULE OF COMITY.

Assuming that such treaties do not exclude the jurisdiction of a court of admiralty absolutely, but that it may assume such jurisdiction in its discretion, it should not do so over the objection of a Swedish consul indorsed by the minister from that country.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 5.*]

In Admiralty. Suit by Hubert Jacob Osterkamp against the Swedish steamship Ester. On petition to dismiss. Petition granted.

N. B. Barnwell and C. D. Schroder, for libelant.
Huger & Wilbur, for respondents.

SMITH, District Judge. This is a libel in rem against a foreign steamship, brought to recover unpaid wages to the amount of $174.55, and in addition thereto damages for personal injury to the amount of $5,000. The respondents, the owners of the ship, have intervened herein, appearing especially to raise the question of jurisdiction, and have filed a sworn petition, accompanied by affidavits and certificates, and have further filed exceptions to the libel, claiming that the matters therein stated are not within the jurisdiction of this court. Upon the libel and this petition, with the accompanying affidavits and certificates and these exceptions and the answer to the petition, a motion has been made to dismiss the cause for lack of jurisdiction, and the case has been heard upon this motion. The facts appear to be as follows: The steamship Ester is a Swedish steamship, sailing under the flag of the Kingdom of Sweden, and is owned by a corporation or company styled the Angfartygsaktiebolagat Karin, which is, and all the members of which are, citizens of the Kingdom of Sweden. This Swedish steamship, whilst lying in the port of Nordenham, in the German Empire, and destined on a voyage to Charleston, S. C., and thence to some further ports as might be deemed expedient, until it should arrive at some port in the Kingdom of Sweden, enrolled the libelant, Osterkamp. Osterkamp, it appears, signed the articles of the ship in due form and went on the ship and served in pursuance thereof. At the time of signing these articles, he was a citizen of the German Empire and under the age of 21 years, and therefore a minor by the laws of the state of South Carolina. The vessel arrived at the port of Charleston, and whilst in that port, lying at her dock at one of the wharves in that port, the libelant, while in performance of his duties on the ship, fell through an open coal chute into a coal bunker, severely injuring himself thereby, in consequence of which he was sent by the master of the ship to a hospital in the city of Charleston. While he was confined in the hospital, the vessel departed from the port of Charleston, leaving the libelant in the hospital, and after visiting various ports in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the United States, returned to the port of Charleston, where she was at the time she was libeled herein. It appears that there is no Swedish consul or vice consul or consular agent or office within the port of Charleston or the territorial jurisdiction of the district of South Carolina, and the relations between the vessel and Osterkamp have been severed.

The petition of the shipowners sets up that, the vessel being a Swedish vessel, and owned by Swedish citizens, the libelant, when he became enrolled as a seaman on that vessel, became for the time being, so long as his term of service lasted, a citizen, and subject of the Kingdom of Sweden, and that, this matter being a question of difference between the master of a Swedish vessel and a citizen and subject of that Kingdom as a seaman on that vessel, under the treaty stipulations between the United States and the Kingdom of Sweden, this court has no jurisdiction, and that, even if it had jurisdiction, as a matter of comity it will not exercise that jurisdiction where the Swedish consul protests against the exercise by the court of any jurisdiction in this case. The petition further alleges that there is a certain declaration between the government of the King of Sweden and the government of the Emperor of Germany concerning assistance to destitute seamen, which provides that whenever a seaman belonging to one of the contracting parties, after having served on board the vessel of the other contracting party, is left behind in a third state or its colonies, and the said seaman is in a condition of distress, then the government on board of whose vessel the seaman has served is bound to support him until he again enters into a ship's service or finds other employment or until he arrives in his native country, or dies. The consul for Sweden in New York certifies to the court that the matter of the adjustment of this controversy and the performance of these treaty provisions between Germany and Sweden is in course of correspondence between the consuls of those countries, and that it is the desire of the consulate that the provisions of this declaration should be availed of and that the seaman Osterkamp be returned to Germany according to the requirements of the declaration. In addition to that, there is presented to the court a letter from the Swedish minister at Washington, asking that the request of the consul for Sweden in New York be granted.

[1] On the other hand, the German consul residing in the city of Charleston, state of South Carolina, denies that the matter of adjustment of this controversy and of the treaty provisions between Germany and Sweden is in correspondence between the consuls of the respective countries, and requests this court to take and hold jurisdiction of the cause and administer such justice and relief as Osterkamp may be entitled to upon his claim. This application of the German consul may be disregarded. When Osterkamp was duly enrolled as a seaman on a Swedish vessel, and signed the articles of employment on that vessel, he became for the time being, for all purposes of consideration by the tribunals of this country in his relations to the ship, a citizen of the Kingdom of Sweden. Ross v. McIntyre, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581; The Marie (D. C.) 49 Fed. 288.

The case presented, therefore, is the case of a controversy based

upon a claim of a citizen of the Kingdom of Sweden for damages received by him on a ship belonging to the Kingdom of Sweden, whilst in the performance of his duties as a seaman duly enrolled on that ship, and caused by the negligence of the master of that ship, also a citizen of Sweden. The libel states that the injuries were caused by the carelessness and negligence of the master of the vessel, in that libelant was required and directed in pursuance of the commands of the master to pass through a dark and narrow passageway between the decks of the vessel, in the discharge of his duty, in which passageway was situated the coal chute down which libelant fell, which coal chute should have been closed, but was carelessly and negligently left open and unguarded and unlit by the master. Has this court jurisdiction of such controversy? And, if so, is that jurisdiction imperative or discretionary? And, if the latter, do the circumstances of this case call for its exercise?

The general rule of international law is stated in the Digest of the International Law of the United States, edited by Francis Wharton, and published by the government (volume 1, p. 130), to be that:

> "So far as regards acts done at sea before her arrival in port, and acts done on board in port by members of the crew to one another, and so far as regards the general regulation of the rights and duties of those belonging on board, the vessel is exempt from local jurisdiction; but if the acts done on board affect the peace of the country in whose ports she lies, or the persons or property of its subjects, to that extent that state has jurisdiction."

This rule as so stated, however, has been modified by the decisions of the Supreme Court of the United States.

In Ex parte Newman, 14 Wall. 150, 20 L. Ed. 877, the court, in the course of the delivery of its opinion (although the point was not involved in the question actually decided), states, on the question of a libel by a Prussian seaman against a Prussian vessel for wages, that admiralty courts, it is said, will not take jurisdiction in such a case except where it is manifestly necessary to do so to prevent a failure of justice; but the better opinion is that, independent of treaty stipulations, there is no constitutional or legal impediment to the exercise of jurisdiction in such a case. Such courts, may, if they see fit, take jurisdiction in such a case; but they will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted. His consent, however, is not a condition of jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion whether jurisdiction in the case ought or ought not to be exercised. This and the succeeding cases in which the subject has come up for an opinion in the Supreme Court of the United States appear to have established the following rules:

[2] (1) The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain. United States v. Diekelman, 92 U. S. 520, 23 L. Ed. 742; Wildenhus' Case, 120 U. S. 11, 7 Sup. Ct. 385, 30 L. Ed. 565.

[3] (2) In the absence of treaty stipulations, the courts of admiralty have civil jurisdiction in all matters appertaining to the foreign ship while in port, and also in certain cases when the court has the vessel in its territorial jurisdiction, although the cause of action arose on the high seas. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Wildenhus' Case, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565.

[4] (3) The exercise of this civil jurisdiction, where those who are concerned are all citizens of the same foreign state and the cause of action occurred on or with regard to the ship, is not imperative, but discretionary, and the courts from motives of convenience or international comity will not take jurisdiction without the assent of the consul of the country to which the ship belongs, where the controversy involves matters arising beyond the territorial jurisdiction of this country, or relates to differences between the master and the crew, or the crew and the shipowners. In such cases on such general principles of comity, the admiralty courts of this country will not interfere between the parties, unless there is special reason for doing so, and will require the foreign consul to be notified, and although not absolutely bound by, will always pay respect to, his wishes as to taking jurisdiction. Ex parte Newman, 14 Wall. 152, 20 L. Ed. 877; The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Patterson v. Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

(4) Where, however, special circumstances exist, such as where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, the courts, in the absence of treaty stipulations, will entertain jurisdiction, even against the protest of the consul. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

[5] (5) Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Wildenhus' Case, 120 U. S. 17, 7 Sup. Ct. 385, 30 L. Ed. 565.

[6] (6) Congress has power by legislation to regulate matters affecting foreign seamen and foreign vessels and foreigners generally when within the ports of this country by making their entrance subject to such conditions, as Congress may seek to impose or withdrawing its consent to permit them to enter wholly, if it see fit. Patterson v. Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

(7) Where Congress has passed an act which may conflict with prior treaty stipulations, it is the duty of the court to uphold the later statute if clear and explicit, even in contravention of express stipulations in an earlier treaty. Fong Yue Ting v. United States, 149 U. S. 720, 13 Sup. Ct. 1016, 37 L. Ed. 905; Patterson v. Eudora, 190 U. S. 178, 23 Sup. Ct. 821, 47 L. Ed. 1002.

The decisions of the lower federal courts in the United States have been many, but it is difficult to draw any uniform, logical rule from them.

Consideration of these cases shows that they may be said to fall within the following four classes or categories:

First. This class includes cases in which it has been held that the courts of admiralty have the right to take jurisdiction in the absence of special treaty stipulations in controversies between foreign seamen and foreign vessels, whether arising on the high seas or in the port, and whether based on tort or for wages. That this jurisdiction is not compulsory, but is discretionary. That this discretion will not be exercised against the protest of the consul of the country to which the vessel belongs, except under special circumstances. Where these special circumstances exist, however, the jurisdiction will be exercised, notwithstanding such protest. The Becherdass, 1 Low. 569, Fed. Cas. No. 1,203; The Lilian M. Vigus, 10 Ben. 385, Fed. Cas. No. 8,346; Boult v. Ship Naval Reserve (D. C.) 5 Fed. 209; The Carolina (D. C.) 14 Fed. 424; Fry v. Cook, Id.; The Montapedia (D. C.) 14 Fed. 427; The City of Carlisle (D. C.) 39 Fed. 807, 5 L. R. A. 52; Camille v. Couch (D. C.) 40 Fed. 176; The Topsy (D. C.) 44 Fed. 631; The Sirius (D. C.) 47 Fed. 825; The Karoo (D. C.) 49 Fed. 651; The Walter D. Wallet (D. C.) 66 Fed. 1011; Bolden v. Jensen (D. C.) 70 Fed. 505; The Lamington (D. C.) 87 Fed. 752; The Eudora (D. C.) 110 Fed. 430; The Kestor (D. C.) 110 Fed. 432; The Troop (D. C.) 118 Fed. 769; The Alnwick (D. C.) 132 Fed. 117; The Ucayali (D. C.) 164 Fed. 897.

It appears that there are no special treaty stipulations between this country and Great Britain. The Ucayali (D. C.) 164 Fed. 899; The Bound Brook (D. C.) 146 Fed. 163; The Troop (D. C.) 117 Fed. 557; The Walter D. Wallet (D. C.) 66 Fed. 1011. All the above-mentioned cases are cases of British vessels, with the exception of the case of Bolden v. Jensen (D. C.) 70 Fed. 505, which was the case of a Chilian vessel, and as to which case it is not said whether there were any special treaty stipulations or not.

[7] There is no defined rule as to the special and particular circumstances which in this class of cases has induced the court to take jurisdiction, notwithstanding the protest of the consul. In The Becherdass they were stated to be such as where the voyage ends by its own terms, and the wages are due in the jurisdiction where the suit is brought, or where the voyage has been wholly broken up by the sale of the ship, or where the ship is so unseaworthy that the crew are not bound to go in her, or where they have been forced to leave by the cruelty of the master. In The Lilian M. Vigus, the court held that it was a matter to be determined upon the circumstances of each particular case; that in that case none of the libelants belonged to Nova Scotia, where the ship belonged; that several of them were from different European countries; that their connection with the ship had been actually severed; that the future destination of the ship was wholly uncertain; that libelants had no certainty of relief if remitted to the foreign jurisdiction, as they had not their domicile there; and that to send them to Halifax for the prosecution of their claims at that late day would be practically to deny their claims altogether. In The City of Carlisle the circumstance relied upon by the court was that to decline the

jurisdiction woud be equivalent to a denial of justice; the libelant was separated from the vessel; his condition and the circumstances justified him in leaving her; that the vessel was not expected to reach her home port for many months yet; and that it was shocking to think of turning a poor helpless boy out of the court in a civilized country without redress for a grievous wrong, upon the theory that he had a remedy in the courts of his own country, when it was apparent that however just may be the laws of such country, or impartial their administration, such remedy is under the circumstances to him utterly unavailing. In The Topsy the court held that when the circumstances of the case are such as to demand immediate investigation, or when a seaman discharged from a ship will be put to disadvantage were she suffered to depart, or when she has departed would be compelled to search the world for her, the court would proceed with the case. In The Sirius the jurisdiction of the court was upheld upon the ground that the court would not turn the libelants away without any practicable remedy for what they claimed to be a grievous wrong, inasmuch as the future movements of the vessel were uncertain and her probable return to England remote. In Bolden v. Jensen the court held that, although the injury was inflicted on the high sea on board a foreign ship, it was the duty of the court of admiralty, which for such cases is a court of the world, to administer justice. In The Troop, 118 Fed. 769, the court held that courts of admiralty are obliged to serve to a certain extent as courts of the world, and that in that case it would have been an inexcusable denial of justice to leave the libelant, who was a German, to go to England to seek in the courts of that country enforcement of his rights, as the Troop might not visit any port of England for many years, and even were the libelant to meet her in an English port he would be unable to establish his rights because all the witnesses upon whom he must depend to prove the facts would be absent, and that the British consul residing at Port Townsend and at Tacoma had disclaimed authority to adjudicate libelant's claim for damage. In The Ucayali it was placed upon the ground that the court would entertain jurisdiction in all cases where seamen have been dismissed or treated with great cruelty.

A review of these decisions discloses no uniform rule for the guidance of the court. The circumstances under which the court will act where it has jurisdiction, and that jurisdiction is discretionary, is not limited in these cases, as indicated by the Supreme Court of the United States in The Belgenland, to cases where the voyage is ended, or the seamen have been dismissed or treated with great cruelty; but the discretion is declared to be properly exercised in all cases in which the court may be of the opinion, under the circumstances of the particular case, that it would work hardship or injustice not to take jurisdiction, whether with the assent or against the protest of the consul of the nation to which the ship belongs. This conclusion practically leaves the matter in a position in which upon any application the court must to a certain extent hear the case on the merits. In order to ascertain whether the special circumstances exist in any particular case that would lead the court to take jurisdiction, it would be neces-

sary to go into an examination sufficient at least to disclose in a general way those circumstances and the respective positions of the parties.

Second. The second class of cases are cases in which the courts have held that notwithstanding there are treaty stipulations, apparently excluding the jurisdiction of the court, yet that the court is at liberty to ignore these stipulations and take jurisdiction where there are special circumstances. The Elwin Kreplin, 4 Ben. 413, Fed. Cas. No. 4,427; The Amalia (D. C.) 3 Fed. 652; The Salomoni (D. C.) 29 Fed. 534. In The Elwin Kreplin the jurisdiction was put upon the circumstance of hardship, such as where the sailors who brought the proceedings would have been left paupers and must have returned to Prussia, and there awaited the return of the ship in order to enforce their demands, bringing about a state of things against which the sense of justice of the court revolted. This decision of the District Court in admiralty, however, was overruled by the Circuit Court in the case of the same title in 9 Blatch. 438, Fed. Cas. No. 4,426. In The Amalia the jurisdiction, notwithstanding the treaty stipulations between the United States and Sweden, was placed upon the ground that there was no consul or other officer of Sweden within the territorial jurisdiction of the court, and in the case of The Salomoni, where special treaty stipulations existed with the Kingdom of Italy, the right of the court of admiralty to take jurisdiction was placed upon the same ground as existing where there was no consul or other officer of the nation to which the ship belonged within the territorial jurisdiction of the court. There is no case later than The Salomoni (D. C.), in 29 Fed. 534, which holds the rule announced in this class of cases. The reasoning on which these cases rest is that the treaty contemplates that there shall be a consular officer to exercise the jurisdiction reserved to him. If there is no such consular officer, then the tribunal provided by the treaty fails, and with it should fail the application of the treaty stipulations. The exclusion of the jurisdiction of the local court is supposedly intended only in favor of the special tribunal provided by the treaty. If there is no such special tribunal, then there would be absolutely no court or person to whom the applicant could apply for justice and relief unless the treaty be interpreted to mean that the local court is not deprived of jurisdiction if the office specified in the treaty is not within the reach of the applicant, and that it is the duty of the country under the terms of such a treaty to provide accessible officers to exercise the jurisdiction or leave the matter to the proper local courts.

Third. The third class is that of cases in which it is held that, where the existing treaty stipulations upon the face of them exclude the jurisdiction of the court, such treaty stipulations are to receive faithful observation, and the court cannot take jurisdiction. The Elwin Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426; The Burchard (D. C.) 42 Fed. 608; The Marie (D. C.) 49 Fed. 286; The Welhaven (D. C.) 55 Fed. 80; The Bound Brook (D. C.) 146 Fed. 160; Tellefsen v. Fee, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379. These cases are none of them cases referring to British vessels, but all referring to Prussian, German, Norwegian, or Swedish vessels,

between which countries and the United States special treaty stipulations exist. The decisions in these cases appear to be logical and to furnish an uniform rule. As the law as held by the Supreme Court of the United States is that a treaty with a foreign country is a supreme law of the land, and should be faithfully observed until it terminates, or is repealed or superseded by an act of Congress or another treaty, then it is the logical sequence that no court would have the right to ignore the treaty provisions because of inconvenience thereby caused to the suitor. If there be no consul within the immediate territorial district jurisdiction of the District Court of admiralty, the suitor can apply to the nearest consul in another judicial district of the United States in which such officer may be found, and his inconvenience in having to make that application, or to defer it until he returns to his native country, i. e., the country to which the vessel belongs, would not appear to be a sufficient authority for a court to ignore the treaty stipulation. In the case of Tellefsen v. Fee, the Supreme Judicial Court of Massachusetts held that under the terms of the treaty between the United States with Sweden and Norway all right of action for wages in the courts of this country by a seaman coming within the scope of the treaty was taken away, whether the action be in rem or in personam. That the court had no discretion in the matter, and the local authorities had no right to interfere.

Fourth. There are also cases which have gone to the length of holding that where the proceedings are brought on behalf of an American citizen, although they may be brought against a foreign vessel, and brought by reason of libelant's having served as an enlisted seaman on that vessel, yet that under the Constitution of the United States he has a constitutional right to invoke the jurisdiction of the court, of which he cannot be deprived either by treaty stipulation or act of Congress. Bolden v. Jensen (D. C.) 70 Fed. 505; The Falls of Keltie (D. C.) 114 Fed. 357; The Troop (D. C.) 117 Fed. 557; The Neck (D. C.) 138 Fed. 144. All these last four decisions are by the District Court for the District of Washington. The conclusion arrived at in these later cases appears to be in direct conflict with the principle that a seaman duly enrolled upon a foreign vessel is for the time being, and with regard to his employment on that vessel, a citizen of the same country as that to which the vessel belongs.

[8] From a consideration of the decisions in all these cases in connection with the conclusions reached by the Supreme Court of the United States, it would appear to be the better rule of law that, where special treaty stipulations exist which would upon the face of them exclude this court from jurisdiction in a cause such as the present one, it is not empowered to proceed and take jurisdiction because of any special circumstances in the particular case, as the absence from the district of South Carolina, in which the court is sitting, of a consul or consular agent or officer of the country to which the vessel belongs (and a fortiori not where a consul of the country actually appears and protests, although not resident in the district), or of any other special circumstances, such as brutality exercised towards the seamen, and the fact that if jurisdiction were not taken, and relief given by the court,

it might leave the applicant practically penniless. If the treaty stipulation is the law, it is to be followed by the court under all circumstances. However shocking to our sense of humanity and justice may be the apparent consequences to the seamen of brutality and indifference to their rights when shown by the master of a foreign vessel in port, it is not more cruel in reality than the exercise of such brutality and indifference upon the high seas or in the home port of the vessel, and provided it does not amount to a disturbance of the peace and the tranquility of the port in which the vessel is lying, or is the perpetration in the port of cruelty and maltreatment forbidden by law and which will be restrained and punished from a criminal aspect, there is no more reason on the ground of humanity alone for the courts of that state to take jurisdiction of a civil claim for indemnity, than there would be if it was exercised on the high seas or in the vessel's home port. If, therefore, by treaty it is stipulated that all the relations among and controversies between the crew including the master, officers, and seamen on board a foreign vessel, whether on the high seas or at a port in a foreign state, are to be treated as matters territorially within the jurisdiction of the country to which the vessel belongs, and to be remitted to the consuls, consular officers, or tribunals of that country, then it would not appear to be in the power of any court to disregard the law as embodied in the treaty stipulation because of the court's opinion that under the peculiar circumstances of the case the applicant will go bereft of justice unless this court awards it to him. The responsibility for such consequences rests upon the lawmaking, not the judicial, department of the government.

[9] The provisions of United States Revised Statutes, §§ 4079, 4080, and 4081 (U. S. Comp. St. 1901, pp. 2766, 2767), would not appear to affect the question. The intent of section 4079 is not to provide that, where by treaty exclusive jurisdiction is given over controversies between the master and any of the crew of a foreign vessel to the consular officer of the country to which the vessel belongs, such jurisdiction can be exercised only in the manner directed in sections 4080 and 4081, and if not so exercised the court of admiralty is not deprived of jurisdiction. The evident purpose of those sections is to provide a method whereby consular officers exercising jurisdiction under the stipulations of the treaty can enforce such jurisdiction and their orders in pursuance thereof. These sections do not infringe upon the treaty stipulations forbidding the exercise of jurisdiction to the local tribunal.

[10] Under this conclusion it is next to be determined whether the treaty stipulations between the United States and the Kingdom of Sweden exclude this court from taking jurisdiction of the case now before it.

The following are the treaty stipulations invoked by the petitioner and the Swedish consul:

Article 11 of the consular convention of June 1, 1910, between Sweden and the United States:

"The respective consuls general, consuls, vice consuls general, vice consuls, deputy consuls general, deputy consuls, and consular agents shall have ex-

clusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of any differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore or in the port, or when a person of the country or not belonging to the crew shall be concerned therein.

"In all other cases the aforesaid authorities shall confine themselves to lending aid to the said consular officers, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list whenever, for any cause, the said officers shall think proper."

Article 13 of the treaty of July 4, 1827, between Sweden and Norway and the United States:

"The consuls, vice consuls or commercial agents, or the persons duly authorized to supply their places, shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities unless the conduct of the crews, or of the captain should disturb the order or tranquility of the country; or the said consuls, vice consuls or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is however understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." 8 Stat. 352.

Do these stipulations on the face of them exclude this court from taking jurisdiction of the present case? This depends upon the construction of the word "differences," as used in the treaties. Does that word cover the case of a tort, such as in the present case, where the claim is based upon personal injury arising from the alleged negligence of the captain? It is not the case of a malicious or cruel assault upon the person of the seaman by the master or any of the officers of the ship, or even any of his fellow seamen. It is not the case of cruelty in his treatment from starvation, bad provisions, or other maltreatment. It is a case of the claim of a seaman made for injury caused to him by falling down an unguarded chute or hatch in a vessel, which might have taken place on the open seas or elsewhere, as well as in the port. In the case of The Marie (D. C.) 49 Fed. 286, the court appeared to consider the word "difference" in this treaty as equivalent to covering all controversies. In the case of The Salomoni (D. C.) 29 Fed. 534, and of The Baker (D. C.) 157 Fed. 485, the court came to the conclusion that the word "differences" did not cover cases of personal tort under the general language of the Supreme Court on page 16 of 120 U. S. and page 389 of 7 Sup. Ct. (30 L. Ed. 565). In the Wildenhus' Case, above mentioned, it does not appear whether the Supreme Court at that time considered the word "difference" in similar treaties as covering controversies embracing personal torts. Inasmuch, however, as the rights of the seamen, based upon negligence shown towards him by the master in his management of his vessel, would appear logically to be a matter contemplated by a treaty—that is, that the country making the treaty would intend to hold that all claims of the seaman against the master for injury received by reason of the

management of his vessel by the master during the relation of master and seaman should be dealt with from the standpoint of the law and maritime discipline of that country—it seems a better view would be to read these stipulations to the effect that the word "differences" does include "controversies" based on torts in the sense of personal injuries occurring through the negligence of the master. Under this view the jurisdiction of this court would be excluded by the terms of the treaty.

[11] But assuming, as indicated by many of the cases above referred to, that this court has the discretionary power in exceptional cases (such as the absence from the district of any consul of the country to which the vessel belongs) of taking jurisdiction, notwithstanding the apparent meaning of the treaty stipulation, or assuming that the word "difference" does not include a controversy of the character set up in this libel, and such controversy is therefore not covered by the treaty in this case, under the general rule of comity as stated by the Supreme Court of the United States, and the circumstances for the exercise of the court's discretion, as relied on generally in the cases above referred to, should this court now take jurisdiction of the present case?

The claim of the libelant is that he was injured by a fall through an unguarded chute, which he attributes to the negligence of the master in leaving it unguarded. Under the principle decided by the Supreme Court of the United States in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, it is doubtful whether under these circumstances a seaman could recover indemnity (beyond maintenance and care) for the negligence of the master. It may be, however, that by the domestic law of Sweden such a recovery is allowed. By the law of South Carolina the libelant is a minor and entitled, according to the circumstances of the case, to consideration from that fact. It may be by the law of Sweden he is not so considered, and might be held at his age, under that law, to a greater or less degree of care on his own part. The Swedish consul sets up that under the declaration between the Kingdom of Sweden and the Empire of Germany this seaman is bound to be supported by the Kingdom of Sweden until he again enters the service of a ship, or finds other employment, or until he arrives in his native country, or dies. The Swedish consul in New York further certifies to this court that it is the desire of that consulate that the provisions of the declaration between Germany and Sweden shall be availed of, and that the libelant be returned to Germany, according to the terms of the declaration, and it is requested by the consulate that this court refuse to take jurisdiction of the present case. In addition, as has been stated, the minister of Sweden at Washington has presented to the court a request that the court accede to the request from the consul for Sweden in New York, which involves the taking care of the libelant, pursuant to the treaty stipulations between Sweden and Germany. In the face of this request of the Kingdom of Sweden itself, as transmitted in the request of its minister, and of the circumstances of this case, the court holds that, if it has discretionary power to take jurisdiction of this case, such discretion should not be exercised.

The court is not insensible to the argument that seamen are, of all classes in the community, perhaps the most helpless and unable

to protect themselves, and are most frequently the subject of gross injustice and maltreatment. As a rule the members of this class are practically penniless, and their vocation in life carries them far from home and friends at home. To say to a sick or helpless seaman from a foreign country, practically a pauper, and dependent on others, that he must transport himself to a distant state to present his claims to a consul of his own country, or that where he had been rendered a helpless cripple by the treatment he has experienced, or by misfortune and accident when in the performance of his duty on the ship, and has been abandoned as such at the nearest foreign port by the vessel on which he served, that he must transport himself back to the country to which the vessel belonged, to get redress and compensation, may seem a mockery, so far as the remedy given to him is concerned, as in most cases it would be practically hopeless for him to avail himself of it. On the other hand, for this very reason, because of the necessity that countries feel to look after their indigent and injured sailors, and the necessity likewise of preserving internal discipline and management on a ship between master and crew, according to the laws of such particular country, the rule of comity mentioned in Ex parte Newman has been maintained by the court, and it has been seen fit by many countries, in order to effect these general purposes, to reserve and by treaty to have reserved to them the entire control of such matters. The treaty making powers of the government have determined that the results of the observance of a general rule of this kind are more beneficial than the relief of humanity in particular cases. In the particular case before this court the failure by the court to take jurisdiction may work great hardship, but the possibility of such consequences is not for the court to consider if it be a matter of treaty, and if it be a matter of discretion then under the rule of comity this court should not assume that the libelant will not receive entire justice from the Kingdom of Sweden, whose representative now declares that his government both recognizes and desires to perform its obligations to the libelant.

A decree will be entered dismissing the libel, but ordering all costs to be paid by the petitioner, Angfartygsaktiebolagat Karin.

IMBROVEK v. HAMBURG-AMERICAN STEAM PACKET CO. et al.

(District Court, D. Maryland. June 27, 1911.)

1. COURTS (§ 96*)—CONTROLLING DECISIONS—DECISIONS OF CIRCUIT COURT OF APPEALS.

The District Court of one judicial circuit will follow the decisions of the Circuit Court of Appeals of another circuit, unless it is in conflict with decisions of the Supreme Court or of the Court of Appeals of the district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 328; Dec. Dig. § 96.*]

2. CRIMINAL LAW (§ 4*)—CREATION OF OFFENSES—LEGISLATIVE POWER—POWERS OF CONGRESS.

The power of Congress conferred by Const. art. 1, § 8, cl. 10, to define and punish felonies committed on the high seas, is independent of any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

power which it may derive from article 3, § 2, cl. 1, declaring that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, but that clause gives Congress any power which it may possess to provide for the punishment of offenses committed on any navigable waters other than those of the high seas.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 4.*]

3. ADMIRALTY (§ 18*)—JURISDICTION.

The federal District Courts, given cognizance of all civil cases of admiralty and maritime jurisdiction, have civil jurisdiction over all wrongs committed on waters over which Congress may, by virtue of the admiralty clause of the Constitution, authorize the exercise of criminal jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 206–221; Dec. Dig. § 18.*

Admiralty jurisdiction of torts, see note to Campbell v. H. Hackfeld & Co., 62 C. C. A. 279.]

4. ADMIRALTY (§ 20*)—JURISDICTION.

An action against a contracting stevedore by an employé for injuries while loading a vessel by the negligence of the stevedore is within the jurisdiction of the court of admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 216, 225, 231; Dec. Dig. § 20.*]

5. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—EVIDENCE.

In libel against a contracting stevedore by an employé for injuries received while loading a vessel, evidence *held* to show the negligence of the stevedore or its agents.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954–972; Dec. Dig. § 278.*]

6. MASTER AND SERVANT (§ 120*)—INJURY TO SERVANT—NEGLIGENCE.

A contracting stevedore employing one to load a vessel must use due diligence to see that he has a safe place to work; and, where he issues orders to his foreman not to allow men to work under partly covered hatches unless the pins are in, and the instructions are disobeyed, the negligence is that of the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. § 120.*]

7. MASTER AND SERVANT (§ 120*)—INJURY TO SERVANT—NEGLIGENCE.

A contracting stevedore employed men to load a vessel. It issued no general or special orders to its foreman that he was not to allow men to work under partly covered hatches unless the pins were in. The foreman had entire charge of the work, and no other person acted for the stevedore. He never concerned himself about the pins, and issued no orders about them. An employé was injured, and the evidence showed that, if the pins had been in, the accident would not have happened. *Held*, that the stevedore was guilty of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. § 120.*]

8. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—BURDEN OF PROOF.

Where the negligence of a contracting stevedore resulting in injuries to an employé is established, the burden of showing that the negligence of a fellow servant contributed to the accident is on the stevedore.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

9. DAMAGES (§ 132*)—PERSONAL INJURIES.

A strong, healthy man 42 years of age was injured. A triangular piece of his skull about 2½ inches on each side was crushed, and the tissues and brain under it were lacerated, and a part of the brain substance exuded. For a time there was a complete paralysis of the right side.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

His leg and arm remained paralyzed to a degree rendering hard physical labor impossible, and the probabilities were that such condition would be permanent. He had a wife and seven children. His average earnings were $10 a week. *Held* to justify an allowance of $4,500.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372–385; Dec. Dig. § 132.*]

In Admiralty. Action by Frank Imbrovek against the Hamburg-American Steam Packet Company and others. Decree for libelant against defendant the Atlantic Transport Company.

Semmes, Bowen & Semmes, for libelant.
Ralph Robinson, for respondent.

ROSE, District Judge. This is a libel to recover for personal injuries. The libelant is a stevedore. He was injured in the lower hold of the Pretoria. It belonged to the respondent the Hamburg-American Steam Packet Company. The Pretoria, its master, and its owner will all be called the ship. The libelant was working under hatch No. 4. This hatch was when fully uncovered about 30 feet long and 16 wide. The covers were in three sections—the fore, the middle, and the after. The covers had been taken off the middle section. They had been left on the other two. The coverings of the middle section had been piled on top of the fore and after sections. The division of the hatch into sections is made by two movable iron crossbeams, placed athwart the ship. From each crossbeam to the other and from each to the hatch combing opposite ran timbers. They are placed lengthwise of the ship. They are called the fore and afters. On these the hatch covers rest. The libelant and his companions were in the employ of the respondent the Atlantic Transport Company. It will be called the stevedore. The gang were loading and stowing copper. On the dock the copper was piled on a heavy, flat, rope mat. The mat had a bridle on each of two sides. One end of each of these bridles was made fast to a corner of the mat. The bridle passes through a U-shaped iron shackle. These two shackles are placed over a hook at the end of the fall attached to the boom. The mat and contents are lifted by the winch, swung over the hatch and lowered into the hold. The mat is unhooked. The copper is taken out. The shackles are again placed in the hook. The winchman is signaled. The mat is hauled up. On one of its trips up the mat caught under the after crossbeam. The latter was instantly jerked out of its supports. It, the fore and afters resting on it, and the hatch covers supported by them, together with such of the coverings of the middle section of the hatch as had been piled on the after section, fell into the hold. The wood and iron which came down weighed nearly two tons. The libelant was struck. His skull was broken.

There would have been no accident had the entire hatch been uncovered. To uncover a hatch takes time and labor. If bad weather comes, it must be covered. Unnecessary uncovering is to be avoided. It is easy to make a partially covered hatch absolutely safe. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

crossbeams of the hatch have holes in their ends. There are corresponding holes in the hatch combings. Pins can be put through these holes. It takes about five minutes to put them in. When in place, an accident such as gave rise to this case cannot happen. The ship's carpenter of the Pretoria keeps the pins when not in use.

Accidents often happen because an opened hatch has been left unguarded, or because the hatch coverings fall into the hold. When they do, there is usually a dispute as to whether the ship or the stevedore is to blame. In the case at bar the ship and the stevedore were represented by the same proctors and by the same advocates. The stevedore acquits the ship. The libelant and his mates are foreigners. Most of them speak little or no English. He offered no testimony as to the division of responsibility between ship and stevedore. The stevedore proved that, when the ship came into port, it took complete charge of the hatches. It uncovered so much of them as it saw fit. If the pins were in and it wanted them out, it took them out. It laid them on the deck. The ship's carpenter gathered them up. If the pins were out and it wanted them in, it told the ship's carpenter. He put them in.

At the close of the testimony the libel as against the captain and the owner of the ship was necessarily dismissed. The court of its own motion called the attention of the advocates of the respective parties to Campbell v. Hackfeld, 125 Fed. 696, 62 C. C. A. 274. In that case the Circuit Court of Appeals for the Ninth Circuit held that admiralty had no jurisdiction to award damages to the employé of a stevedore for injuries received in consequence of the negligence of his employer. It made no difference that the tort was committed on navigable waters. In the case before me one of libelant's fellow workmen had been killed in the same accident. A libel to recover for his widow and children compensation for his death was by agreement tried with this. When the testimony closed the jurisdiction of this court was still unchallenged. It might have been assailed in the Appellate Court or denied by that court of its own motion. It would then be too late to sue at law. It seemed to be the duty of the court to bring the question of jurisdiction to the notice of the advocates of the libelants. They decided to stand by their libels. The advocates for the stevedore asked leave to amend its answer. Leave was granted. The amendment disputes the jurisdiction of the court.

As the case stands on the pleadings and proofs, the libelant must show (1) that he was injured by the negligence of the respondent; (2) that the court of admiralty has jurisdiction; (3) that his injuries did not result from the negligence of his fellow servants.

Neither of the two last-named defenses would have been open to the ship, if the testimony had shown that it, and not the stevedore, had charge of uncovering the hatches or of making secure the coverings left in place.

The question of jurisdiction must first be considered. Campbell v. Hackfeld was decided in October, 1903. More than four years earlier the same question was raised in this court in the case of Dombroska v. Westoll. At least one thorough and learned brief was submitted

and is still on file among the papers in the case. That eminent admiralty lawyer, Judge Morris, had no difficulty in disposing of the point. In view of the language of the Supreme Court and of the inferior admiralty courts and of the expressions of the text-writers, he appears to have thought the jurisdiction too clear for dispute. He accordingly overruled the exception of the respondent without writing an opinion.

[1] In spite of this earlier decision in this court, it might well be its duty now to conform its rulings to those of the Circuit Court of Appeals of the Ninth Circuit. It is true that the decisions of that court are not technically binding here. Nevertheless they should be followed, unless after full consideration they appear to be in conflict with principles clearly settled by the decisions of the Supreme Court or of the Court of Appeals of this circuit. The Supreme Court has said, "Every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The Plymouth, 3 Wall. 37, 18 L. Ed. 125. This language was used 45 years ago. The Supreme Court has never intimated any dissatisfaction with it.

In The Blackheath, 195 U. S. 368, 25 Sup. Ct. 46, 49 L. Ed. 236, Justice Brown, in concurring with the conclusion of the majority of the court, said he understood that The Plymouth was overruled in so far as it decided that the admiralty had no jurisdiction over injuries done by ships to structures on shore. He assumed that in future the English statutory rule that the admiralty had jurisdiction of any claims for damages by any ship would prevail. If he had been right, it would not have followed that the admiralty would not still have had jurisdiction over all torts committed upon navigable water, irrespective of the relation borne by the wrongdoer to a ship. It would, however, have given an opportunity to argue that, as the rule as to locality had not been held always binding, another would have to be found. Such rule might then have been sought in the nature of the tort and the relation which it bore to the ship and its navigation. It turned out that the Supreme Court had not taken the step which Justice Brown supposed it had. In Cleveland Terminal v. Steamship Co., 208 U. S. 317, 28 Sup. Ct. 414, 52 L. Ed. 508, the court expressly decided that it would follow The Plymouth.

The admiralty, therefore, has no cognizance of any tort, however maritime its nature, unless it becomes effective on navigable water. The jurisdiction over torts depends on locality, and not on the nature or origin of the wrong done. That the language of the Supreme Court in The Plymouth literally understood was broad enough to cover the tort in controversy in the case of Campbell v. Hackfeld was admitted. The Circuit Court of Appeals, however, said that it could not be so understood because, if it was, it would lead much farther than the Supreme Court could possibly have intended to go. It said "we think it would surprise the Supreme Court to be told" that admiralty had cognizance of the tort committed when Laura D. Fair on board the ferry steamer El Capitan on a voyage from Oakland to San Francisco shot A. P. Crittenden. There is much reason to sup-

pose that the Supreme Court has repeatedly implied, and sometimes apparently decided, that such a tort as that mentioned is within the jurisdiction of the admiralty. If the Circuit Court of Appeals for the Ninth Circuit is right, the power of Congress to provide for the punishment of offenses committed on navigable waters, other than the high seas, is much more limited than either Congress or the Supreme Court appear ever to have supposed.

[2] The Constitution (article 1, § 8, cl. 10) confers upon Congress the power to define and punish piracies and felonies committed on the high seas. The high seas are the open waters outside the portion surrounded or inclosed between narrow headlands or promontories and without the body of a county of those seas which are in fact free to the navigation of all nations and people on their borders. Within this definition are included the waters of the Great Lakes. United States v. Rodgers, 150 U. S. 255, 14 Sup. Ct. 109, 37 L. Ed. 1071. Within such seas may be included an open roadstead within a marine league of the shore, but at which vessels can safely ride at anchor only in those seasons in which the wind invariably blows from one direction. United States v. Brailsford, 5 Wheat. 184, 5 L. Ed. 64. The right of Congress to define and punish felonies on such waters is entirely independent of any powers which it may derive from the declaration of the Constitution (article 3, § 2, cl. 1) that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But it is that clause which gives Congress any power which it may possess to provide for the punishment of offenses committed upon any navigable waters other than those of the high seas. Congress has always assumed that it had such power. In the first crimes act passed in 1790 (Act April 30, 1790, c. 9, 1 Stat. 112), punishment was provided for the crime of manslaughter when committed on the high seas; and for murder when committed either on the high seas or in any river, haven, basin, or bay outside of the jurisdiction of any particular state. The Supreme Court decided that the particular state intended was a state of the American Union, and not a foreign country. United States v. Brailsford, supra. It held that a navigable tidal river in China was not a part of the "high seas." It followed that a person might not lawfully be convicted of manslaughter committed on an American ship on such a river because Congress had not seen fit to attempt to punish it. United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37. Justice Story on circuit held that a land-locked bay in the Bermudas was not a part of the high seas. United States v. Robinson, 4 Mason, 307, 27 Fed. Cas. 871, No. 16,176. He made a similar ruling as to outer Boston Bay. United States v. Grush, 5 Mason, 290, 26 Fed. Cas. 48, No. 15,268. Chief Justice Marshall who in U. S. v. Wiltberger, supra, spoke for a unanimous court, did not doubt the power of Congress to legislate on the subject. He pointed out that it had not seen fit to do so. Until it acted the courts could not. He assumed throughout that the sections of the statute which provided for the punishment of murder on waters which were not parts of the high seas was clearly constitutional.

In the previous case of the United States v. Bevans, 3 Wheat. 336, 4 L. Ed. 404, the prisoner had been charged with murder on an American ship in Boston Bay within the jurisdiction of the state of Massachusetts. The Supreme Court through Chief Justice Marshall there said that, assuming the right of Congress under the admiralty clause to provide punishment for offenses committed on navigable waters, whether within or without the jurisdiction of a particular state, Congress had not seen fit to exercise its right. The question was discussed purely as one which turned on what Congress had done. After the decision in United States v. Wiltberger, supra, the crimes act was redrafted by Justice Story. He made it apply throughout, not only to the high seas, but to any arm of the sea or to any river, haven, creek, basin, or bay if within the admiralty jurisdiction, and without the jurisdiction of any particular state. In the case of the United States v. Grush, supra, he expressly said that the admiralty jurisdiction extended over all arms of the sea; that is, over all tidal waters. The states had concurrent jurisdiction over such of them as were within the body of a county. Congress had wisely refrained from legislating as to offenses which could be more conveniently disposed of in the state courts. From that day to this eminent judges and courts have said the same thing, as, for example, Mr. Justice Nelson and Judge Betts in United States v. Wilson, decided in 1856, 3 Blatchf. 435, 28 Fed. Cas. 718, No. 16,731; Judge Wilkins in Miller's Case (1867) Brown's Adm. 156, 17 Fed. Cas. 300, No. 9,558. From time to time Congress had exercised in part, although always sparingly, the power it has thus been told it has.

In United States v. Rodgers, 150 U. S. 255, 14 Sup. Ct. 109, 37 L. Ed. 1071, the prisoner was charged with doing precisely what Laura Fair did; that is, make an assault with a deadly weapon. The only difference was that she shot Crittenden on waters within the jurisdiction of the state of California. Rodgers made his assault upon that part of the Detroit river which is within the jurisdiction of the Dominion of Canada, and therefore without that of any state of the Union. The Detroit river was admittedly not a part of the high seas in any sense of those words. Congress could not legislate as to it under its power to punish felonies on the high seas. No statute made an assault with a deadly weapon punishable when committed on the Detroit river unless it was a river connected with the high seas. The question before the court was whether the Great Lakes were high seas. If they were, Congress had exercised so much of the power resulting from the admiralty clause of the Constitution as was necessary to punish the offense. Otherwise not. The court held that the Great Lakes were high seas. Justices Gray and Brown dissented. They did not question the power of Congress to punish crimes committed on navigable waters. They said Congress had not done so. Justice Brown declared: "I have no doubt whatever of the power of Congress to extend its jurisdiction to crimes committed upon navigable waters." After the case had been tried below and before it was heard above, Congress provided for the punishment of various crimes when committed upon any vessel registered, licensed,

or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes or any of the waters connecting any of said lakes. The Straits of Mackinaw connect Lakes Michigan and Huron. They are within the state of Michigan as much as the Bay of San Francisco is within the state of California. If Congress has the power to provide for the punishment of offenses committed upon the Straits of Mackinaw, it has like power when they are committed upon any other navigable water of the United States. The text-writers all say or assume that Congress has such power. As an illustration, see one of the earliest and one of the latest, 2 Story on the Constitution, §§ 1665, 1669; 2 Willoughby on the Constitution, §§ 646, 647. Nowhere has it been suggested that this power to punish crimes is limited to persons or offenses who or which bear any special relation to the ship upon which the deed is done. Congress may make all crimes committed in places within the admiralty jurisdiction punishable in the federal courts. It never has provided for the punishment therein of more than an insignificant proportion. It may safely be assumed that it never will.

[3] It has, however, given the District Courts cognizance of *all* civil cases of admiralty and maritime jurisdiction. It follows that those courts on the civil side have now jurisdiction over all wrongs committed upon waters over which Congress could by virtue of the admiralty clause of the Constitution authorize the exercise of criminal jurisdiction. One text-writer suggests that the civil jurisdiction of courts of admiralty now in matters of tort is less extensive than the potential jurisdiction of Congress over crimes appears to be. Benedict on Admiralty, after stating the rule in the usual form, adds:

"It may, however, be doubted whether the civil jurisdiction in such cases of torts does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen bathing in the sea should assault or imprison or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort." Benedict's Admiralty (3d Ed.) § 308.

The point is not further argued. The rule by which the civil jurisdiction may be confined in narrower limits than that over which the criminal jurisdiction extends is not stated. The case supposed of one landsman robbing another while bathing is an extreme one. It is not likely that courts of admiralty will ever be troubled with many suits to recover damages for such injuries. Plaintiffs are more likely to seek smart money from a jury. If a case of that nature once in a while found its way into a court of admiralty, no great harm would be done. Unnecessarily to introduce into simple and easily understood rules of jurisdiction exceptions which in their nature are hard to define accurately is always costly. Mistakes as to whether jurisdiction does or does not exist inevitably cause denials of justice. Such a case as that which Benedict gives as an illustration of a tort not cognizable in the admiralty has no connection whatever with a ship, not even that of locality. It may perhaps be that a tort com-

mitted on navigable waters, but not on a ship and not connected with a ship, or in any direct way affecting a ship, may not be redressed in the admiralty. Such, however, is not the case at bar.

[4] The tort complained of occurred on navigable waters and on board of a ship. The parties to it were engaged at the time in work absolutely essential to the business of the ship in navigating the seas. The tort alleged is the failure of one of them to use due care in protecting the other from the dangers of that work. It would seem that such a tort is clearly maritime. If maritime, it is in any event and under any general theory of jurisdiction within the cognizance of a court of admiralty.

If the custom of the port had required the ship's carpenter to put in the pins of his own motion, there would be no doubt that the libelant could have redress in the admiralty. It would be hard to explain to any layman why he could not merely because the ship's carpenter was not expected to put in the pins until the boss stevedore told him to do so. There are arbitrary distinctions in all departments of the law. There always will be. There are some in the admiralty. There is no reason to add unnecessarily to their number. The contract of the stevedore with the ship is unquestionably maritime. Norwegian S. S. Co. v. Washington (Fifth Circuit) 57 Fed. 224, 6 C. C. A. 313; The Maine (Fifth Circuit) 51 Fed. 954, 2 C. C. A. 569; The John Shay (D. C.) 81 Fed. 216. If the Supreme Court and many other American courts and text-writers have been in error in saying that admiralty has jurisdiction over torts of whatever nature when committed on navigable waters, as the Circuit Court of Appeals for the Ninth Circuit thinks, it does not follow that admiralty has not jurisdiction over the case at bar.

The particular tort here complained of is maritime within any but the narrowest definition of that term. It appears to be true, as the Circuit Court of Appeals for the Ninth Circuit points out, that there are no cases in the books of recoveries or attempted recoveries in admiralty by working stevedores against boss stevedores for injuries suffered in the course of their work on shipboard in consequence of the negligence of their employers. The circumstance is not without its weight. It must be borne in mind, however, that, when the boss stevedore was pecuniarily worth suing, he could be conveniently sued in the state courts. Most lawyers who make a specialty of personal injury cases prefer to try them before juries. There may be a number of cases in the District Courts, as there has been at least one in Maryland, in which the jurisdiction seemed to the judge so clear as not to justify an opinion. The Circuit Court of Appeals for the Ninth Circuit relies largely on the opinion of Lord Esher in Reg. v. Judge of the City of London Court, L. R. I. Q. B. Div. 1892, 273. It is an able and learned deliverance. The statute and precedents of the English admiralty with which he was concerned are markedly different from the accepted doctrines of our courts of admiralty. Much which he says is admittedly irrelevant here. He points out that American decisions on questions of the jurisdiction of admiralty are largely inapplicable there. What he decided was

that admiralty has no jurisdiction to entertain a libel against a pilot for damages resulting from his negligent handling of a ship. Such is not the law in this country. In the case of Donald v. Guy (D. C.) 127 Fed. 228, the District Court for the Eastern District of Virginia assumed jurisdiction in admiralty over a libel filed by the owners of a steamer against one Guy and 26 associates who composed the Virginia Pilot Association. Guy was a licensed Virginia pilot, and was in charge of the steamer at the time it came into collision with a schooner. The steamer was held in fault and compelled to make good to the schooner its damage. It was alleged that the negligence for which the steamer had been held responsible was the negligence of Guy. It was contended that the other 26 members of the Virginia Pilot Association were his partners in the business of pilotage, and were jointly liable with him. The question was greatly discussed as to whether the 26 pilots, who were not themselves negligent, were liable. The District Court reached the conclusion that they were. See, also, the same case (D. C.) 135 Fed. 429. When the case came to the Circuit Court of Appeals for the Fourth Circuit, it certified the question as to whether the other 26 pilots were or were not liable to the Supreme Court of the United States. That court in Guy v. Donald, 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245, held that they were not. Not once anywhere in any of the three courts through which the case passed does it appear that any one raised the question of jurisdiction. It seemed to the able admiralty lawyers employed in that case, and to the experienced judges who heard it, too clear for question. Nor did the question of jurisdiction suggest itself to the Circuit Court of Appeals for the Third Circuit in the case of the City of Dundee, 108 Fed. 679, 47 C. C. A. 581. All the above-mentioned courts took it for granted that a libel in personam would lie against a pilot who was personally negligent in navigating a ship to recover for the injury resulting from such negligence. The earliest of these cases was decided a number of years after Lord Esher's opinion was published. Most of them were subsequent to the case of Campbell v. Hackfeld. For the reasons above stated, the objection of the respondent to the jurisdiction will be overruled.

[5] Was the libelant injured as a result of the negligence of the stevedore or of its agents or servants? If the pins had been in, he would not have been hurt. As I saw and heard the evidence, I was convinced that so soon as the accident happened every one except the laborers themselves thought of the pins. The promptness with which they came into everybody's mind is convincing evidence that one of their recognized uses was to render such accidents impossible. According to the testimony of the stevedore's own witness, it would not have taken more than five minutes to put them in. It was negligence to omit so simple and well-understood a precaution; the possibilities of accidents otherwise being so obvious. The fact, as testified to, that this particular stevedore had never before had a similar accident, means little. No one attempted to say how often the work had been carried on under like conditions without the pins being in place. Even if that had been frequently done, it would have tended to show

that the stevedore had been fortunate rather than prudent. The stevedore says that, if there was any negligence, it was the negligence of a fellow servant of the libelant, and for that it is not responsible. It admits that the duty to provide a safe place in which to do the work is one which cannot be delegated, but it points out that the duty is one of construction or provision, and not of operation. It says that the pins were provided. If they were not used, it was the fault of the gang boss. The gang boss, it says, was a fellow servant of the libelant. It does not seem important to determine whether he was or was not. In view of the complete control of the work which he was allowed to exercise if he chose, of his power to employ and discharge the men under him, of the lack of any attempt at supervision over him, it seems probable that he was a vice-principal. It is not necessary so to decide.

[6] The stevedore was bound to use due diligence to see that the libelant had a safe place in which to work. If it had issued orders to its foremen or gang bosses that they were not to allow the men to work under partly covered hatches unless the pins were in, then, if those instructions were disobeyed, the negligence would be the negligence of the gang boss. If the gang boss was the fellow servant of the libelant, the latter might not be entitled to recover.

[7] There is no evidence that any such orders, whether general or special, were ever issued. The stevedore's sole witness, Bartthol, appears to have had entire charge of the work of loading and unloading. He at least appears to have occupied the position of vice principal. The testimony at all events does not show what other human being acted for the corporate respondent. He admits that he never concerned himself about the pins. He did not look to see whether they were in or out. He issued no orders about them. It is evident from his testimony that the stevedore did not give a thought to them. In failing so to do it neglected a duty which it owed to the libelant and his mates. The stevedore admits in its brief that there is no question of contributory negligence in the case. The witness Bartthol, who was not present, says that the accident never could have happened had the mat been properly hooked on. I am not satisfied that he is correct in this. It seems quite possible that there were conditions in which the mat might have caught had the shackles been properly hooked. There is no evidence that they were not, except this witness' opinion that, if they had been, the mat could not have pulled the crossbeam out of place. Two eyewitnesses swear that the mat was hooked on.

[8] The negligence of the stevedore being established, the burden of showing that the negligence of a fellow servant of the libelant contributed to the accident is on it. In my judgment that burden has not been sustained.

[9] The libelant was terribly injured. A triangular piece of his skull, about two or two and a half inches on each side, was crushed. The tissues and brain under it were lacerated. A part of the brain substance exuded. His life was saved. For a while there was a

complete paralysis of the right side. His condition has improved somewhat. His leg and arm, however, are still paralyzed to a degree to render hard physical labor impossible. It is the only kind of labor to which he ever was trained. The disinterested physicians from the public hospital to which he was taken after the accident say that the probabilities are that his right arm and leg will remain permanently as they now are. He was a strong, healthy man, 42 years of age. He has a wife and seven children. He probably averaged earnings of about $10 a week. An allowance of $4,500 to him will be moderate and reasonable. I will enter a decree in his favor against the Atlantic Transport Company for that amount.

STATE OF MARYLAND, to the Use of SZCZESEK, v. HAMBURG-AMERICAN STEAM PACKET CO. et al.

(District Court, D. Maryland. June 27, 1911.)

1. ADMIRALTY (§ 21*)—JURISDICTION—ACTION FOR WRONGFUL DEATH—MARYLAND STATUTE.

Code Pub. Gen. Laws Md. 1904, art. 67, §§ 1, 2, giving a right of action for wrongful death, may be enforced in a court of admiralty where the cause of action arises from a maritime tort, notwithstanding the provision for the assessment of damages by the jury.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218–220; Dec. Dig. § 21.*

Admiralty jurisdiction of torts, see note to Campbell v. H. Hackfeld & Co., 62 C. C. A. 279.]

2. DEATH (§ 99*)—DAMAGES—AMOUNT.

An award of $4,500 *held* proper in admiralty for the negligent death of a husband 40 years old, whose earnings were $10 a week, and who left a widow and 5 children between 16 and 3 years old.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

In Admiralty. Suit by the State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, and Stanislaus, infant children of Martin Szczesek, deceased, against the Hamburg-American Steam Packet Company and others. Decree for libelants.

Semmes, Bowen & Semmes, for libelants.
Ralph Robinson, Esq., for respondents.

ROSE, District Judge. This is a libel filed on behalf of the widow and infant children of Martin Szczesek. The deceased was working with Frank Imbrovek, the libelant in the aforegoing case. He received fatal injuries in the same accident in which Imbrovek was hurt. The cases were tried together.

[1] For the reasons therein stated, I find that his death resulted from negligence of the Atlantic Transport Company. In this case that company set up the additional defense that admiralty has no juris-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

diction to enforce the Maryland form of Lord Campbell's act. For the reasons stated in my opinion in the case of State of Maryland, to the use of Pryor et al., v. Miller et al. (D. C.) 180 Fed. 796, this defense is overruled.

[2] The deceased was 40 years of age. He leaves a wife and 5 children, the eldest of whom is 16, the youngest 3 years. He earned about $10 a week. An allowance of $4,500 to his widow and children in the aggregate would be fair and reasonable.

I will hear the proctors for the libelants further as to the proper division of this sum among the widow and children.

In re NEW CHATTANOOGA HARDWARE CO.

(District Court, E. D. Tennessee, S. D. August 23, 1911.)

No. 1,354.

1. BANKRUPTCY (§ 39*)—VOLUNTARY PROCEEDINGS—EFFECT OF PENDING INVOLUNTARY PETITION.

Whether a court of bankruptcy should proceed under a voluntary petition of a debtor or a pending involuntary petition against him is not a question of jurisdiction or of right in the parties, but one of practice, and the adjudication should be made in the proceeding which under all the circumstances appears to be for the best interest of the entire estate. As a general rule, it should be made in the voluntary case, with proper protection to the rights of prior petitioning creditors as quicker, less expensive and less likely to lead to expensive litigation, and the court is not precluded from acting under such rule by the fact that the debtor may have appeared and participated in the involuntary proceeding under such circumstances as might ordinarily create an estoppel if his own interests alone were involved.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 39.*]

2. BANKRUPTCY (§ 51*)—ADJUDICATION—PENDENCY OF VOLUNTARY AND INVOLUNTARY PROCEEDINGS.

An adjudication on a voluntary petition in bankruptcy will not necessarily render void the appointment of a receiver in prior involuntary proceedings, but all rights under such proceedings, including liability for costs and expenses, may be fully protected by order of the court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 51.*]

In the matter of New Chattanooga Hardware Company, bankrupt. On certificate of referee. Adjudication ordered.

Wilkerson & Wilkerson, for petitioner.

SANFORD, District Judge. This is a petition for voluntary bankruptcy filed by the New Chattanooga Hardware Company. The judge being absent, it was referred by the clerk to the referee in bankruptcy. The petitioning creditors in an earlier petition against the hardware company for involuntary bankruptcy have moved to stay an adjudication under this voluntary petition until action is had on their involuntary petition. The referee in accordance with the practice followed in Re Stegar (D. C.) 113 Fed. 978, has certified this motion for instructions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The situation in reference to the administration of the estate of this admittedly insolvent corporation, as it appears from the pleadings in this case and in two other cases pending against it in this court, of which the court will take judicial notice, is as follows: On July 10, 1911, the First National Bank of Chattanooga and two other creditors, having claims aggregating in excess of $2,648, filed an involuntary petition against the hardware company in bankruptcy cause No. 1,339, alleging it to be a corporation organized for and engaged in the mercantile business, and praying for its adjudication as a bankrupt and for the appointment of a receiver. The only act of bankruptcy alleged was that it had on July 7, 1911, paid H. Boker & Co., one of its creditors, the sum of $73.25, "the same being an unlawful preference to creditors." There was, however, no averment that the hardware company was insolvent at the time this payment was made. The averment of an act of bankruptcy therefore was clearly insufficient. Section 3a (2), Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422); In re Hammond (D. C.) 163 Fed. 548. And see In re Rome Planing Mills (D. C.) 96 Fed. 812; Troy Wagon Works v. Vastbinder (D. C.) 130 Fed. 232; Remington on Bankruptcy, 1342, p. 785. Neither did the petition allege in terms that this payment was made by the bankrupt with intent to prefer Boker & Co. over other creditors. See section 3a (2) of the bankruptcy act; In re Rome Planing Mills, supra; In re Gilbert (D. C.) 112 Fed. 951; In re Tupper (D. C.) 163 Fed. 766; Collier on Bankruptcy (8th Ed.) p. 72. Neither did the petition aver that the appointment of a receiver was "absolutely necessary" for the preservation of the estate (section 2 [3] of the bankruptcy act), but merely that "great loss" would occur to the creditors unless a receiver was appointed. The petition, furthermore, was verified by only one of the petitioning creditors. See Official Forms in Bankruptcy, No. 3 (89 Fed. xxviii, 32 C. C. A. lii).

On the same day the hardware company, by its treasurer, in writing, acknowledged notice of the filing of this petition, admitted its insolvency, consented to the appointment of a receiver as prayed, and waived an indemnity bond on account of such appointment. The case having been referred by the clerk to the referee in the absence of the judge, the referee on the same day made an order adjudging that the appointment of a receiver was "absolutely necessary" for the preservation of the estate of the defendant, and appointing a receiver (who appears to be a large creditor), under $10,000 bond, with authority to take immediate charge of its assets and to collect its accounts. This receiver at once qualified and entered upon the discharge of his duties. On July 25th A. C. Bickhaus, C. L. Anton, and another creditor, having claims aggregating $533.31, filed a second involuntary petition in bankruptcy against the hardware company in cause No. 1,443, duly alleging acts of bankruptcy on the part of the company in making, while insolvent, payments to four of its creditors of $128.50, $10.61, $34.76, and $52.16, on March 28, April 13, May 18, and May 25, 1911, respectively, with intent to prefer them over other creditors. On the same day, the Burrows Lock Company and

two other creditors, having, it appears, claims aggregating $498.79, entered their appearance in cause No. 1,339, and demurrer to the petition therein, on the ground that it failed to sufficiently allege an act of bankruptcy or to show cause for the appointment of a receiver, and for various other grounds. On the same day the Standard Oil Company and two other creditors, having, it appears, claims aggregating $359.36, likewise entered their appearance in cause No. 1,339, and moved to discharge the receivership therein for want of sufficient jurisdictional averments. On July 27th the petitioning creditors in cause No. 1,339 petitioned for leave to amend their original petition by permitting it to be verified by all the petitioning creditors, by specifically alleging that the payment to Boker & Co. was made while the hardware company was insolvent, and with intent to prefer said creditor over other creditors, by alleging a similar act of bankruptcy in making a payment of $90.45 intended as a preference to another creditor on March 15, 1911, and by making further allegations as to the necessity for the appointment of a receiver; and they also moved to strike from the files the motion of the Standard Oil Company and others to discharge the receivership. And on the same day they also moved to strike from the record the involuntary petition filed by Bickhaus and others in cause No. 1,343, on the ground that the court had acquired prior jurisdiction in cause No. 1,339. On July 29th the defendant hardware company, by attorney, moved, in cause No. 1,339, to strike from the files the petition of the Standard Oil Company and others, and in cause No. 1,343 to strike from the files the second involuntary petition that had been filed against it by Bickhaus and others. On August 3d the Standard Oil Company and the other two creditors associated with it entered their appearance in opposition to the amendment sought to be made to the original involuntary petition in cause No. 1,339, and demurred thereto on the ground that as the original petition did not allege an act of bankruptcy on the part of the hardware company, nor allege that it was a moneyed and business corporation, and not an insurance, municipal, railroad, or banking corporation (see section 4 of the bankruptcy act as amended by section 3, Act June 25, 1910, c. 412, 36 Stat. 839; In re Bellah [D. C.] 116 Fed. 78), no jurisdiction had been acquired thereunder, and it was not subject to amendment, and upon various other grounds. On the same day, C. L. Anton, one of the petitioning creditors in cause No. 1,343, and 16 other creditors having claims aggregating $6,145.38, entered their appearance in cause No. 1,339, and filed an answer to the original petition, denying that its averments were sufficient to confer jurisdiction, resisting the amendment thereto, and charging, on information and belief, that the petition and amendment were filed and being prosecuted by collusion between the hardware company, the First National Bank and the receiver, and in their mutual interest.

On August 9th the petitioning creditors in cause No. 1,339 filed another petition therein, praying leave to further amend their original petition by specifically alleging that the hardware company was a business and commercial corporation, and not a municipal, railroad,

insurance, or banking corporation, and by making averments as to the necessity for the appointment of a receiver to take charge of certain assets of the Dayton branch of the hardware company; and on the same day they also moved to strike from the files the demurrers of the Burrows Lock Company and others, and the Standard Oil Company and others, for want of proper verification. On the same day the hardware company filed in cause No. 1,339 a schedule of its assets and liabilities signed and verified by its president. On the same day the First National Bank and the receiver filed in cause No. 1,339 a "special replication" to the answer of Anton and others, denying, under oath, fully and particularly as false and without foundation the averments of collusion between themselves and the hardware company. On August 11th the hardware company filed its voluntary petition in bankruptcy in the present cause No. 1,354. This petition was verified by its president, and alleged that its filing was authorized by a resolution adopted that day by its board of directors reciting the pendency of the two involuntary petitions, the possibility of a long drawn-out contest over their legality, and "that the affairs of the company ought to be wound up," and directing the president to file a petition in voluntary bankruptcy for that purpose. The schedule attached to the petition, which is substantially the same as that previously filed in cause No. 1,339, shows total assets of $42,413.04, including a stock of merchandise of the invoiced value of $17,576.94 and accounts on persons not in bankruptcy of the par value of $15,878.09, and total liabilities of $43,743.46, including unsecured debts other than wages and taxes, aggregating $42,067.02, due to about 200 different creditors. On the same day this voluntary petition was, in the absence of the judge, referred by the clerk to the referee.

On August 14th the petitioning creditors in cause No. 1,339 moved that the adjudication prayed in the voluntary petition be stayed until after action should be had by the court on their pending involuntary petition, and that, if adjudication should be had in said involuntary cause, the voluntary petition be then dismissed. The grounds of this motion were: (1) That the hardware company had submitted to the jurisdiction of the court in the involuntary cause No. 1,339 by acknowledging notice of the filing of the petition, admitting insolvency, consenting to the appointment of a receiver and waiving bond, and was thereby estopped from seeking a voluntary adjudication; (2) that the hardware company, since submitting to the jurisdiction in said involuntary petition, had sent circular letters to all its creditors, offering a composition settlement, and that the voluntary petition was intended solely for the purpose of securing a speedy action touching such composition, and was wholly in the interest of the hardware company, and not in the interest of creditors; and (3) that any adjudication in the voluntary case would render null and void the appointment of a receiver and other steps taken in said voluntary cause. On the same day the hardware company answered this motion, denying that it had submitted to the jurisdiction of the court in cause No. 1,339 or any other involuntary proceeding, and alleging that the action taken in its name by its treasurer in cause No. 1,339 was without au-

thority, and had never been adopted or approved by the company, and that it had never taken any corporate action as to bankruptcy except when on August 11, 1911, it determined, by proper authority, to go into voluntary bankruptcy; (2) that the letters offering composition set out in the motion were likewise sent out without corporate authority; and (3) that it is manifestly for the interest of creditors that the affairs of the company be administered and wound up under the voluntary petition without the delay and costly litigation which will result under the two conflicting and litigated involuntary petitions pending against the company. There was filed as an exhibit to this answer the affidavit of its treasurer to the effect that he signed the written confession of insolvency at the request of the attorney for the petitioning creditors; that he did this without any corporate authority and without the knowledge or consent of the board of directors and stockholders; and that as treasurer under the by-laws he had no authority to sign such instrument.

The petitioning creditors in cause No. 1,339 thereupon moved to strike this answer from the files upon various grounds, among others, that the action of the treasurer in cause No. 1,339 was within his official authority, and did not require sanction of the board of directors; that the answer did not deny knowledge by the board of directors of the proceedings taken by its treasurer on behalf of the company in said involuntary cause, and the company was estopped by acquiescence therein to question the authority of its treasurer; and that the company could not collaterally attack in the voluntary case the authority exercised by its treasurer and other officers in the involuntary case in the manner above set out, and in the actual filing of schedules therein.

In this state of the pleadings the referee has certified to me the action of the petitioning creditors in cause No. 1,339 to deny an adjudication in the voluntary cause No. 1,354 for my opinion and instructions.

[1] 1. The principles which should govern a court of bankruptcy in determining whether an adjudication should be made upon a voluntary petition, or upon a pending involuntary petition previously filed, and the practice which should be followed, have been carefully considered in the cases of In re Dwyer (D. C.) 112 Fed. 777, and In re Stegar (D. C.) 113 Fed. 978.

In the Dwyer Case, supra, it was said by Judge Amidon that the question whether the adjudication shall be made under the voluntary or the involuntary petition is not one of jurisdiction, but a mere matter of practice, to be disposed of as shall seem for the best interest of the estate; that "the consideration which should guide the court in adopting the one course or the other is the welfare of the estate"; that, on the one hand, the bankrupt has no right to take any proceeding which will defeat a just application of his estate in accordance with the bankruptcy act, and, on the other hand, creditors who have filed an involuntary petition cannot properly insist that the rights of all creditors shall be prejudiced in order that a full hearing may first be had upon their petition; that, while the bankrupt in defense of

his good name has the right to resist an adjudication under an involuntary petition charging fraudulent conduct, yet as issues of that character frequently take months for their determination, if no voluntary petition could be instituted until their determination, the estate might easily be seriously prejudiced by liens which by reason of the four-month limitation of the bankruptcy act could not then be assailed; and that the proper practice would seem to be that, upon the filing of the voluntary petition, notice should be given to the petitioning creditors under the involuntary petition before any adjudication is made upon the voluntary petition, and such action should be then taken as the hearing shows to be for the best interest of the estate; and, since in the case before him the petitioning creditors had come before the court and made a showing fairly indicating that under an adjudication upon the voluntary petition a large portion, if not all, of the property of the estate might pass beyond the trustee's power of recovery by the expiration of the four-month limitation, he held that proceedings under the voluntary petition should be stayed until the disposition of the involuntary petition, although the voluntary petition should remain on file, so that under section 60 of the bankruptcy act the running of the four-month limitation might be stopped in case the involuntary petition should be finally decided in favor of the bankrupt.

In the Stegar Case, supra, in which the defendant had not appeared in the involuntary proceeding, and no action had been taken therein at the time the voluntary petition was filed, it was said by Judge Jones that ordinarily a debtor has the right to avail himself of the benefits of the bankrupt law on his own petition, and this right cannot be forfeited or rendered ineffectual merely because the creditors' petition is first filed and pending undetermined when the debtor files his petition; that the debtor has the undoubted legal right to contest the involuntary proceeding, which must necessarily be based upon some violation of the act, of which he may not be guilty, and is therefore unwilling to be adjudged guilty, although desirous to have his estate distributed among creditors on his own petition, and that he is not bound to postpone this right because of the involuntary proceeding, and may, unless he has waived the right, push his own proceeding, and at the same time contest the creditors' proceeding; that as the object of the law in giving a creditor the right to force his insolvent debtor into bankruptcy is to compel the just distribution of the insolvent's estate among his creditors, if the petitioning creditors obtain this result, they cannot complain, so long as their rights are fully protected, that the distribution, instead of being effected on their petition, is accomplished upon the voluntary petition of the debtor; that ordinarily adjudication on the debtor's own petition is the better mode, since it is quicker, less expensive, and less likely to lead to delay and unnecessary litigation; that nothing, so far as then appeared, would be gained by adjudication on the involuntary proceeding which could not be had on an adjudication under the voluntary petition; that the estate, if administered under the involuntary proceeding, would be burdened by cost, expense, and useless litigation, which would be avoided if adjudication passed on the voluntary proceeding, while, on the other

hand, if the involuntary petition should be defeated, nothing would be affected except profitless litigation and delay, and it might be, damage to creditors; that manifestly, therefore, it was not to the advantage of creditors to press the involuntary proceeding further, unless it should become necessary to enforce some right which could not be saved under adjudication on the voluntary petition; that, however, since creditors, by commencing an involuntary proceeding, incur liability for costs and attorneys' fees, and, if the petition be wrongfully filed, for damages, and also get in position to avoid preferences and transfers which might not be assailable on the adjudication under the later voluntary petition, the court could not deprive the petitioning creditors of these rights, or enlarge their liabilities by dismissing the prior involuntary proceeding in order to administer the estate under the voluntary petition; that these rights of the petitioning creditors should hence be saved if they were not allowed to proceed, and the administration of the insolvent estate be had under the insolvent's voluntary petition; that, however, as a debtor who, without appearing in an involuntary proceeding, subsequently files a voluntary petition, upon which he is adjudged a bankrupt, cannot complain of the filing of the involuntary petition, this liability being out of the way, it only remained to save the creditors harmless as to costs and attorney's fees; that this might easily be effected by directing an adjudication on the voluntary proceedings, staying the involuntary proceeding in the meanwhile, and reserving to petitioning creditors the right to prove their costs and expenditures under the adjudication on the voluntary petition, with leave to bring forward the involuntary petition if subsequently it might be found necessary to protect rights which could not be saved by adjudication under the voluntary petition, and with further leave to creditors to prove their claims under the adjudication on the earlier involuntary proceeding, if it became necessary to bring it forward, notwithstanding such claims might have been proved, or dividends might have been accepted, in the proceedings on the voluntary petition; and that such decree, within the undoubted power of the court of bankruptcy to mold its decrees upon the two petitions in as broad and flexible a manner as a court of equity, would amply secure every possible right of the petitioning creditors; and it was accordingly held that an adjudication should be made under the voluntary petition and the proceeding stayed in the involuntary case, with provisions for the protection of the rights of the petitioning creditors of the general character indicated.

I entirely agree to the opinion expressed in the Stegar Case that ordinarily adjudication made under a voluntary petition is the better mode, as quicker, less expensive, and less likely to lead to delay and unnecessary litigation, and think that, in case of conflicting petitions, the adjudication should, as a general rule, be made in the voluntary case, with proper protection to the rights of prior petitioning creditors. However, I likewise fully concur in the doctrine so clearly and forcibly stated in the Dwyer Case that the question is, after all, not one of jurisdiction, but one of practice, and that neither party has a fixed and inflexible right to a prior adjudication under either petition, but that

the adjudication should be made in such proceeding, as, under all the circumstances, appears to be for the best interest of the entire estate. And, since under the doctrine of that case the controlling consideration which should guide the court in adopting the course to be pursued is "the welfare of the estate," I cannot agree, without qualification, to the view suggested obiter in the opinion in the Stegar Case, that the debtor should by a prior participation in the proceedings in the involuntary case be deemed to have so waived his right to proceed with a voluntary petition that an adjudication should be necessarily denied thereunder. If the debtor's own interests were alone involved, I should unreservedly agree to the statement in that opinion (at page 980 of 113 Fed.) that there might be cases in which the debtor, after going so far as to begin the trial of the issues on an involuntary petition, should properly be held to have waived his right to subsequently proceed upon his voluntary petition until the involuntary petition has been heard and determined. But since, in a case of this character, the right of creditors to a prompt and economical administration of the estate is also involved, I think that the debtor's previous conduct should not be made the sole criterion, but that the choice of the proceeding in which the adjudication should be made, should, in the last analysis, after giving due weight to all the circumstances, including the extent to which the proceedings have gone in the involuntary case, be controlled, as stated by Judge Amidon, by that which appears to be for the best interest of the estate to be administered. And, while it may well be that in many cases the advantage there would otherwise be in making the adjudication in the voluntary case is so slight that the scale of convenience would be turned by the extent of the participation of the bankrupt in the prior case, yet, upon general principles and as a matter of sound public policy, I do not think that the debtor's participation in the prior proceedings should be permitted to prevent an adjudication in the voluntary case, where, in spite of such participation, an adjudication in the voluntary case still appears to be for the clear and manifest interest of the estate and of its creditors.

2. Coming, then, to the application of these principles to the present case, the situation is this: The hardware company is admittedly insolvent. It has ceased to do business as a going concern, and its assets are now in the hands of a receiver appointed by the referee of this court.

The first involuntary petition in case No. 1,339 is being prosecuted by only three creditors, holding about 6 per cent. of the claims, while 22 creditors, holding about 16 per cent. of the claims, have entered their appearance in opposition to this petition, and are actively resisting an adjudication thereunder upon various grounds. Including the preferential payment sought to be set up by way of amendment, it charges only two preferences of comparatively slight amounts, only one of which, for $90.45, is alleged to have been made more than four months before the filing of the voluntary petition. And, owing to the patent defects in the original petition, it is far from ready for a hearing upon the question of an adjudication, since even if a hearing

should be had upon the various pending demurrers and motions, and the amendments which are sought to be made to the original petition should be allowed, it would still be open to the objecting creditors, if not to the hardware company, to deny the making of the preferences relied on as acts of bankruptcy; and it is clear that in the complicated state of the pleadings much time would inevitably be lost before the case would be ready for an adjudication, even if the petition should ultimately be sustained.

The second involuntary petition, No. 1,343, is likewise being prosecuted by only three creditors, holding a little more than 1 per cent. of the total claims. The hardware company has not in any manner participated in the proceedings in this case, and of the four small preferences which it seeks to set aside only one, amounting to $128.50, is alleged to have been made more than four months prior to the date on which the voluntary petition was filed. On the other hand, it appears that almost 200 creditors of the hardware company, holding approximately 78 per cent. of the claims against it, are not as yet directly represented in either of these proceedings. It is clear that it is for the best of the bankrupt's estate as a whole and of the great body of its creditors, who have no personal interest in the priority of either one or the other of the involuntary cases, that the adjudication should be made in that case in which it can be made at the earliest moment, and in which a trustee can first be appointed and the insolvent estate most speedily administered in the bankruptcy court. This can obviously be best accomplished in the voluntary case, which is ready for an immediate adjudication.

In this state of affairs, it seems to me to be both unnecessary and inexpedient to delay an adjudication under the voluntary petition in order that the complications in the pleadings in the first involuntary case, due to the inherent defect in the original petition, may be straightened out, with a possible ultimate failure of adjudication therein in the event of inability to prove the acts of bankruptcy alleged, or to delay such adjudication until the question may be determined whether or not the treasurer of the hardware company had authority to take the steps which he did in the name of the company in the first involuntary case. To whatever extent the hardware company might, so far as its own interests are concerned, have waived the right to proceed under an involuntary petition, for the reasons already stated, I do not think that this should be controlling upon the question of adjudication as against the manifest interest of the large body of creditors, but am of opinion that the adjudication should now be made in the voluntary case, in which an administration may be promptly had of the affairs of this insolvent estate, and that this adjudication should not be delayed for the prior determination of the many issues of law and fact raised in the first involuntary case, with the inevitable result that the assets of the estate will be largely diminished by the delay incident thereto, and the substance of the creditors largely consumed in the costs of unnecessary and profitless litigation. And as to the suggestion made in the brief filed in behalf of the petitioning creditors in the second involuntary cause that as the first involuntary petition did not

sufficiently allege an act of bankruptcy at the time their petition was filed, and as their petition alleged an earlier act of bankruptcy, a hearing as to an adjudication should be first had under their petition—although no motion to that effect appears to have been made—it is sufficient to say that general order in bankruptcy No. 7 (89 Fed. v, 32 C. C. A. xi), upon which they rely, at least by analogy, providing for the priority of the petition alleging the earliest act of bankruptcy, only applies by its terms where the debtor has appeared and shown cause against an adjudication on two or more involuntary petitions (In re Harris [D. C.] 155 Fed. 217); and, further, that, as the hardware company has not participated at all in the proceedings in cause No. 1,343, there will be no occasion for giving priority to that petition over the voluntary petition, even under the doctrine of waiver suggested in the Stegar Case.

I am clearly of opinion that the want of formal notice to the petitioning creditors of the application for an adjudication in the voluntary case, which it is stated in the Dwyer Case should, as a matter of proper practice, be given, is not now a valid objection to an adjudication in the voluntary proceedings, as it appears that the petitioning creditors in both the involuntary cases have, in fact, had actual notice of the application for an adjudication under the voluntary petition and have appeared in opposition thereto, so that the failure to give them formal notice is entirely immaterial. Neither should adjudication be delayed under the voluntary petition, even if it be a fact, as alleged, that the motive of the hardware company in seeking a speedy adjudication in the voluntary case is that it may be enabled to effect a composition with its creditors, although it is difficult to see how this can in fact be the motive of the hardware company as the amendment made by section 5 of the act of June 25, 1910, to section 12a of the bankruptcy act, specifically authorizes a bankrupt to offer composition to creditors either before or after adjudication. But, however that may be, as the bankruptcy act makes specific provisions for compositions, and they are in all respects proper and often very advantageous to creditors, and can only be confirmed after the court is satisfied that they are for the best interests of the creditors (section 12d [1] of the bankruptcy act), it does not appear that the desire of the hardware company to take advantage of this provision of the bankruptcy act, if it has such intention, is a valid ground of objection to an adjudication under its petition. Neither is there any difficulty in making an adjudication under a voluntary petition by reason of the impairment of any rights that may have accrued to the petitioning creditors in either of the involuntary cases by reason of liability for costs and attorney's fees, since such rights, if any, can be fully protected by proper order of the court as was done in the Stegar Case.

[2] Nor does it appear that the fact that an adjudication is made in the voluntary case will necessarily render void the receivership proceedings in the involuntary case No. 1,339; but, on the contrary, all rights under such receivership proceedings, including liability for fees and expenses of the receiver, may likewise be fully protected by order of the court.

Upon the whole and after a careful consideration, I conclude that adjudication should now be made in the voluntary case, and that an order should be entered protecting the rights of the petitioning creditors in the involuntary cases in general conformity with that which was directed to be entered in the Stegar Case, and with proper provisions in reference to the receivership in case No. 1,339, nothing now appearing in the record, which, in my opinion, at this time, shortly before the election of a trustee, require the discharge of the receivership, or change therein, or the entailing of any additional expense on the estate in consequence thereof.

A decree will accordingly be entered overruling the motion to stay adjudication in the voluntary case, and ordering and adjudging (1) that the referee proceed to adjudicate the hardware company a bankrupt on its own petition in cause No. 1,354, and to administer the estate thereunder as required by law; (2) that until the further order of the court all proceedings be stayed under the involuntary petitions filed by the First National Bank and others in cause No. 1,339 and by A. C. Bickhaus and others in cause No. 1,343, except that the receiver appointed in cause No. 1,339 will continue in custody of the assets of the hardware company as receiver in said cause No. 1,339, and under his appointment therein until such time as a trustee shall be appointed in cause No. 1,354, when he will turn over the assets to such trustee, but this continuance of the receivership is without prejudice to the right of any creditors to bring forward, pending the appointment of a trustee, their objections to the receivership made in cause No. 1,339; (3) that the adjudication in bankruptcy against the hardware company in cause No. 1,354 shall not prejudice any right obtained by any of the petitioning creditors by the filing of their prior petitions in causes No. 1,339 and 1,343, and they may apply at any time after adjudication in cause No. 1,354 to bring forward either or both of their involuntary petitions, if found necessary to protect the rights of creditors which cannot be saved under the adjudication on the voluntary petition; (4) that the proving of claims or acceptance of dividends under the adjudication upon the voluntary petition shall not be deemed a bar or waiver of the rights of creditors to prove their claims under an adjudication on either or both of the involuntary petitions, if such should hereafter be made; (5) that the petitioning creditors in either or both of the involuntary causes may prove against and be allowed out of the assets of the bankrupt in case No. 1,354 their reasonable costs and fees in such involuntary causes and to which they may be entitled, including the reasonable costs and fees incident to the receivership in cause No. 1,339; and, to the end of preserving all the rights reserved under this order, the voluntary petition and either one or both of the two involuntary petitions may be hereafter consolidated and treated as one proceeding if it becomes necessary in the future progress of this matter. (See, as to such consolidation, In re Stegar, supra, at page 981 of 113 Fed.; In re Knight (D. C.) 125 Fed. 35, 37.)

LOUISVILLE & N. R. CO. et al. v. WRIGHT.

(Circuit Court, N. D. Georgia. June 2, 1911.)

No. 1,323.

1. EQUITY (§ 252*)—ANSWER—EXCEPTIONS.

An exception to an answer in equity that it did not set up any defensive matter to a bill and set up no effectual or sufficient reason why complainants should not have the relief sought for was unsustainable under the rule that the merits will not be considered on exceptions to the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 523, 524; Dec. Dig. § 252.*]

2. EQUITY (§ 190*)—BILL—ANSWER—RESPONSIVENESS.

A bill by railroad companies to enjoin the assessment of taxes on complainants' property alleged that the United States Supreme Court had decided that the railroads in question were exempt from a property and franchise tax, and that the legislation of the state of Georgia, which sought to impose a tax thereon was unconstitutional, null and void, but that respondent was seeking to collect taxes on the same property in the hands of complainants as lessees. *Held*, that an answer admitting such decree, but alleging that it involved no consideration of the lease of the railroad to complainants, or of complainants' liability to pay taxes, and denying that the litigation respecting the taxes due by the railroad company had any relation to the question of what taxes, if any, complainants were required to pay, was not objectionable as nonresponsive.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 190.*]

3. EQUITY (§ 191*)—ANSWER—IMPERTINENT MATTER.

Complainant railroad companies suing to restrain the collection of taxes as lessees, charged that their lessor had never parted with its right, title and estate in the property, or sought to do so; had never sought to be absolved from its obligations to the public as a common carrier of freight and passengers, or as a railroad company, but that on the contrary was subject to suit for injuries to goods and passengers, irrespective of the fact that in most cases the lessees indemnified the lessor against such judgments. *Held*, that averments in the answer alleging that such liability existed by operation of law had no bearing on the complainants' liability to pay taxes, and denying that the lessor company had not parted with an estate in the property, claiming that under the law of Georgia a leasehold for a long term was an estate in realty different from a mere tenancy under a landlord, in that the exclusive and absolute right of possession and control of the term was in the lessee, with a mere estate in reversion in the lessor, etc., was not objectionable as impertinent, though it exceeded what was necessary in response to complainants' averments.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 191.*]

4. TAXATION (§ 608*)—RAILROADS—INJUNCTION—SCOPE OF BILL.

Where complainants, lessees of railroad property, sued respondent to restrain the assessment and collection of taxes on the property leased, the respondent properly set up the facts and claimed in the alternative that if all of the property was not subject to taxation, at least, separate designated portions thereof were taxable, since, if the court found that a part of the property was rightfully assessed, it would not enjoin the collection of taxes on that part.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 608.*

Restraining collection of taxes because of excessive or unequal assessments or valuations, see note to Atchison, T. & S. F. Ry. Co. v. Sullivan, 97 C. C. A. 16.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. EQUITY (§ 252*)—ANSWER—EXCEPTIONS.

Where complainants, lessees of railroad property, sued to restrain the assessment and collection of taxes thereon, an allegation in the answer that the leasehold estate itself was more valuable than any life estate could be, and worth $4,000,000, and that that at least was taxable to complainants, raised a question which should be heard on its merits, and was not subject to exception.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 252.*]

In Equity. Bill by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company against William A. Wright. On exceptions to answer. Overruled.

Jos. B. & Bryan Cumming and McDaniel, Alston & Black, for complainants.

John C. Hart, Saml. H. Sibley, and H. A. Hall, for respondent.

NEWMAN, District Judge. This case is now being heard on exceptions to the answer. The complainants, the two railroad companies, on September 24, 1910, filed their bill in this court seeking to enjoin the defendant, acting as Comptroller General of the state of Georgia, from collecting from the complainants taxes on the property leased by them from the Georgia Railroad & Banking Company. The defendant filed his answer November 7, 1911.

By section 15 of the charter of the Georgia Railroad & Banking Company, granted December 27, 1831, "the stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investment."

On the 7th of May, 1881, the Georgia Railroad & Banking Company leased the property in question to William M. Wadley and his assigns. By various conveyances the complainant railroad companies became successors of the said Wadley as lessees of said railroad property, and have been for many years operating the same under this lease. The defendant, as Comptroller General of the state of Georgia, is now seeking to collect the ad valorem taxes levied by the state of Georgia on other property from the defendants on the leased property. The answer sets up in substance that this property is subject to taxation as is other property in Georgia, and that the scheme of taxation provided in the charter of the Georgia Railroad & Banking Company does not apply to the property in the hands of the lessees. There are a number of exceptions which will be dealt with in their order.

[1] The first exception is:

"Because said answer sets up no defensive matter to the bill of complaint, and sets up no effectual and sufficient reason why these complainants should not have the relief sought by them in said bill."

Undoubtedly this exception is not good. It is clearly settled by the authorities that the merits of the case will not be considered on exceptions to the answer. In Walker et al. v. Jack, 88 Fed. 576, 31 C. C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. 462, in the opinion of the Circuit Court of Appeals, by Judges Taft, Lurton, and Severens, Judge Taft delivering the opinion, the following language pertinent to this question is used:

"The complainant excepted to the answer for insufficiency, the court sustained the exception, and, the defendants declining to plead further, the court entered a decree perpetually enjoining the defendants as prayed in the bill. The court seems to have treated the exceptions as if equivalent to a demurrer testing the sufficiency of the averments of the answer as a defense to the bill upon its merits. This was not according to proper equity practice. There is no such thing as a demurrer to an answer in equity. Grether v. Cornell's Ex'rs. 43 U. S. App. 770, 23 C. C. A. 498, and 75 Fed. 742. The only way by which the sufficiency of an answer on its merits as a defense to the case made in the bill can be tested is by setting the case for hearing on the bill and answer. The office of an exception is to raise the question whether the averments and denials of the answer are sufficiently responsive to the allegations of the bill. In this case the averments of the answer were in every way responsive to the allegations of the bill, and left nothing to be desired in defining the sharpness of the real issue between the parties. It was therefore an error to sustain the exceptions."

See, also, 16 Cyc. 315.

[2] The second exception is this:

"Complainants except to that portion of said answer which is embraced in the ninth paragraph thereof upon the ground that the same is insufficient. The portion of the bill of complaint which the defendant undertakes to answer by said ninth paragraph is contained in paragraph 8 of the bill of complaint, and is as follows: 'The Supreme Court of the United States having decided that the railroads aforesaid were exempt from a property tax including a so-called "franchise tax" and that the legislation of the state of Georgia which sought to impose a tax thereon was unconstitutional, null and void, nevertheless the defendant, having failed in his persistent effort to collect taxes from the owner of the property, the Georgia Railroad & Banking Company, is now seeking to levy the same taxes on the same property in the hands of the tenant of the owner, to wit, your orators as lessees, and to force your orators to pay the same.'

"Said answer to paragraph 8 as embodied in paragraph 9 of the answer is as follows: 'It is true that litigation with the Georgia Railroad & Banking Company over said taxes for 1903 resulted in a decree of this court, affirmed save as to the Washington Branch by the Supreme Court of the United States, which restrained respondent from collecting from said Georgia Railroad & Banking Company ad valorem taxes on the railroad from Augusta to Atlanta, and from Union Point to Athens, in so far as the same represented investments of the stock of said company which is exempt as aforesaid. Said decree, however, involved no consideration of said lease, or of the liability of the complainants to pay taxes to the state of Georgia and the political divisions thereof, and the respondent denies that the litigation respecting the taxes due by the Georgia Railroad & Banking Company has any relevancy to the question what taxes if any these complainants are liable to pay.'

"Said answer is not fully responsive and does not definitely and precisely meet the allegations in the bill of complaint quoted above, and the same is evasive."

This portion of the answer is sufficiently responsive.

[3] The third exception stated is:

"The fourteenth paragraph of said bill of complaint is as follows: 'Said lessor, the Georgia Railroad & Banking Company, has never parted with its right, title, and estate in said property, or sought to do so. It has never sought to be absolved, as the owner of said railroads and their appurtenances, of its obligations to the public as a common carrier of freight and passengers,

or of any of its obligations to the state and the public as a railroad company. On the contrary, since the date of the aforesaid lease to William M. Wadley, just as prior to said lease, the Georgia Railroad & Banking Company has been and is constantly sued by passengers, or their legal representatives, and shippers, and by persons who have been injured by the running of trains on its railroads, and in such cases, judgments, for which it alone is liable, have been rendered against it and have been satisfied annually for thousands of dollars. It makes no difference in the legal status that in most cases the lessees indemnify the lessor against such judgments.'

"The answer to these averments is found in the fifteenth paragraph of the defendant's answer, as follows: 'It is admitted that in leasing its railroads and franchises the Georgia Railroad & Banking Company did not and could not relieve itself from liability to the individuals of the public for any wrong use thereof by the lessees, such being the law as between such individuals and the corporation. It is denied, however, that the protection thus reserved by the law to the individuals of the public has any bearing upon the liability of the complainants to pay taxes. It is also denied that the Georgia Railroad & Banking Company parted with no title or estate in said railroads, nor sought to do so; but, on the contrary, it is averred that in Georgia a leasehold is an estate in realty, and differs from a mere tenancy under a landlord in that the exclusive and absolute right of possession and control of the term of the lease is in the lessee, with a mere estate in reversion in the lessor.'

"The following portion of this answer: 'It is also denied that the Georgia Railroad & Banking Company parted with no title or estate in said railroads nor sought to do so; but, on the contrary, it is averred that in Georgia a leasehold is an estate in realty, and differs from a mere tenancy under a landlord in that the exclusive and absolute right of possession and control of the term of the lease is in the lessee, with a mere estate in reversion in the lessor'—is excepted to on the ground that the same is impertinent. This portion of the answer to the averments in the fourteenth paragraph of the bill of complaint is neither responsive nor germane. It has no relevancy to any issue made in the cause, and it is foreign to the complaints made in the bill of complaint and the relief sought therein, but said part of this portion of defendant's answer undertakes to bring in extrinsic matter which is impertinent."

The part of the answer excepted to can hardly be considered as impertinent. Perhaps it goes somewhat beyond what was necessary by way of response to complainants' averments, but hardly justifies the court in sustaining an exception to it. The eighteenth paragraph of defendant's answer, which is in response to paragraph 17 of the bill is excepted to both for insufficiency and impertinence. Both this paragraph of the bill and of the answer seem to me rather argumentative concerning the section of the charter authorizing the Georgia Railroad & Banking Company to "rent or farm out all or any part of their exclusive right of transportation or conveyance," but in view of the character and general subject-matter of the bill and answer, I do not find the answer to be so insufficient or impertinent as to justify striking it on exception.

[4] The exception which is most strenuously urged is to that part of the answer succeeding paragraph 23. That portion of the answer sets up that if the entire property taken over and operated by the complainant companies, under the lease, is not subject to ad valorem taxation, certain specific items of property are so subject. As to some of these items there is no dispute whatever between the parties. These need not be mentioned.

It is claimed, first, that the proceeds of certain bonds issued by the Georgia Railroad & Banking Company, and still outstanding, from which it realized, and invested in the property afterwards leased to complainants, the sum of $2,500,000, is not its stock and not exempt from taxation. It is further set up in the answer that the value of this $2,500,000 of railroad property was, at the time of the lease, and still is, taxable even against the Georgia Railroad & Banking Company, and a fortiori against complainants.

There is also the general claim that the effect of the 99-year lease from the Georgia Railroad & Banking Company to the complainants was to vest an estate in the property in the lessee companies, and that estate is subject to taxation.

It is further claimed in the answer that the railroads as leased were laid with light iron, unballasted, with deficient depots and terminals, and since the lease that these lessees and their predecessors have made large additions and improvements; that additional right of way has been acquired, additional side tracks laid, and new stations established; that the main tracks have been relaid with steel of nearly double the weight of the former rails, and much better ballasted, new steel bridges erected instead of the former wooden ones; that all these additions and improvements have been made with the funds of the complainants and for their advantage and benefit in the enjoyment of their leasehold estate; that the Georgia Railroad & Banking Company has paid nothing towards these improvements, and gets no increased consideration therefor, and should any remain at the end of the lease it would, under the terms of the lease, have to make compensation for and purchase the same; that the present values are the property of complainants, and the increased value of said railroad by reason thereof is taxable to the lessees; certain extensive improvements made in Augusta and Atlanta are claimed to be especially subject to taxation as against the lessees; also, that a large amount of rolling stock has been purchased by the lessees since their possession of the road, which is of large value, and is the property of complainants and subject to taxation; that the value of certain stocks and bonds mentioned in the assessment exhibits, aggregating $1,348,900, are the stocks and bonds assigned in said lease and now held by complainants. Said stock and said bonds, it is claimed, were not a part of the railroads authorized by the charter of the Georgia Railroad & Banking Company, and do not represent any authorized investment of its stock, but represent some collateral surplus investment. The answer then proceeds in this language:

"Respondent therefore contends that the property assessed is taxable to the lessees, complainants, as a whole; but if he is in error in that contention, that each of the items before designated are taxable to complainants, and that, were it not so, vast sums of taxable wealth would be covered up by an exemption limited to a stock of 'not exceeding four million dollars,' and to the advantage and benefit of persons who had no contract of exemption with the state, and were never intended to be benefited thereby."

The exception to that part of the answer above referred to is that:

"It is neither responsive nor germane to any of the allegations in the bill and it sets up no matter which offers defense or which tends to avoid, in

whole or in part, the averments and charges in the bill of complaint, but this portion of the answer is entirely outside of the cause, and relates to matters and contains averments which bear no relation to the assessment made by the defendant, the attack made upon the assessment by these complainants, and does not directly or remotely effect the relief sought by these complainants. Certain acts of the defendant are charged to be illegal and inequitable by these complainants, and relief from his act in levying the tax assessment referred to in the bill of complaint and annexed to the bill of complaint as an exhibit is sought. The defendant in the portion of the answer now excepted to makes statements which have no reference or bearing upon the assessment in question and offer no reason whatever why these complainants should not be relieved against such assessment, but the portion of the answer excepted to consists of extrinsic matters without relation to the cause, and this portion of the defendant's answer is therefore impertinent."

The assessment of the Comptroller General is:

"The railroad from Barnett to Washington and realty connected therewith at $222,453; the franchise thereof at $1,800; and rolling stock and all other personal property connected therewith at $15,747.

"The railroad from Augusta to Atlanta and from Union Point to Athens, and realty connected therewith, exclusive of terminals separately assessed below, at $6,736,748; the franchise thereof at $2,527,436; and the rolling stock and all other personal property in connection therewith, including stocks and bonds valued at $1,348,900, at $3,891,436.

"The tracks, buildings, and other property at Atlanta known as Atlanta joint terminals, at $2,813,786.

"The tracks and buildings and other property at Augusta known as the Augusta terminals, at $325,000."

The question argued at the bar on the last exception mentioned is whether the defendant may by his answer claim that even if it be determined that certain parts of the property assessed (which would mainly consist of the main line of the road from Augusta to Atlanta and from Union Point to Athens and its equipment, its franchises, depots, etc.) are not subject to taxation, yet certain other things (mainly the proceeds of certain stocks and bonds, the enhanced value of the property in the hands of the lessees by reason of improvements placed thereon by such lessees, and the terminals at Atlanta and Augusta) are subject.

The prayers of the bill are:

"First. That it be adjudged that your orators are not, or either of them, chargeable with taxes or any part of them on the property included in the assessment aforesaid.

"Second. That the said William A. Wright, Comptroller General, be enjoined from proceeding further in charging your orators with the taxes aforesaid and especially from issuing any execution for the collection of the same.

"Third. That your orators may have all other and further relief that the case may require and equity can afford."

It is urged that the assessment made by the Comptroller General is on the property assessed as a whole, that the bill attacks the assessment as a whole, and that the defendant cannot by his answer segregate the property and say that if certain parts of it be not subject to taxation that certain other parts certainly are.

I am unable to agree with this proposition. The view that I entertain of the matter is that if the court is asked to enjoin the collection of taxes assessed against certain property and a portion of the tax

assessed is a valid and legal tax and part not, the court certainly would not enjoin as to the part which is rightfully assessed and sought to be collected, even if it granted an injunction as against a part of it. And if the collecting officer is proceeding against property which can be separated and certain of the parts so separated are taxable and certain parts are not, the court might, by its decree, distinguish between the parts so subject and the parts not subject and enjoin the collection in accordance therewith.

Where the bill seeks, therefore, to enjoin the collection of the tax as a whole, or any part of it, and the answer sets up, as in this case, that certain items of property are clearly taxable even if the whole is not, it is fairly responsive to the bill. This exception must be overruled.

[5] The last exception is to the following portion of the answer:

"And respondent avers that the leasehold estate itself of complainants, for a term of seventy years yet, is more valuable than any life estate could be, and worth, in said leased property as improved, a sum of four million dollars, and that the same is in all events taxable to the complainants."

This appears to raise a question which should be heard on its merits, and it is not subject to exception.

All of the exceptions to the answer are overruled, and the case may be set for hearing on the bill and answer, or, if replication be filed, it may be referred to the standing master to take testimony and report on the issues involved.

HASTINGS v. TRAVELERS' INS. CO.

(Circuit Court, W. D. Washington, N. D. May 24, 1911.)

No. 1,898.

(Syllabus by the Court.)

INSURANCE (§ 455*)—RISKS INSURED—ACCIDENT POLICY.

In an action on a policy of accident insurance insuring against "bodily injuries effected directly and independently of all other causes through external, violent and accidental means," it appeared that the assured, a man of 54 years of age, normal height and weight, raised and lowered himself repeatedly in and from a Morris chair by the use of his hands and arms alone; that such exertions caused his death by dilation of the heart, which, on post mortem examination, proved to be enlarged and the valves hardened. *Held* that, as the exertions were voluntary and intended, the only element of accident was the result, for which there was no liability under the policy of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166–1169; Dec. Dig. § 455.*

Accident insurance, risks and causes of loss, see notes to National Acc. Soc. v. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 126.]

At Law. Action by H. H. A. Hastings, as executor of George W. Dunlap, against the Travelers' Insurance Company. Heard on motion for directed verdict. Jury instructed to find for defendant.

Hastings & Stedman, for plaintiff.

Bamford A. Robb, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DONWORTH, District Judge. This is an action on a policy of insurance issued by the defendant to George W. Dunlap, insuring him "against bodily injuries, effected directly and independently of all other causes through external, violent and accidental means."

The second amended complaint alleges that Mr. Dunlap, who weighed about 180 pounds, "was vigorously raising himself in and from an arm chair in which he was then sitting, by placing his hands on the arms of said chair and raising himself up from said chair and lowering himself again in said chair by his hands and arms; that he did these acts several times at said time in close succession." It is further alleged that the effort produced an unusual, extraordinary, and unforeseen and not anticipated sprain and strain of the muscles of the heart, resulting in a dilation of the heart; that the overexertion was "so great as to produce a collapse of the organs of his system; and that he died as a result and on account thereof."

The defendant denies the allegations as to the cause of death, and pleads that the death resulted from pre-existing diseases and bodily infirmities.

The evidence shows that on the evening of January 18, 1910, George W. Dunlap, 54 years of age and of normal stature, was sitting with his wife in their lodgings in Pasadena, Cal. They had taken a long walk during the day, and he seemed to be in good health. He first sat in a rocking chair, and raised and lowered himself several times in the chair by the use of his hands and arms alone, remarking that he was pretty strong for an old man. He then moved from the rocking chair to a Morris chair and repeated the same exercise two or three times. He then gasped for breath and in a few moments died. A post mortem examination was held the next day by a capable physician, who discovered that prior to death Mr. Dunlap had an enlarged heart and hardened valves; but the immediate and proximate cause of death was his physical exertions, which produced a dilation of the heart.

Several physicians have testified concerning the usual condition of the heart of the average man of Mr. Dunlap's age and stature, and have expressed their opinions as to whether such a man can ordinarily undergo physical exercise of this character without injury. While these opinions do not altogether coincide, I do not consider them in conflict as to any material point in the case.

The evidence being all in, the defendant has moved the court to instruct the jury to find for the defendant on two grounds: First, that it appears from the evidence that the death of Mr. Dunlap was not caused by "external, violent and accidental means," but was the result of intentional acts; the only element of accident being the result itself. Secondly, that it appears from the evidence that the death of Mr. Dunlap was caused, in part at least, by a pre-existing enlargement of the heart and hardening of the valves.

The essential facts of the case are fairly free from controversy. There is no dispute as to what violence, if any, led up to the death of the deceased. It is admitted by the plaintiff that the only violence was the act of the deceased himself in lifting himself up and down

two or three times in a chair, possibly two or three times in one chair and two or three times in another chair very soon afterwards. The question is whether the death brought about in that way was caused by "external, violent and accidental means." Counsel for the respective parties have briefed the case with much research, and yet from the cases cited it does not appear that any court has ever held affirmatively on the question stated. It has been held that where a person is taking exercise with apparatus of some kind, and something unexpected happens causing injury, the case may be considered one of accident. Rustin v. Standard Life & Accident Co., 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136; McCarthy v. Travelers' Insurance Co., 15 Fed. Cas. 1,254. So, also, where a person is lifting an object or handling a tool. Horsfall v. Pacific Mutual Life Insurance Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846; Standard Life & Accident Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 51, 74 Am. St. Rep. 112; Insurance Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Pervaugher v. Union Casualty Co., 85 Miss. 31, 37 South. 461; Atlanta Accident Association v. Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; Martin v. Traveler Insurance Co., 1 Fost. & F. 505. The lodging of meat in the windpipe during eating has been held to be an accident. American Accident Co. v. Reigart, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374. So, also, as to a death from blood poisoning brought about by a new shoe which caused an abrasion on the foot. Western Commercial Co. v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653. Undoubtedly death resulting from a fall may be accidental. Meyer v. Fidelity & Casualty Co., 96 Iowa, 378, 65 N. W. 328, 59 Am. St. Rep. 374; Hall v. American Masonic Accident Association, 86 Wis. 518, 57 N. W. 366. No authority more in point than the cases just mentioned has been called to my attention by plaintiff's counsel. Some of the language contained in the opinion in the case of Horsfall v. Pacific Mutual Life Insurance Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846, if understood literally without regard to the facts of that case, would tend to sustain plaintiff's contention that where a rupture of the heart, not intentional, is the immediate cause of death, the case is one of liability under a policy of this kind. The language of the opinion, however, must be restricted in its application to the case which the court had before it, and, when it is so restricted, the case cannot be considered an authority in plaintiff's favor. There were two elements in that case which might properly be treated as involving the element of accident, namely, the fact that the insured was carrying a heavy weight, and the further fact that while so carrying the weight he was obliged to step along and off of a pile of iron. It fully appears that there was opportunity for miscalculation and for mistake as to the nature of the acts which the insured attempted.

In this case I do not see how a recovery can be had without abolishing the distinction between accident and heart disease. A man may rise suddenly out of a sitting posture and die of a rupture of the heart. Can it be claimed that his death results from "external, violent and

accidental means" on its being shown that if he had risen more slowly he probably would not have died at that time? Men frequently take exercise without apparatus by moving their bodies or their limbs one way or another. Is it reasonable to say that a person dies by "external, violent and accidental means" who ruptures his heart while taking such exercise, not having encountered any external object, and there being no cause for the heart injury other than the intended movement of body and limbs?

The words of the policy are to be taken in their plainly understood, everyday meaning. It would surely surprise the average layman to be informed that a man who intentionally lifts himself up in a chair by the arms, and thereby injures his heart so as to produce death, dies by "external, violent and accidental means."

The case should be submitted to the jury if there were any room to find that there was any miscalculation, anything unforeseen, or unintended in the events leading up to the death of the deceased. In other words, if there had been anything in the act of the deceased which was unforeseen, unexpected, or miscalculated, then it would be a question for the jury as to whether that accidental element caused the death. But it is admitted here by the plaintiff that the act of the deceased in lifting himself by his hands and letting himself down was precisely the movement that he was intending to perform and desirous of performing. There was no slipping of the hands or of the body or of the chair. So far from there being any element of chance or miscalculation or the unexpected, the movement was accomplished precisely as contemplated. The only mistake the deceased made was in miscalculating the strength of his heart.

These views are in accord with United States Mutual Accident Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60. It appeared in that case that the deceased jumped from a platform to the ground beneath, and in so doing injured himself so that he died. The trial judge instructed the jury as follows:

"We understand, from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstable in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

"And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then

any resulting injury was not effected through any accidental means. But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect to make under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means."

This instruction and others to the same effect were approved by the Supreme Court. The principle that they embody is applicable to this case and is decisive. I cannot submit to the jury the question submitted in the Barry Case, because that would be to submit a question on which there is not the slightest evidence to sustain the plaintiff's right to recover.

Undoubtedly insurance policies are to be liberally construed in favor of the insured so as to promote and not defeat the purpose intended by the parties, namely, indemnity against injuries resulting from accident. To subject the defendant, however, to a judgment on this evidence, would be to go against both the letter and spirit of the contract. It cannot be assumed that the deceased, when he took out this policy, expected an indemnity for death resulting wholly from his intended acts.

For the reasons stated, the jury will be instructed to find for the defendant.

BURTON v. R. G. PETERS SALT & LUMBER CO. et al. (STEARNS SALT & LUMBER CO., Intervener).

(Circuit Court, W. D. Michigan, S. D. May 13, 1911.)

1. CORPORATIONS (§ 547*)—INSOLVENCY—ASSETS—TRUST FUND—ADMINISTRATION—"INSOLVENT."

Since the assets of a corporation which is "insolvent" in the sense of being unable to pay its debts as they mature, are trust funds belonging primarily to its creditors, the administration and distribution of such funds is a matter of general equitable cognizance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2178–2181; Dec. Dig. § 547.*

For other definitions, see Words and Phrases, vol. 4, pp. 3647–3655; vol. 8, p. 7689.]

2. CORPORATIONS (§ 547*)—INSOLVENCY—ADMINISTRATION OF ASSETS—EQUITY JURISDICTION.

The prima facie jurisdiction of a court of equity to administer the assets of an insolvent corporation is subject to but two limitations; namely, it cannot proceed until the remedy at law is exhausted or obstructed, and, unless it is enforcing an equitable lien, cannot take from the board of directors against its will the management of its affairs so long as the corporation is a going concern.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2178–2181; Dec. Dig. § 547.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CORPORATIONS (§ 553*)—INSOLVENCY—ADMINISTRATION OF ASSETS—EQUITY JURISDICTION.

Where a corporation is insolvent, it may waive its right to further manage its affairs and to have its creditors' claims collected by enforcement of legal remedies, and may consent to the administration of its assets for the benefit of its creditors by a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201–2216; Dec. Dig. § 553.*]

4. CORPORATIONS (§ 558*)—INSOLVENCY—LIQUIDATION—RECEIVERSHIP.

Where, after the appointment of a receiver for an insolvent corporation, it appears that the receivership is being managed with a view to primary operation and contingent liquidation, rather than primary liquidation and incidental operation, the remedy is not by objection to the court's jurisdiction to appoint the receiver, but to compel the receiver to perform his duty.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2237–2240; Dec. Dig. § 558.*]

5. CORPORATIONS (§ 558*)—INSOLVENCY—COLLUSION—EVIDENCE.

Where, at the time proceedings in equity were begun to liquidate the affairs of a corporation, it was insolvent, the fact that, before the bill was filed, the corporation, in contemplation of the filing thereof, had directed an answer admitting the allegations of the bill and consenting to a receivership, and that the parties had agreed on the receiver who was appointed, and the fact that the creditor who should bring the suit was selected at the suggestion of one of the officers of the corporation, so that there might be diverse citizenship to confer federal jurisdiction, was insufficient to establish collusion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2237–2240; Dec. Dig. § 558.*]

In Equity. Suit by Emma Burton against the R. G. Peters Salt & Lumber Company and another and the Stearns Salt & Lumber Company, intervening petitioner. Application by intervener to compel the receiver for the defendant company to perform a contract made by it with intervener. Denied.

Norris & McPherson, for intervener.
Kleinhans & Knappen, for receiver.

DENISON, District Judge. The intervener asks an order directing the receiver to perform the contract made by the Peters Company with the intervener, before the receivership. The effect of the performance will be to give the intervener a preference over other creditors of the Peters Company. The intervener sets up no special equity entitling it to such preference, and rests its demand on the proposition that the receiver herein must be considered as the agent of the parties bound to carry out their contracts as in the case of the receivership of a solvent partnership, since if it is of a character to bar the ordinary rights of the creditors, it has no sufficient basis for existence. It is clear that the present receivership is not of the first suggested character, and, hence, we are driven to consider the alternative. From this point of view, petitioner alleges that there was no jurisdiction on the face of the pleadings, when the receiver was appointed, and that if jurisdiction appeared, it was collusively conferred.

[1, 2] 1. Jurisdiction. It is a familiar rule that the assets of an in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

solvent corporation (i. e., one which cannot pay its debts as they mature) are a trust fund belonging primarily to its creditors; and it necessarily follows that the administration and distribution of such trust fund is a matter of general equitable cognizance. The prima facie power of a court of equity to proceed in such cases, is subject to two limitations, and two only, so far as material in this case: First, it cannot proceed until the remedy at law is exhausted or obstructed; and, second, it cannot, unless it is enforcing an equitable lien, take away from the board of directors of a corporation, against the will of the board, the management of the company's affairs and the lawful disposition of its property, so long as the corporation is a "going concern," or, as sometimes said, so long as it has not "yielded up dominion" over its affairs; and it is only another way of stating this latter limitation to say that the trust fund rule does not actively attach until the company's affairs reach this stage. Both these limitations, however, fail to reach or destroy the underlying, perhaps latent, general, equitable jurisdiction; they are all impediments or obstacles to the exercise of that jurisdiction.

[3] It seems to follow, upon the general principles involved, that the debtor corporation can waive the existence of either of these impediments and can consent that the latent and general jurisdiction shall be exercised. Whatever might otherwise be thought, I consider that this question, in its broadest aspect, is foreclosed by the ruling of Circuit Judge (now Mr. Justice) Lurton, in Horn v. P. M. R. R. Co. (C. C.) 151 Fed. 626, 633. Several of the same Supreme Court cases relied upon by petitioner here are there cited in support of Judge Lurton's conclusion.

I find no distinction in the remark that in that case the defendant debtor "confessed its utter insolvency." The record shows that the insolvency charged in that case was of the same character as that here charged, viz., a present inability to pay debts coupled with the ownership of assets which, properly handled and with the good will preserved, would pay the debts and leave a surplus. The total inability any longer to pay maturing debts and to keep the corporation going appears as fully in this case as in that.

Nor do I find any distinction in the fact which is not there mentioned by Judge Lurton, but which appears in some of his cited cases, that the debtor's property was so heavily mortgaged that an execution would not have been collectible, and that a judgment and execution would have been a useless proceeding. The bill, in the present case, shows that collection by execution, by complainant or by any other creditor, would have been uncertain, and that such proceedings, generally, would have resulted in the loss of their debts in whole or in part by all or by many creditors; but whatever may be the force of these allegations, it is clear that a judgment and execution returned unsatisfied, go only to the point that there is no adequate remedy at law, and that this objection is one which may be waived.

I am satisfied that if the bill in the Horn Case was a general creditors' bill disclosing a general equitable jurisdiction and supporting a receivership, the same things are true of the bill in this case. If par-

ticular and additional equities are necessary, they may be found in the facts that the operations of the defendants extended over several states, that such operations involved extraordinary complications, that the good will of the various enterprises involved, separately and in association, was of great value and of great importance, that there are many hundreds of creditors in the different states having primary claims upon parts of the property and general claims upon other parts, and that the assets of the corporation defendant and of the individual defendant are almost inextricably confused, and the rights of various creditors, as against each and of each as against the other, call very strongly for the powers and procedure of a court of equity.

It is further objected to the jurisdiction that this proceeding is really one for the purpose of having a court of equity take over and manage a complicated business, and pay the debts out of the profits that may be made; and cases are cited to the effect that a court of equity has not this power. I do not question this rule; but it does not apply to this case. There is nothing upon the face of the bill or in facts outside, as they have developed before me, indicating that the purpose was other than to have the assets realized upon and the debts paid, or that a continuing of the business and operation by a receiver were contemplated, except as incidental to the main purpose of realizing upon the assets to the best advantage, and saving for creditors (and, secondly and incidentally, for the defendants) the value of a going business and an entity as distinguished from a dead enterprise and scattered fragments.

[4] In this class of cases, if it later develops that the receivership is being managed with a view to primary operation and contingent liquidation rather than primary liquidation and incidental operation, the remedy is not to conclude that there was no jurisdiction to appoint the receiver, but to direct the receiver to perform his duty.

[5] 2. Collusion. It is next urged that the pleadings and the facts show that this receivership was procured by the defendant, for its own benefit and for the purpose of keeping off creditors while it continued its operations through an instrument of its own selection. No such conclusion is justified. It is true that, before the bill was filed, the debtor corporation, in contemplation of the filing, had directed an answer admitting the allegations and consenting to the receivership, and that the parties had agreed upon the receiver who was nominated and appointed. Doubtless, the debtor corporation believed that the proposed course was the best one for defendant as well as for its creditors. Probably, too, the creditor who should bring suit was selected at the suggestion of Mr. Peters or the Peters Company, and perhaps, so that there might be diverse citizenship. All of these things together, however, do not make up collusion. There is no reason to doubt that the chief creditors approved of and demanded the receivership, and that the defendants yielded to such demand when it could not be longer resisted. In these respects, the case is not dissimilar to Re Metropolitan Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, which case also bears upon the jurisdictional questions discussed.

An order may be entered granting leave for filing the intervening petition, reciting a hearing upon the pleadings and affidavits and reports on file, and directing that the petition be dismissed. If the intervener has any equities with regard to any balance unpaid on the 1910 transactions, they may be preserved by suitable further proceeding.

In re CANFIELD.

(District Court, S. D. New York. July 5, 1911.)

1. EVIDENCE (§ 437*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS—ILLEGALITY.

Where the entire agreement of the parties has been reduced to writing, parol evidence is inadmissible, and the court can only enforce the written stipulations, but parol evidence is admissible to show that the obligations contemplated by a written contract involve acts forbidden by law, though the writing expressly provides that nothing but the writing shall be considered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2025–2029; Dec. Dig. § 437.*]

2. CONTRACTS (§ 140*)—VALIDITY—ILLEGAL CONTRACTS.

Where the parties to a contract reduced to writing stipulating that nothing but the writing shall be considered, made an illegal contract outside of the writing, the original contract is void, and with it must follow the written agreement, whether regarded as a part of the total engagements between the parties, or as an independent contract made in performance of the prior oral contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 713–721; Dec. Dig. § 140.*]

3. CONTRACTS (§ 138*)—ILLEGAL CONTRACTS—ESTOPPEL.

A party to an illegal contract cannot be estopped from setting up the illegality, and this is especially true where the contract violates a statute designed to relieve the party from some supposed oppression.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. § 138.*]

4. USURY (§ 53*)—USURIOUS TRANSACTIONS.

A lender of $10,000 at 6 per cent. had as a part of the transaction borrowed the funds at 5 per cent. He obtained collateral security for the loan, but the collateral was troublesome. He received as a part of the transaction an additional $1,200 per year for nominal work of notifying delinquent debtors of the borrower on their claims delivered as collateral. *Held*, that the transaction was usurious under the statute of New York.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 91, 114–118; Dec. Dig. § 53.*]

5. USURY (§ 113*)—BURDEN OF PROOF—EVIDENCE.

A party relying on the defense of usury has the burden of proving it by a preponderance of the evidence, and the court in determining the sufficiency of the evidence must act cautiously.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 308–323; Dec. Dig. § 113.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE.

Whether the usury law is too drastic, or is economically unwise, is no concern of the courts, which are bound to enforce it as written.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

In the matter of the bankruptcy of Abram L. Canfield. Proceedings on the claim of one Burden. Report of master denying relief confirmed.

Brush & Crawford, for petitioner.
Engel Bros., for receiver.

HAND, District Judge. The first question is of the admissibility of oral testimony to contradict the written instrument. It would seem hardly necessary to show that the parties may not avoid the positive command of the sovereign by resorting to so easy a cover as reducing their agreement to writing. Wigmore, § 2414. However, the case in Barbour is to the contrary, and there are other cases looking in the same direction. I regard Scott v. Lloyd, 9 Pet. 418, 446, 9 L. Ed. 178, as controlling, because in that case although the bargain took the form of the sale of an annuity charged on land, the court charged the jury that they might consider all the circumstances including matter in pais contradicting the deeds. This part of the charge the Supreme Court sustained after full discussion. So far as the case in Barbour itself goes, it is at least overruled by Mudgett v. Goler, 18 Hun. (N. Y.) 302. Nothing is more common than for courts to disregard the form of the transaction and find whether it is only a cover for violation of the statute; the books are full of the unravelling of all sorts of ingenuities, which involve the contradiction of what the parties have written. Mercantile Trust Co. v. Gimbernat, 134 App. Div. 410, 119 N. Y. Supp. 103. Upon principle there can be no doubt.

[1] The parol evidence rule means only this: That where the parties have in any form said that a writing shall completely embody their engagements, the court can enforce none but the written stipulations without disregarding the very contract they have made. Wigmore, §§ 2429, 2430. When, however, the inquiry is whether the performance of the obligations contemplated involves acts which are forbidden by law, the parties have no power to determine the scope of that inquiry.

[2] Even if the writing expressly agreed that nothing but itself should be considered, the inquiry would still be whether, notwithstanding that written stipulation, they had made an illegal contract dehors the writing. If so, that original contract is void, and with it must fall the written agreement, whether the latter be regarded as a part of the total engagements between the parties, or as an independent contract made in performance of the prior oral contract.

[3] Nor can there be any estoppel against setting up the illegality of an agreement; that would be to evade the very purpose of the law in forbidding men to make it. It would be peculiarly improper in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

case as here of a statute designed to relieve the weaker party from some supposed oppression. Surely every one must see that when the law relieves such an one from the consequences of his weaker position in the bargain, he may not be successfully tied up at the very time of his weakness from subsequently claiming protection.

[4] On the merits I agree with the master. It is, of course, possible by consistent hostility not to enforce any statute of which one disapproves the purpose. Nothing short of such a determination can, I think, cover up the actual tenor of this transaction; and, if so, I have no right to relieve the lender, because the penalty is greater than I might wish, or even if the offense should seem to me to be no offense at all. To that particular kind of judicial usurpation I will not yield. What then are the facts? The lender borrows all his funds at 5 per cent. and lends them upon a troublesome collateral at 6 per cent. By that he gets $100 per year and accepts a risk of $10,000. So far there is small inducement by way of profit. However, he does get in addition $1,200 per year, making a net profit of $1,300 on his loan. That he explains was no more than fair return for the work required of him as obligee under the guaranty bond; work which was undeniably substantial and vexatious. The question resolves itself into a consideration of whether $1,200 per year was clearly too much to pay for the work. What, then, was it, and how did he calculate its worth? He says that he knew that the accounts would average about $100 each, and that there would be therefore always 100 of them outstanding. His substantial duties in regard to each were these: (a) To notify the debtor whenever remittance to him from Canfield on any account was twenty days in default, (b) To examine the books and vouchers of Canfield monthly and to compare the statements rendered by Canfield to him with the books of original entry. The work of comparison Burden says that he estimated would take five or six days every month, while the letters to overdue debtors would be an added labor. However, all the comparison required upon 98 accounts he said he in fact did in one day. It is of course possible that his provisional estimates were honestly so far wrong as that, but, since he was himself a bookkeeper, it is unlikely. It is also true that he made two other examinations in January, but these were for substituted accounts, and there appears no reason to suppose that the parties originally contemplated substituted accounts or any other examination than the monthly one required in the bond. That being so, certainly Burden much miscalculated the labor involved in doing what was required. The labor of notifying delinquent debtors was necessarily uncertain, but if every debtor failed to pay—a ridiculous assumption—it would not have equalled the difference between the pay for a day's work and the monthly interest rate. Indeed the accounts assigned apparently were only due in four months. There is just ground then for believing on Burden's own testimony alone that he hardly regarded the services mentioned as equal to the pay reserved.

Moreover, the whole situation was most extraordinary. Why should Burden at the outset have sought a place at $50 per week with light work as an accessory to a loan of $10,000? It is perhaps not incred-

ible, but it is certainly most unusual. Why thereafter should he lend money that he did not have for the sake of $100, and, again as an accessory, perform incidental services to secure the principal, which were worth $1,200? If he had been in search of employment, he might have thought to get it in this way for its own sake, but he advertised himself as a retired merchant with money to lend. If he honestly believed what he now says he was an extraordinary man; but if he saw a chance by borrowing to lend out at 18 per cent. he was a usual man. If, moreover, he looked about with his broker for ingenious fetches to elude the drastic usury law of New York, he found one which under the circumstances had an apparent plausibility that was most promising. All the antecedent probability is therefore with the receiver and against the claimant.

Nevertheless suspicion is not enough, for the result is harsh. The added proof comes from the direct testimony. Canfield and Hess each swear squarely that the whole matter was a cover for usury; Koehler and Burden squarely contradict them. Burden has $10,000 to lose; Koehler must naturally see his customer through if he has embarked him in the difficulties and has suggested the device to him. Each of these has a strong personal bias to tell the story as they tell it. Canfield has his own proper bias as well, though not so direct as Burden's. If he should get his discharge, it is quite true that he would have no pecuniary interest in how the estate was divided between his creditors; still I think it not fanciful to assume that he has a reasonable motive to make the dividend to his general creditors as large as possible. If, on the other hand, his discharge be refused, he has an obvious motive now to tell a story which may protect him from successful suit hereafter upon this indebtedness. Furthermore the same story would serve to defeat objection to his discharge if that came from Burden himself, for it would show that he had no provable debt. Now, I think that there is already in the case enough proof to show that Canfield may have some ground to fear for his discharge, without of course meaning to suggest any opinion upon that subject. While, therefore, it is undoubtedly true that of the two Burden is more directly concerned in the outcome since he has his money directly staked on the result, I cannot still regard Canfield as a disinterested person. The same is not true of Herzog's testimony, for I can see no motive which she can have in telling what is not true. She is now married and presumptively not dependent upon Canfield for employment, nor is it indeed apparent that he is in a position to give her future employment, were she not. The question raised of her presence at the interview is largely verbal, for with such partitions with open windows in them giving right into Canfield's room, and especially with the door left open, there is no reason to doubt that she was in a position to hear, as she swears she was.

[5] However, were the case one merely of word against word, I should perhaps feel that the receiver had not carried the burden of proof which the defense puts upon him. The antecedent probability of Canfield's story, and the improbability of Burden's, supply a corroboration which turns the scale. It is not essential that I should lay

every reasonable doubt, as though Burden were being tried for the crime of usury, but the preponderance of the proof is all that is required. Just what is meant by the proviso found in the books that the proof must be clear and convincing is not apparent, except it be that a court should be cautious. However, indecision, or hostility, is not caution, and here a determination for Burden can proceed only from one or the other.

[6] Finally a word about the supposed equities of the situation. Whether or not the statute against usury is too drastic, or is unwise economically, is in the first place no business of the courts, nor have they any right, even if they have the power, indirectly to substitute their own beliefs for those of the Legislature, no matter which of the two be right. Here, however, there is not even the supposed room for such spurious considerations which at times prove potent in actual decisions, because the law of usury is many decades old upon the New York statute books, and every one knows what chances he takes when he disobeys it. If my inference is right upon the facts, Burden deserves not the slightest sympathy. He has invented a very ingenious and plausible device to evade the law, one of those manifold expressions of the pressure which economic necessity exerts in this matter to circumvent the popular will. When he did it, at the suggestion of his broker, he showed clearly enough that he was quite alive to what he was about, and to the risks he was taking. The play has gone against him, and he has no ground of complaint whatever. Therefore, the whole question is one of fact, to be regarded without the least color of sympathy or prejudice. If he did honestly make such a contract for so little profit, overweighted as it was with an incident of so much more consequence than the main motive itself, he is like any other creditor; if he was only one more money lender, who will take the risk of forfeiture under the usury laws, in the hopes that he will not be caught, he has himself to blame for disregarding the will of the community in which he lives. I can have no doubt of the facts, and the report will be confirmed.

YEE GING v. UNITED STATES.

(District Court, W. D. Texas, El Paso Division. August 2, 1911.)

No. 284.

ALIENS (§ 32*)—CHINESE—DEPORTATION PROCEEDINGS—CITIZENSHIP.

Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320), provides that any Chinese person arrested under the provision of the act shall be adjudged unlawfully within the United States unless the person shall establish by affirmative proof, at the hearing, his lawful right to remain within the United States. *Held* that, where a Chinese person, arrested in deportation proceedings within the United States, and not taken at the border, claimed to be a natural born citizen, the burden of proof thereof was on him, and the United States was not bound to establish the contrary.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Yee Ging was arrested in deportation proceedings, and from an order of deportation he appeals. Affirmed.

Peyton F. Edwards and Loomis & Knollenberg, for appellant.
S. Engelking, Asst. U. S. Atty.

MAXEY, District Judge. The appellant was arrested in a laundry at Ft. Bliss, Tex., near El Paso, for being unlawfully in the United States. In the order of deportation it is recited by the commissioner that he is a Chinese person and a laborer by occupation, and that he failed, upon the hearing, to establish by affirmative proof his lawful right to remain in the country. The appellant bases his claim of exemption from arrest on the ground that he is a citizen of the United States, having been born, it is asserted, in San Francisco, Cal. At the hearing before the commissioner the appellant introduced the depositions of two Chinese witnesses for the purpose of proving his birth as claimed. When the cause was before the court on appeal the testimony of several other witnesses was heard, including that of the appellant, the Chinese interpreter, and three or four others. Several photographs of the appellant were also admitted in evidence.

The first, and it may be said the serious, question which confronts the court in the consideration of this case is the following: The appellant having been arrested in the state of Texas for being unlawfully here and claiming to be a citizen of the United States, is he required to establish by proof the fact of his birth in the country? or is the burden of proof upon the government to show that he was not born in the United States? Counsel for the appellant insist that the Circuit Court of Appeals for this circuit, in the case of Gee Cue Beng v. United States, 184 Fed. 383, 106 C. C. A. 493, has answered the second question in the affirmative. And it appears from an examination of that case that the view advanced by counsel is correct. The decision in Gee Cue Beng's Case seems to have been placed upon two grounds: (1) That the appellant established by sworn witnesses "a strong affirmative case" that he was a citizen of the United States; and (2) that the burden was on the government to establish his noncitizenship. In reference to the second ground, the only one that it is necessary to consider, the court, without advancing any independent reasons of its own, noted its concurrence with the views and reasoning of the Circuit Court of Appeals for the Seventh circuit, as expressed in the opinion of Judge Grosscup in Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85.

The question presented is one of far-reaching importance, and, if the doctrine in Moy Suey's Case should be ultimately sustained by the Supreme Court the effect would be to seriously impair, in the judgment of the writer, the efficiency of the Chinese exclusion laws enacted by the Congress. What ruling the Supreme Court may finally make is a matter which that eminent tribunal will determine for itself. But the question, it is thought, has heretofore been decided precisely to the contrary by the Supreme Court in the case of Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121. And it is worthy of remark that no reference is made to that case by Judge

Grosscup in his opinion delivered in the case of Moy Suey. But he appears to proceed upon the assumption that a different rule of evidence should be applied to a Chinese person "physically and politically" in the country from that applicable to such a person who is stopped at the border line and refused admission. In the latter case he admits, in consonance with the holding in United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, that the burden of proving citizenship is upon the Chinese person seeking admission. But in the former he seems to insist that, where the Chinese person claims to be a citizen, the government must prove that he is not native born. The statute makes no such distinction, nor is it to be found, so far as the court is advised, in any case decided by the Supreme Court. The words of the written law are as follows:

"Sec. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States." Act May 5, 1892, c. 60, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320).

Such is the language of the statute. Now let us see what the Supreme Court has said in the Chin Bak Kan Case. In that case the appellant, using the expression of Judge Grosscup, was "physically and politically" in the United States when he was arrested. He claimed to be a citizen of this country, but the proof upon that point being insufficient he was ordered deported by the commissioner, whose judgment was affirmed. In that condition of the record, it was said by Mr. Chief Justice Fuller, speaking as the organ of the court:

"By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.' As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by a mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed." 186 U. S. 200, 22 Sup. Ct. 894 (46 L. Ed. 1121). See Ah How v. United States, 193 U. S. 65, 24 Sup. Ct. 357, 48 L. Ed. 619.

The case, from which the foregoing excerpt was taken, would seem to be decisive of the question; and it has evidently been so considered by several courts which have based their judgments directly upon it. Lee Yuen Sue v. United States, 146 Fed. 670, 77 C. C. A. 96, Circuit Court of Appeals for the Ninth circuit; United States v. Hoy Way, (D. C.) 156 Fed. 247, District Court, E. D. Pennsylvania.

Without citing Chin Bak Kan, other courts have announced in similar cases the same rule of evidence. United States v. Chin Ken (D. C.) 183 Fed. 332, District Court, N. D. New York, citing numerous authorities; Yee King v. United States, 179 Fed. 368, 102 C. C. A. 646 and Kum Sue v. United States, 179 Fed. 370, 102 C. C. A. 648, Circuit Court of Appeals for the Second Circuit; United States v. Too Toy (D. C.) 185 Fed. 838. See also United States v. Ju Toy, 198

U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; United States v. Lee Huen (D. C.) 118 Fed. 442.

It will thus be seen that the Supreme Court, in a case where the Chinaman—claiming to be a citizen—was arrested when "physically and politically" in the United States, expressly held that the mere assertion of citizenship was not sufficient, but the "facts on which such a claim is rested must be made to appear." The court considers it unnecessary to offer an apology for inserting in this connection a review by Judge Hand of the case of Moy Suey:

"On the other hand, I shall likewise assume that section 3 of the Act of 1893, 27 Stat. 25, applies, and that the burden rests upon the defendant in spite of the fact that the issue is citizenship, and that he has been arrested in this country. It is quite true that in Moy Suey, 147 Fed. 697, 78 C. C. A. 85, a distinction is taken between a Chinese person entering the United States and so covered by United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and a Chinese person who has got in and is arrested here, but, that decision not being binding upon me, I cannot follow it. The doctrine of Ju Toy v. U. S., supra, which that case held had been implicitly affirmed in several previous cases, was this: The United States has the power to determine through the executive department the very issue of fact upon which its power of exclusion depends, and it is not enough to give jurisdiction to a court that that issue involved citizenship—a fact, which, if proved would remove the applicant from the operation of the power. Now, if the issue on which the power depends may itself be determined by executive officers, as an incident to the exercise of the power itself, it can be of no consequence whether the alleged alien be at the borders of the country or within it. A citizen is as much protected in his right to enter the country as in his right not to be deported, while he is here. Indeed that was expressly assumed in U. S. v. Ju Toy, 198 U. S. 263, 25 Sup. Ct. 644, 49 L. Ed. 1040. The point in that case was whether one who might be a citizen could have that right taken from him by executive hearing, and the decision admitted and accepted that possibility. Even if it be conceded that there is greater likelihood of that possibility's occurring in the case of persons arrested within the country, the power does not depend upon the unlikelihood of its depriving a citizen of his constitutional right. It exists, because it is a necessary incident to an unquestioned constitutional power, to the exercise of which is a reasonable adjective regulation. In Moy Suey v. U. S., supra, the court says that a citizen who has never gone out of the country may not be banished without judicial decision. This, it seems to me, involves two difficulties: First, it begs the question by assuming that the applicant had in fact always been within the country which after U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, would involve his citizenship; and, second, it assumes that a citizen's rights are different after he leaves the country from what they are while in it, which, as I have already said, is not the law. A citizen, like any one else must submit to that determination, if it be a reasonable adjunct to an admitted national power." United States v. Too Toy, (D. C.) 185 Fed. 840, 841.

In scores of cases heard by the court at the El Paso division, where the number seems to be constantly augmenting, the rule has been uniform that the burden of proving citizenship rested upon the Chinaman. Were it otherwise held it would become increasingly difficult, if not impracticable, to so enforce the exclusion acts along the American-Mexican border as to expel Chinese persons having no lawful right to remain in the United States.

The question next arises whether this court, in the determination of Chinese causes, should be controlled by what may not be inaptly classed as obiter dicta of the Circuit Court of Appeals; or whether its rulings should be governed by the decisions of the Supreme Court. A reply to this question scarcely admits of doubt. It is true that, in the absence of expression by the Supreme Court on a given question, it is the duty, as it has ever been the pleasure of this court, to acquiesce in and follow the rulings of the Circuit Court of Appeals for this circuit. But where the Supreme Court has spoken and proclaimed the law all other judicial tribunals should yield obedience to its judgments. As the final arbiter of all national judicial controversies its word is decisive, and its judgments are the law of the land.

Hence, this court holds, in obedience to the ruling of the Supreme Court, that Chinese persons, arrested for being unlawfully in the country and claiming to be citizens of the United States, must establish by affirmative proof, to the satisfaction of the justice, judge, or commissioner, as the case may be, the fact of their citizenship. Mere assertion will be unavailing; satisfactory proof should be made.

Has the appellant in the present case complied with this rule of evidence? The court will not enter upon an analysis of the testimony embodied in the record. It speaks for itself, and will doubtless reach the Circuit Court of Appeals where it may be examined. Suffice it to say the court has read and reperused it with unusual care, and after due consideration the court is of the opinion that the appellant has failed to establish that he is a native born citizen of the United States.

The judgment of the commissioner should therefore be affirmed, and it is accordingly so ordered.

GREEN v. WILBRAHAM.

(Circuit Court, D. New Jersey. November 20, 1909.)

MONEY RECEIVED (§ 4*)—CONTRACT—PRIVITY.

Plaintiff's contract for services provided that he should receive not less than $20 per week, and that when dividends paid by the employer corporation exceeded 5 per cent. plaintiff should then receive as additional compensation not less than $15 for each additional $100 in excess of the sum necessary to pay the 5 per cent. dividend, the balance of each of such $100 to be divided pro rata among the stockholders, and that all wages and additional wages or salary should be charged to the expenses of the company. *Held*, that such agreement did not make the additional wages provided for on dividends exceeding 5 per cent. being declared by the corporation, plaintiff's property, but simply fixed the amount of wages which he should from time to time receive, and hence, such additional wages not having been paid to plaintiff when dividends in excess of 5 per cent. were declared and paid to the stockholders, plaintiff could not recover a proportionate amount of such additional wages from each stockholder receiving such increased dividends in assumpsit for money received.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 7–13; Dec. Dig. § 4.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Thomas W. Green against Thomas C. Wilbraham. On motion to strike out the first count of the declaration. Granted.

Walter H. Bacon, for the motion.
Malcolm Buchanan, opposed.

CROSS, District Judge. Briefly summarized, the first count of the declaration alleges that the plaintiff had a contract with all of the stockholders of Wilbraham-Baker Blower Company (a corporation of this state), of whom the defendant was one, whereby the plaintiff was to be continued as an employé of that corporation as theretofore, at $20 per week so long as the dividends declared by the company did not exceed 5 per cent. When the dividends, however, should exceed that rate, he was to be paid, as additional wages or salary, $15 out of each $100 of profits in excess of the sum necessary to pay the 5 per cent. dividend, which said additional sum of wages or salary was to be charged to the expenses of the company. It is then alleged that said agreement was approved by all of the stockholders of said corporation, at a special meeting held June 29, 1895, and by its board of directors at a meeting held July 15, 1895; that subsequently said corporation ceased business, and its assets, expressly including the said agreement, were thereupon taken over by the Wilbraham-Green Blower Company, a Pennsylvania corporation, which assumed all of its liabilities. The count in question also alleges that the plaintiff never received more than $20 per week as wages, although dividends in excess of 5 per cent. were declared on several occasions by each of said corporations; that plaintiff received his share thereof, and said defendant also received his share, without objection from the plaintiff, because he had forgotten the fact that under the agreement he was entitled to additional wages, although the defendant well knew it; and that the defendant by his joinder in the declaration of said dividends, and his receipt thereof, worked a fraud upon the plaintiff. Whereupon the plaintiff, as an employé of both corporations, sues the defendant as one of the stockholders, who united in said agreement, to recover back such part of the dividends declared by said corporations in excess of 5 per cent. as he had received. The portions of the excess dividends alleged to have been received by the defendant from time to time are set forth in detail, and the amount thereof is then demanded from the defendant as moneys had and received by him for the use of the plaintiff. Neither of the corporations is a party to the suit, and the suit is not directly founded upon the agreement. Twenty reasons why the count should be stricken out have been assigned, but were not discussed in detail at the argument, and will not be here. The fourth item of the agreement contains substantially all of the matter affecting this suit, and is as follows:

"Fourth. That said John S. Wilbraham and Thomas W. Green shall be employed by said company as heretofore and shall receive full and ample compensation for their services, such compensation to be fixed by the board of directors, with power to change the same as the necessities of the business require.

"Provided that the wages of John S. Wilbraham shall never be less than twenty dollars per week and the wages of Thomas W. Green shall never be

less than twenty dollars per week. The said wages however to be exclusive of additional wages or salary hereinafter mentioned. When the dividend to be paid exceeds the five per cent. as aforesaid, then the said John S. Wilbraham and Thomas W. Green shall receive additional wages or salary as hereinafter provided and the said John W. Wilbraham shall receive as full compensation as wages or salary not less than fifteen dollars from each additional one hundred dollars in excess of the sum necessary to pay the five per cent. dividend and the said John S. Wilbraham and Thomas W. Green shall receive as additional wages or salary a like compensation or in other words when the profits warrant a dividend in excess of five per cent. on the paid up capital, each of the aforesaid John W. Wilbraham, John S. Wilbraham, and Thomas W. Green, shall receive from each additional one hundred dollars the sum of fifteen dollars, and the balance of each one hundred dollars or fifty-five dollars shall be divided pro rata among the stockholders.

"Provided that at no time shall the aggregate amount of wages and salary paid either of the aforesaid be more than forty-five hundred dollars in any one year. All wages and additional wages or salary to be charged to the expenses of the company.

"In case of death of either of said recipients the weekly wages of said deceased shall cease at once and the wages or salary to be deducted from the dividend of the current year shall be determined proportionately."

It will be remarked at the outset that the agreement did not constitute the profits of the corporation in excess of the 5 per cent. dividend, or any part of them, the plaintiff's money. Such excess of profits were not then earned or in existence, and no charge upon them in his favor was thereby made or intended. The plaintiff was to receive certain stipulated wages or salary from the company, until it should be in a position to pay a dividend on its stock exceeding 5 per cent., when he was to receive more; but it still came from the company and was invariably styled by the agreement "additional wages or salary." The scheme was obviously devised not only to fix the amount of wages which the plaintiff should then receive, but also the amount which he should thereafter receive, if and when the prosperity of the company should warrant an increase. The plaintiff was not, however, by that agreement, made other than a creditor of the company to the account of which his wages were to be charged, and to which he assented when he affixed his signature thereto. That the plaintiff's compensation was, to a certain extent, contingent upon the earnings of the company, did not alter his relations to or constitute him other than an employé of the company. In Bennett v. Millville Improvement Company, 67 N. J. Law, 320, 51 Atl. 706, it appeared that the plaintiff was to receive as compensation, in addition to a fixed sum, one-sixth of the clear net profits of the business, construing which the court held that it "was salary—payment for services—and not part of the profits, but part of the expenses of the business." It seems entirely clear, moreover, that the agreement under consideration did not provide a plan for the *payment* of the plaintiff's wages, but for fixing the amount of them from time to time. At first he was to receive from the company $20 per week, then a percentage of the profits over a certain sum, if there were any; but so far as appears his wages, whether more or less, were to be paid in the ordinary way. The case at bar then is that of a creditor of the corporation who does not pretend to stand upon his agreement with the stockholders, who does not sue the corporation itself for his wages, but who, on the contrary, ignoring all such methods, sues the defend-

ant as a stockholder for the share of the excess dividends received by him, and this too without any allegation of the insolvency or mismanagement of the corporation, or that, when the excess dividends were respectively declared and paid, there did not remain in its treasury a surplus fund sufficient to have paid not only the plaintiff, but all of its other creditors. The suit is anomalous, and since it is apparent that, in the event of its successful issue, the plaintiff at the most can only recover of this defendant a small proportion of the excess dividends paid by the corporations, a suspicion arises that possibly the corporation has an offset or other partial or complete defense to the claim. But, that aside, there is nothing in the count which shows that the plaintiff ex æquo et bono is entitled to demand and have of the defendant any part of the moneys he has received as dividends regularly declared by the directors of the corporation. The circumstances under which excessive and unwarranted dividends declared and paid by a corporation may be recovered back are prescribed by the statute, and the remedies thereby provided, certainly in the absence of express contract, are exclusive. It is sufficient to say that none of them contemplate a suit at law by a creditor against an individual stockholder upon an implied contract.

This action is based upon an implied assumpsit, but I find nothing in the alleged facts which warrant such an implication. The plaintiff was an employé of the company, and his wages, by his express agreement, were a part of its expenses. Nor is there anything in the agreement which authorized or suggests a suit of this character, for, while it is true that fraud on the part of the defendant is alleged, the facts relied on do not support the charge; at the most they constitute on his part a breach of the agreement. If any action could possibly be maintained thereon, it would only lie against all of the stockholders who jointly united in its execution. By it the plaintiff was to be continued in the service of the corporation, and the amount of his wages or salary, present and future, fixed, and, so far as this suit is concerned, that was all. Subsequently the agreement was assumed by both of the corporations.

Returning now to the question of implied assumpsit, it will be found that much looseness of expression has been used in stating, or attempting to state, when and under what circumstances such an action will lie. No better exposition of its nature and character, however, will readily be found than that given by Chief Justice Hornblower, in Sergeant v. Harris & Stryker, 16 N. J. Law, 464, 32 Am. Dec. 404. It is true that this is an old case; but it is equally true that the action of indebitatus assumpsit is old. In the case just referred to, it appears that a sheriff had offered a reward for the apprehension of an escaped prisoner. One Stryker arrested the prisoner and lodged him in jail in an adjoining county for safe-keeping until he could notify the sheriff offering the reward of the arrest. The following day Stryker went to the sheriff, notified him of the arrest, and claimed the reward, whereupon he learned that other persons had been to the sheriff, and, representing to him that they had arrested the prisoner, had claimed and received the reward. Stryker thereupon sued those

persons for the reward, as for moneys had and received to his use. The Supreme Court, however, held that the action would not lie, for the reason that there was no privity, expressed or implied, between the parties whereon to found the action. The reasoning of the Chief Justice in delivering the opinion of the court is instructive throughout; but only comparitively short extracts therefrom can be here given.

Speaking of the action of indebitatus assumpsit, he says:

"Broad and extensive as this action is, it has limits, beyond which it ought not to go; and the great difficulty is to prescribe those limits, and make them out by such specific and perceptible lines as leaves the mind in no doubt or perplexity. To say that it lies to 'recover back money which ought not to be kept'—for money, 'which ex æquo et bono the defendant ought to refund'—or 'for money which the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund,' or 'for money got through imposition,' or 'extortion,' or 'oppression,' or 'by mistake,' or 'by an undue advantage taken of the plaintiff's situation,' is, after all, dealing in generalities which afford us no specific rule, by which to test any particular case.

"Notwithstanding the universality of the expressions used in the books on this subject, there is and must be, in truth and justice, a limit to this action. It cannot be that every person having a legal demand and a right of action against a third person is at liberty to abandon his suit against such person, and, by a suit against me for money had and received, compel me to litigate with him and establish my right to moneys I may have received from his debtor."

And further on in his opinion, after analyzing some English cases, he adds:

"Stryker's right to recover in this suit, if he has any such right, is not because the sheriff paid the money voluntarily to the defendants, nor because they had no right to it in fact; but because they in fact, or by implication of law, received it for Stryker. That the sheriff did not pay the money to them, for Stryker, he expressly testifies; nor did they profess so to receive it, but, on the contrary, claimed it as their own. If then the law can raise any implication that the defendant received the money to and for the use of Stryker, it must be on the ground that they practiced a fraud on the sheriff. But I cannot well perceive how a fraud on one man can inure to the benefit of another; or how a fraud practiced on the sheriff can raise a promise to pay money to the plaintiff. If, indeed, the money had been paid to Stryker, and left by him in a bag, or purse, with the sheriff for safe-keeping, and the defendants had got possession of it by falsehood and misrepresentation, then it would have been a fraud on the plaintiff; it would have been his money, and he might have pursued it in this form of action. But, however unfair towards the sheriff the conduct of the defendants has been, they did not thereby get Stryker's money. They got Jones' money, and ex æquo et bono they ought not to retain it from him. They are bound by the ties of natural justice and equity to refund it to him. And, in his favor, the law considers it, in their hands, as money received by them to his use—not to the use of any other person. The money that Jones paid to Sergeant and Harris was no more Stryker's money than it was the money of any other creditor of Jones. * * * I think all the cases relied upon are such as go upon the plaintiff's title to the specific fund, or where, the third person having lawfully paid over the money, the plaintiff has no remedy against him; and this I think will be found to be the true criterion in such cases."

The foregoing case was cited and followed in Nolan v. Manton, 46 N. J. Law, 231, 50 Am. Rep. 403; Westcott v. Sharp, 50 N. J.

Law, 392, 13 Atl. 243. In Cary v. Curtis, 3 How. 236, at page 247 (11 L. Ed. 576), Mr. Justice Daniel, speaking of the form of action under consideration says:

"Another principle held to be fundamental to this action is this: That there must exist a privity between the plaintiff and defendant, something on which an obligation, an engagement, a promise from the latter to the former, can be implied, for if such implication be excluded from the relation between the parties by positive law, or by inevitable legal intendment, every foundation for the promise and of the action upon it is destroyed, for none can be presumed or permitted to promise what either law or reason does not warrant or may actually forbid."

As has already been said, the moneys sued for in the case at bar were never the property of the plaintiff, and were not received for him or to his use. The agreement did not make them his property, but rather fixed the amount of wages which he should from time to time receive. The moneys the corporation earned were its property until the directors had converted them into dividends, when they became the property of the stockholders. King v. Paterson, etc., R. Co., 29 N. J. Law, 82, s. c. 29 N. J. Law, 504.

The first count of the declaration will, accordingly, be stricken out. It sets up no cause of action against the defendant.

UNITED STATES v. CITY OF TIFFIN et al.

(Circuit Court, N. D. Ohio, W. D. September 28, 1911.)

No. 2,269.

EMINENT DOMAIN (§ 47*)—CONDEMNATION PROCEEDINGS—RIGHTS OF GENERAL GOVERNMENT.

The rule that land in public use cannot be taken for another and inconsistent public use under general legislative power of condemnation, but that the right must appear, to seize the particular property, by express provision directed toward the special property, in some pertinent legislation or be the inevitable implication arising from such legislation, does not apply to a proceeding by the United States to condemn a portion of a public alley for a post office site; the comparative importance of the contending public uses under such circumstances being a matter for judicial determination.

[Fd. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*

Nature and extent of power of United States to condemn property for public use, see note to Town of Nahant v. United States, 70 C. C. A. 633.]

Proceedings by the United States against the City of Tiffin and others to condemn a portion of a public alley for a post office site. On demurrer to petition. Overruled.

U. G. Denman, Dist. Atty., for United States.

E. G. Staley and Willis Bacon, for defendant City of Tiffin.

KILLITS, District Judge. This is an action to condemn a portion of a public alley in the city of Tiffin for a post office site. The govern-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment in its petition recites the organization of the municipality of Tiffin, the dedication to the city of the plotted ground of which this alley is a part, the fact that by act of Congress the Secretary of the Treasury was authorized and directed to acquire by purchase, condemnation, or otherwise a site in said city for a post office, and that under the laws of the United States the Secretary of the Treasury had determined that the land in question was necessary to such a site, the action having been brought in conformity to the provisions of Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), the manner of pleading, as provided by that act, following the laws of Ohio in such case. The abutting landowners, who appear from the petition to have a special interest in the alley in question, have not demurred, but have answered, waiving all claims to the maintenance of the alley. The city of Tiffin demurs to the petition on the grounds, among others, that there is no jurisdiction in the court, that the plaintiff has no legal capacity to sue in this action, and that the amended petition does not state facts sufficient to constitute a cause of action.

The whole contention, and the only question argued, is that neither an act of Congress nor an act of the Legislature has expressly authorized the condemnation of this plot of ground already dedicated to public use, and the only proposition offered in support of the demurrer is the rule that land in public use cannot be taken for another and inconsistent public use under general legislative power of condemnation, but the right must appear, to seize this particular property, by express provision directed toward the special property, in some pertinent legislation or be the inevitable implication arising from such special legislation. This rule is established and the numerous authorities which support it are collated in a note on page 614 of 15 Cyc. The attempt to apply the rule, however, in this case ignores the difference in status between the United States in its relation to lands sought to be devoted to public use and the parties attempting to condemn in the cases giving rise to the rule.

The United States has paramount authority in the matter of taking any property within its borders for those public uses which are within the constitutional reservations to the general government. Its rights in this behalf are inherent in its sovereignty, and are prior to constitutions and statutes. The Constitution does not operate to create this right, but only to limit its exercise to certain objects. The several states for their own administrative purposes within their own borders hold authority of the same generally broad and extraconstitutional nature. The principle of strict construction of either the nature or extent of this right applies to neither sovereignty for the reason that such right is a very part of the sovereignty itself, existing from the beginning. This does not mean, however, that no power may intervene to prevent arbitrary action, for such power certainly abides with the courts.

The rule offered in behalf of the city of Tiffin, on the other hand, is one which is the fruit of the application of the doctrine of strict construction of the power to invoke the principle of eminent domain granted by the Legislature to inferior public administrative corporations and to combinations of individuals who are engaging for their own profit in a public service. Because obligations for the public benefit are

imposed upon municipal and public service corporations in the administration and conduct of their affairs, to them is delegated this attribute of sovereignty, which they can exercise only within the express provision of the legislative delegation strictly construed.

An examination of the cases which support the rule in question shows that in each in which the right to condemn was denied the attempting condemnor was a municipal or a private public service corporation, which was vanquished by the application in this particular sense of the general principle that the legislative grant to it of a right to condemn must be strictly construed. No authority is shown, either in the briefs or in our own researches, in which the rule is applied against the sovereignty which it was established to protect. The Legislature, speaking the voice of paramount authority over all property, private as well as public, may, it is conceded, authorize the submission of property already in the public use to another public use, even when the conflicting public uses are those exercised by private public service corporations, if it specially determines upon such a course by particular legislation, and the rule invoked but operates to hold this right in the sovereign power until it clearly appears to have been given to some creature of the sovereignty, such as a municipal or public service corporation. The rule, having existence only to protect the sovereign power against its creatures, plainly, we think, may not consistently be offered to obstruct the supreme authority in the exercise of its administrative and sovereign functions.

The petition in this case, as required by the Ohio practice, to which it is required to conform by the federal statutes above cited, shows a plat of the property sought to be condemned. The record, as we have said, suggests that the abutting owners who have a special interest in the maintenance of the alley are yielding their claims to the government. The city of Tiffin, then, stands here objecting, to protect the general and indefinite right of the public to the use of this alley. The plat shows that the blocking of the alley will not, in fact, deprive any resident of the city of Tiffin of any very material right, as his means of access to all the surrounding territory will be but slightly inconvenienced thereby. These facts, to be sure, have nothing to do with the decision of the legal question, but we take them up as illustrative of the absurd extent to which the rule, if it were applicable, could be enforced. Assuming the rule is applicable, then the government, after Congress had passed the necessary general legislation to establish a post office in this particular city, and the Secretary of the Treasury had exercised the semijudicial function cast upon him by law to determine the necessity of any particular plot of ground and had selected this strip of alley, the maintenance of which is of very slight consequence to the city of Tiffin at large, would be compelled to await a session of Congress and reopen the whole matter for the purpose of getting an act passed specially designating this alley as one of the component parts of the site. It seems to us the statement of that proposition is all that is necessary to prove that the sovereign power ought not to be so hampered, and that the rule, having its birth in a jealousy for the rights of sovereignty, should not be extended to embarrass the object of its service.

We believe that all there is in this case is for a determination by judicial consideration of the comparative importance of the contending public uses involving this plot of ground (In re Certain Land in Lawrence [D. C.] 119 Fed. 453), and that the demurrer should be overruled, with exceptions.

THE MENOMINEE.

(District Court, E. D. Pennsylvania. June 30, 1911.)

No. 54.

COLLISION (§ 94*)—OVERTAKING VESSELS—FAULT OF OVERTAKEN VESSEL.

A collision occurred on the Delaware river in the daytime between the steamships Caprivi and Menominee, both passing up. The Caprivi was in the lead and about on the range, when the Menominee, which was the larger and faster vessel, then about 1,000 feet behind and on a parallel course 300 feet east of the range, signaled her intention to pass to the starboard of the Caprivi, which was at once assented to. A short distance above where the collision occurred it was necessary to change to the starboard 1½ points to a new range, and it appeared from the evidence that the Caprivi made the turn too soon, crowding the Menominee to the edge of the channel, where the collision occurred, though she made all efforts to prevent it. *Held*, that it was due solely to such fault of the Caprivi; the passing by an overtaking vessel at that point being a proper maneuver, and which should have been executed without danger.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. § 94.*

Collision with overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

In Admiralty. Suit for collision by Anders Holtung, master of the steamship Caprivi against the steamship Menominee. Decree for respondent.

Henry R. Edmunds, for libelant.

H. Alan Dawson, for respondent.

J. B. McPHERSON, District Judge. About 9 o'clock in the morning of March 18, 1907, a collision occurred in the river Delaware, not far above Wilmington creek, between the British steamship Menominee and the Norwegian steamship Caprivi, both on the way up the river to Philadelphia. The tide was about the last of the ebb, the day was fair, the wind was too light to be a factor, and no other vessel was near. The place of the collision was near the red spar buoy—then No. 28, now S 2 B—that marks the eastern edge of the channel, and is about 300 feet east of the Cherry Island range. The buoy is at the turn from this range to the Bellevue range, the necessary change of course being to eastward, or starboard, about a point and a half. Both vessels were proceeding on the same course, and the collision occurred while the Menominee was trying to pass the Caprivi. On both ranges the channel is near the western, or Delaware, shore. Below the buoy the width is 600 feet, perhaps a little more, and above

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the buoy it is at least 1,000 feet, the depth at low tide being 30 feet. A vessel about to round the buoy should not pass close to it, but should continue upon the Cherry Island range for some distance above the buoy before making the turn. This is the proper course, and there are space and depth enough to make it safe. In March, 1907, the Bellevue range was marked only by buoys.

The Menominee is 475 feet long, 52 feet 3 inches beam, of 4,441 tons net register, and was drawing about 22 feet 6 inches aft and about 15 feet 6 inches forward. On her bridge were a licensed and competent pilot, her master, the senior second officer, the third officer and a quartermaster at the wheel. A lookout was in the crow's nest on the foremast forward of the bridge. The Caprivi is 315 feet long, 40 feet 6 inches beam, of about 1,800 tons net register, and was drawing 23 feet 3 inches. Her bridge was occupied by a licensed and competent pilot, and by her chief officer and the man at the wheel. Her master was aft in his cabin until a few minutes before the collision. At that time he came out upon the poop and afterwards went upon the bridge. Before the attempt to pass, both vessels were practically on the Cherry Island range. The Menominee was the faster boat, and was coming at the rate of 10 to 12 miles an hour through the water, while the speed of the Caprivi was not more than 8 or 8½ miles. There is some dispute whether more than one passing signal was given. I do not regard the fact as vitally important, but I believe it to be true that the Menominee gave two signals; the first, when she was about a mile astern, and the second, when she was about 1,000 feet astern. I do not believe the first signal was heard, or (if heard) was understood or replied to, by the Caprivi; but the dispute I think is not important, for undoubtedly the second signal was heard and assented to, and there were then time and room enough to permit the maneuver to be executed in safety. On both occasions the Menominee blew a single blast—indicating the intention to pass to starboard—and to the second blast the Caprivi promptly agreed. But, after the Menominee had given the first signal—whether it was heard, or not—she altered her course immediately, putting her helm to port and moving over to the starboard or eastern edge of the channel. Shortly afterward and as a result of this change, she and the Caprivi were on parallel courses, the Caprivi being a little to the westward of the Cherry Island range, and the Menominee being of course still astern, but probably 300 feet to starboard, or eastward. At all events, she was well over to the eastern edge of the channel. If the Caprivi had heard the signal and had desired to change her position, she could easily have gone at least 100 feet further to port in the channel, but, as already stated, she either did not hear or did not understand the signal, and in any event she cannot be blamed for observing the rules and keeping her course at this time. Upon these parallel courses the Menominee overhauled the Caprivi, until the former was about 1,000 feet astern of the latter, when the second signal was given and answered. This is the critical moment to which attention is particularly to be directed. As I read the testimony, there was no reason then to anticipate any danger in passing. It was only neces-

sary that each vessel should hold its course, for it is clear, I think, that each had room enough and depth enough to hold it and to make the turn around the buoy in safety. But the Caprivi did not continue to hold her course as she was bound to do. For some reason that is not satisfactorily explained, she began to swing to starboard, and, although the Menominee promptly took every measure that was then possible, putting her helm hard-a-port and her engines full speed astern, the collision could not be avoided. Under her port helm the Menominee reached the verge of navigable water, and could go no further to starboard. Her way was measurably stopped, but she was still moving ahead under momentum when the vessels came together, and the bluff of her port bow came into contact with the starboard quarter of the Caprivi, about 50 feet from the stern, and scraped the Caprivi's side about as far as the bridge, thus doing the damage complained of. The blow was glancing, and the Menominee suffered no damage. No assistance was needed by the Caprivi, and both vessels proceeded to Philadelphia without delay.

The fault charged against the Menominee is that she tried to pass too close, and that the vessels were drawn together by suction. In my opinion the evidence does not support this contention. On the contrary, I agree with the Menominee's argument that the collision was due solely to the Caprivi's change of course, which crowded the Menominee out of the channel, and brought the accident about. Shortly before the collision the vessels were on parallel courses about 300 feet apart. This is ample space for the customary maneuver between such vessels at this or any similar point in the river, and the channel here easily allows this space to be maintained. As it seems to me, the probable cause of the collision was the Caprivi's hasty desire to turn buoy 28 in order to get upon the range immediately above. This explains adequately what happened, and no other theory is in accord with the decided weight of the evidence. It is much to be regretted that the man who was steering the Caprivi was not produced. I do not suggest that the libelant is at fault in not calling him. I accept the reason that is offered for his absence; but no one can read the testimony without feeling that a gap now exists that he might perhaps have been able to close. If he made a mistake, either in understanding or in carrying out his orders, much would be clear that is now perhaps in some doubt; and it is impossible to deny that his absence lends some weight to the inference that he himself may have been at fault. But, leaving the helmsman out of view, it is I think proved beyond reasonable question that the collision took place near the buoy, but south of it; and (whatever the cause may have been) the Caprivi had no business to be on the eastern edge of the channel at this time. Her place then was at least on the range, 300 feet to the westward, and, if she had been there, the collision would have been impossible. Her fault is primary and sufficiently accounts for the disaster. I am unable to discover any contributory fault on the part of the respondent.

No legal question seems to be involved. The inland rules are clear. It was lawful to pass at this point. The Menominee had the burden

of the maneuver and was bound to keep out of the Caprivi's way; but the Caprivi was equally bound to obey the rules and hold her course. Having failed to hold it, she lost her privileged position and became the wrongdoer.

A decree may be entered dismissing the libel, with costs.

THADDEUS DAVIDS CO. v. DAVIDS et al.

(Circuit Court, S. D. New York. June 22, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 45*)—NAMES—RIGHTS ACQUIRED BY REGISTRATION—PERSONAL NAMES.

Under the trade-mark act (Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725 [U. S. Comp. St. Supp. 1909, p. 1278]), which permits the registration of "any mark * * * which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this act," any such mark, although, as in case of a proper name, it could not have been the subject of a common-law trade-mark, becomes a valid trade-mark on its registration, and is entitled to the same kind and extent of protection as would be accorded to any other trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 53; Dec. Dig. § 45.*

Right to use one's own name as trade-mark or trade-name, see notes to R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 579; Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co., 27 C. C. A. 357.]

2. TRADE-MARKS AND TRADE-NAMES (§ 53*)—NAMES—INFRINGEMENT—WHAT CONSTITUTES.

Infringement of a trade-mark is the use by defendant for trading purposes, and in connection with goods of the kind as to which complainant's exclusive right exists of a mark identical with complainant's or colorably resembling it, although the wrongful imitation need not be exact or perfect, but may be limited or partial.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 61; Dec. Dig. § 53.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 59*)—NAMES—INFRINGEMENT—INJUNCTION.

A complainant which by registration had acquired the exclusive right to use the name "Davids" as a trade-mark for inks *held* entitled to an injunction to restrain a competing manufacturer from using the name "Davids Manufacturing Company," or the word "Davids" displayed at the top of their labels.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68–72; Dec. Dig. § 59.*]

In Equity. Suit by the Thaddeus Davids Company against Cortlandt I. Davids and others, trading as the Davids Manufacturing Company. On final hearing. Decree for complainant.

See, also, 178 Fed. 801, 102 C. C. A. 249.

Mr. Preble, for complainant.

Mr. Newell, for defendants.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOUGH, District Judge. The bill herein is in the main for infringement of complainant's registered trade-mark "Davids" as applied to "writing inks of all varieties, hectograph ink, showcard indelible and stamping ink and stamp-pads." United with this cause of action, however, are allegations of "unfair and unlawful competition on the part of defendants," although all parties to the litigation are residents of this state and district. It is therefore necessary to dismiss from consideration all allegations and evidence relating to unfair competition, and to regard the matter not only as one of trade-mark law alone (National Casket Co. v. New York & Brooklyn Casket Co. [C. C.] 185 Fed. 533), but as a trade-mark case in which jurisdiction depends solely on registration under the act of February 20, 1905.

[1] A demurrer herein was before the Circuit Court of Appeals in 178 Fed. 801, 102 C. C. A. 249. The bill of complaint is there sufficiently summarized. The scope of that decision is vitally important now that the cause has come on for hearing upon evidence.

It is understood that that decision held that "Davids," being the name of the founder of complainant's business, could not be "a valid common-law trade-mark," but it might be a "mark used as a trade-mark," and might therefore be registered under section 5 of the trade-mark act of February 20, 1905. It was also declared that the act made "a mark actually and exclusively used for the requisite period (ten years) entitled to registration as a trade-mark," and, finally, it was asserted that, if it be "entitled to registration, it is entitled to protection." It is not declared that the "mark" which is an invalid common-law trade-mark shall be entitled to protection only as a mark; but it is said that "we are unable to appreciate the distinction sought to be drawn by the defendant between the right to register a trade-mark and the right to protect it." It follows from the language of the higher court that, since the "mark" may be registered as a trade-mark and is entitled to protection, it is entitled to protection as a trade-mark, which is equivalent to saying that it becomes a valid trade-mark by registration. This seems to be the congressional intention, for section 5 was amended on February 18, 1911 (Act Feb. 18, 1911, c. 113, 36 Stat. 919), by adding the proviso "that nothing herein shall prevent the registration of a trade-mark otherwise registerable because of its being the name of the applicant or a portion thereof"; and it is also important that the original act in section 29 declares that:

"The term 'trade-mark' includes any mark which is entitled to registration under the terms of this Act and whether registered or not and a trade-mark shall be deemed to be 'affixed' to an article when it is placed in any manner in or upon either the article itself or the receptacle or package or upon the envelope or other thing in, by, or with which the goods are packed or inclosed or otherwise prepared for sale or distribution."

The question presented by this litigation is therefore this: To what measure of relief is one entitled who owns as a valid trade-mark a word which before registration under the statute he could not protect at law, without invoking the doctrine of unfair competition? It is

to be regretted that sharp distinction was ever drawn between that trespass on property rights called trade-mark infringement, and the exactly similar trespass commonly spoken of as unfair competition, but since the distinction has not only become well known, but been made a basis for limiting jurisdiction, it is necessary here to find infringement of trade-mark according to strict rules, if complainant is to be entitled to any relief.

[2] Trade-mark infringement is the use by defendant for trading purposes, and in connection with goods of the kind as to which complainant's exclusive right exists, of a mark identical with complainant's, or colorably resembling it. The wrongful imitation need not be exact or perfect, but may be limited or partial. McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Saxlehner v. Eisner, etc., Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60. Within these familiar rules, it would seem that any use of the word "Davids" in connection with inks would be infringement, and very interesting questions would arise did the bill seek to enjoin any and every use of defendants' own names in conjunction with the manufacture of an article which is free for all. The bill, however, asks only that defendants be enjoined from the use of complainant's trade-mark in their trade name of "Davids Manufacturing Company," and also from the use of the word "Davids" at the top of their labels in connection with the business of making and selling inks, etc.

[3] Since it has been held that a proper name can under the circumstances here existing become a valid trade-mark, then such trade-mark must receive the same kind and extent of protection as would be accorded to an arbitrary or fanciful name selected for euphony or quaintness, and associated with a particular kind of goods made by a particular person. Thus if complainant's trade-mark were not "Davids," but "Davyne" (an actual word at present wholly unrelated to ink), defendants would plainly not be permitted to sell, advertise, or mark inks as those of the "Davyne Manufacturing Company," nor to use the word "Davyne" prominently upon their labels. Undoubtedly this statute as construed limits some rights heretofore thought to have been secured to all men in respect of the use of their own names, yet such in my judgment is the logical result of the decision first referred to, and the legislative intent as shown by recent amendment. The evidence herein conclusively shows that defendants do display the word "Davids" very prominently at the top of their labels and elsewhere, and transact all their business under the trade name of "Davids Manufacturing Company."

From these acts (in relation to inks) let them be restrained according to the prayer of the bill, which is for an injunction only and not for an accounting.

ACKER et al. v. CHARLESTON & W. C. RY. CO.

(Circuit Court, D. South Carolina. September 12, 1911.)

REMOVAL OF CAUSES (§ 107*)—REMAND TO STATE COURT—DOCKET FEE.

On remand of a cause erroneously removed to a federal court, the Circuit Court clerk is entitled to tax a docket fee of $10, under Rev. St. § 824 (U. S. Comp. St. 1901, p. 632), authorizing the clerk to tax a docket fee of such amount in an action at law when judgment is rendered without a jury.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 234; Dec. Dig. § 107.*]

At Law. Action by J. P. Acker and others, as administrators of W. F. Acker, deceased, against the Charleston & Western Carolina Railway Company. On appeal from a taxation of costs by the clerk on remand of costs to the state court. Taxation approved.

Thurmond & Timmerman, for plaintiffs.

F. Barron Grier and W. C. Cothran, for defendant.

SMITH, District Judge. This matter comes up on an appeal from a taxation of costs by the clerk and by agreement of counsel is submitted on written arguments. An action at law was brought in the state court by the plaintiffs against the defendant for damages for injuries, resulting in death, inflicted upon W. F. Acker, deceased, by reason of the negligence of the defendant, the railway company, in the management of its trains. The railway company, defendant, filed a petition for removal of the cause to this court on the ground that it was a suit at law of a civil nature arising under the laws of the United States. The transcript having been filed, a motion was made to remand, and after full hearing the court ordered the cause remanded, with costs in favor of the plaintiffs. The clerk has taxed the costs, and included therein a docket fee of $10, allowed under the provisions of section 824, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 632), for a case at law when judgment is rendered without a jury.

The exact question was decided by the late Judge Simonton, then one of the Circuit Judges for this district, sitting in this court in the case of Riser v. Southern Ry. Co. et al., 116 Fed. 1014. That decision settled the practice in this court at the time, and I see no reason for not holding it to control the present case. It is therefore adjudged that the docket fee of $10 allowed by the clerk in his taxation be approved.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LEECY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1911.)

No. 3,507.

INDIANS (§ 13*)—INDIAN LANDS—ADDITIONAL ALLOTMENT—TIMBER RESERVE.

Where complainant, a Chippewa Indian, having received an allotment in the White Earth reservation, was entitled to an additional allotment under Act April 28, 1904, c. 1786, 33 Stat. 539, and in 1907 selected and applied for 80 acres out of a certain township in satisfaction of her claim, the Interior Department had no authority to decline her application on the ground that such section had been reserved as a sawmill reserve to furnish lumber with which to construct houses for Mille Lac Indians removing to the White Earth reservation, according to the government's agreement of August 30, 1902, to build houses on lands allotted to the Mille Lac Indians in order to induce them to remove to such reservation; there being no statutory authority authorizing the withdrawal of reservation lands, otherwise subject to entry, for that purpose.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit by Jane Leecy against the United States to recover an additional allotment in the White Earth reservation. From a judgment overruling plaintiff's motion for judgment on the pleadings and dismissing the bill, she appeals. Reversed, with directions.

George B. Edgerton (Edgerton & Edgerton, on the brief), for appellant.

Charles C. Houpt, U. S. Atty.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The complainant, an Indian, has all her life been a member of the band of Chippewa of the Mississippi and has all her time resided on the White Earth Indian reservation in Minnesota as created by the treaty proclaimed April 18, 1867. She received an allotment of 80 acres upon this reservation. There is no dispute that she was entitled to an additional allotment of 80 acres under the act to provide allotments to Indians on the White Earth reservation in Minnesota of April 28, 1904. 33 Stat. 539, c. 1786. In 1907 she selected and applied for the E. ½ of the N. W. ¼ of section 24 in township 143, range 39, in satisfaction of her claim. Her application was ultimately denied, and she brings this action to secure the allotment to her of the land described under Act Feb. 6, 1901, c. 217, 31 Stat. 760, entitled "An act amending the act of August fifteenth, eighteen hundred and ninety-four, entitled 'An act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaties and stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-five,' and for other purposes."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The land in question was and is chiefly valuable for pine timber growing thereon. Under the general allotment law of February 8, 1887 (24 Stat. 388, c. 119), and the act of January 14, 1889 (25 Stat. 642, c. 24), allotments were to be made on lands "advantageous for agricultural and grazing purposes." The Interior Department held that land chiefly valuable for the timber growing thereon did not come within the description of lands advantageous for agricultural and grazing purposes and therefore excluded such lands from allotment. The act of April 28, 1904 (33 Stat. 539, c. 1786), commonly known as the "Steenerson Act," abrogated this limitation. United States v. Fairbanks, 171 Fed. 337, 96 C. C. A. 229. In the Indian appropriation law passed May 27, 1902 (32 Stat. 245, c. 888), Congress authorized the Indians on the Mille Lac reservation in Minnesota to remove to the White Earth reservation, conferred upon them the right to allotments there, and appropriated $40,000 to compensate them for the improvements they had upon the Mille Lac reservation. Under this authority a large number of them moved to the White Earth reservation.

The government in its answer sets up the act of May 27, 1902, with reference to the removal of the Indians from the Mille Lac reservation, and alleges: That for the purpose of obtaining the consent of said Indians to the acceptance of the amount appropriated in payment for their improvements, and to secure their removal to said White Earth reservation, James McLaughlin, United States Indian inspector, and Simon Michelet, United States Indian agent of said White Earth Indian reservation, by authority and direction of the Secretary of the Interior, entered into a certain agreement with said Indians dated August 30, 1902, which, among other stipulations, contained a promise and agreement made to said Indians whereby the United States undertook to construct and erect suitable dwelling houses upon all allotments which said removal Mille Lac Indians might thereafter select on said White Earth Indian reservation. That said promise to so provide and erect said dwelling houses for said Indians was so made as an additional inducement to their removal to said White Earth reservation. That thereafter, and long prior to the attempted selection of said lands as an allotment, the said Simon Michelet, as agent of said White Earth Indian reservation, set apart section 24, with other lands, as and for a sawmill reserve, and by that means reserved said section with others from allotment purposes. That the withdrawal of said section 24, with other lands, from allotment purposes, and the establishment of the same as a sawmill reserve, was duly approved by the Secretary of the Interior, and thereafter said sawmill reserve was held and treated by the Secretary of the Interior as lands specially set apart and devoted to the needs of the Indian service, and to provide the necessary lumber and material for the erection of dwelling houses for removal Mille Lac Indians in fulfillment of the provisions of the agreement of August 30, 1902. That all the land embraced in said sawmill reserve, including said section 24, was at the time of the withdrawal thereof covered with valuable pine timber, and that the land described in the complaint is a portion

of said sawmill reserve, contains a valuable growth of pine timber, which is necessary for the use of the Indians and of the officials of the Indian Office and for the dwellings of said Mille Lac removal Indians as aforesaid. Defendant further avers that the withdrawal of certain lands from allotment purposes is temporary, and is intended to cease when the timber thereon has served the purpose for which said withdrawal was originally made, and that in the opinion of the Secretary of the Interior it is still necessary to maintain such reserve for the uses and purposes before mentioned, and that the order heretofore made establishing said reserve has been in no way revoked or modified.

The complainant moved for judgment on the pleadings, and the motion was overruled, the plaintiff's bill dismissed, and she appeals.

There is only one question in this case, and that is: Did the Indian agent or the Secretary of the Interior have any rightful authority to withdraw the land in question from allotment for the purposes set up in the answer. In Oakes v. United States, 172 Fed. 305, 97 C. C. A. 139, the government in its answer set up that lands there in controversy had been set apart for allotment to Indians who might be removed from the Mille Lac reservation. That defense was abandoned, but it must not be confused with the defense here. There is no claim made that this land has been set apart for allotment to the Mille Lac Indians, but that the agents of the government, as an inducement not expressly authorized by the act of May 27, 1902, but by authority and direction of the Secretary of the Interior, made an agreement with the Mille Lac Indians that the United States would construct suitable dwelling houses upon all allotments made them on the White Earth reservation, and that the Indian agent at the White Earth reservation, who was one of the government agents in the making of said agreement, set apart the section in which plaintiff seeks her allotment as a sawmill reserve and as a place from which to obtain timber among other purposes to build houses on other lands allotted or to be allotted to Indians from the Mille Lac reservation, and that the action of the Indian agent was approved by the Secretary of the Interior.

The question is thus at once presented: What authority had the Indian agent or the Secretary of the Interior to withdraw section 24 from allotment? If the original agreement of August 30, 1902, to build houses upon the lands allotted to the Mille Lac Indians, ought to be held binding upon the government, it doubtless has the ability to perform it, whether the timber upon the 80 acres in controversy is reserved or not. The following statutes are cited as conferring the authority attempted to be exercised:

The general allotment act of February 8, 1887 (24 Stat. 388, c. 119), and particular reliance is placed upon that portion of it which reads as follows:

"Sec. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the

Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office."

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the names of the allottees."

The provision in the act of January 14, 1889 (25 Stat. 642, c. 24), commonly known as the "Nelson Act," that the allotments therein provided for shall be "in conformity with the act of February eighth, eighteen hundred and eighty-seven."

Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252):

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third—The Indians."

Section 463, Revised Statutes (U. S. Comp. St. 1901, p. 262):

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations."

None of these provisions conferred the power claimed. It is not necessary to consider whether the provisions in the general allotment law quoted control allotments under the act of April 28, 1904. It is true, if this law applies, allotments must be "made under such rules and regulations as the Secretary of the Interior may from time to time prescribe."

The power of Congress over the whole subject of our relations to the Indians is plenary. Lone Wolf v. Hitchcock, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299. But it does not follow, because Congress makes a valid law and intrusts its execution to the head of an executive department, with power to make rules and regulations for its execution, that he is thereby clothed with plenary power to make such rules and regulations as would not aid in the execution of the law but nullify its provisions. In Williamson v. United States, 207 U. S. 462, 28 Sup. Ct. 177 (52 L. Ed. 278), the Supreme Court said:

"True it is that in the concluding portion of section 3 of the timber and stone act [Act June 3, 1878, c. 151, 20 Stat. 90 (U. S. Comp. St. 1901, p. 1546)] it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office'; but this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations.

The power to withdraw the land in question cannot be found in the provision that allotments should be certified to the Secretary of the Interior for his action, in the one providing for his approval of allotments before patent, in section 441, R. S., charging the Secretary of the Interior with supervision of the public business relating to the Indians, or in section 463, R. S., charging the Commissioner of Indian Affairs under the Secretary of the Interior with the management of Indian affairs and matters arising out of Indian relations. If under any of these laws the Secretary of the Interior could withdraw lands from allotment, or upon his judgment that lands authorized to be allotted by Congress ought not to be allotted refuse to approve an allotment when submitted for action, the very statute under which this action was brought, and which was enacted after all the statutes relied on were passed, would be practically nullified. The act of February 6, 1901 (31 Stat. 760, c. 217), provides:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant)."

It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that, as allotments must be reported to the Secretary of the Interior for his approval, the absence of his approval would defeat the suit, when, of course, no one would want to bring a suit if he had that approval.

The claim of power under sections 441 and 463, R. S., is subject to the same criticism. Why authorize a suit, if either of the sections conferred upon the Secretary of the Interior or upon the Commissioner of Indian Affairs general authority conclusive on the courts? Certainly Congress did not mean to authorize the bringing of wholly futile actions.

A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so.

The case is reversed, with directions to the Circuit Court to set aside its former order, sustain the motion of the plaintiff, and enter a decree as prayed.

Ex parte WING YOU.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1911.)

No. 1,928.

1. HABEAS CORPUS (§ 92*)—CHINESE DEPORTATION PROCEEDINGS—SCOPE OF INQUIRY.

On a writ of habeas corpus to obtain the discharge of a Chinese person held under a deportation order, the court is bound in limine to determine whether the alien had in fact been denied a fair and impartial hearing on his application to enter the United States, and, if not, the court's jurisdiction is at an end.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.*]

2. ALIENS (§ 32*)—CHINESE.

Rev. St. § 866 (U. S. Comp. St. 1901, p. 664), provides that any Circuit Court, on application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States. *Held*, that where a Chinese person, going to China, applied to perpetuate testimony with reference to his citizenship, and under an order appointing a referee to take such testimony and on notice to the United States introduced evidence that he was an American-born citizen, and filed the same in the regular way, such depositions, not being taken to be used in any court of the United States, but before the immigration officer on the person's return from China, were not conclusive on the United States of the fact of citizenship, and did not prevent such officers from denying entry, on the ground that the applicant was an alien Chinese person, not entitled to enter, established by other proof.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Application of Chin Leong for a writ of habeas corpus for Wing You. From an order discharging the latter from the custody of Ellis De Bruler, Immigration Commissioner, he appeals. Reversed, with directions to dismiss the writ.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty., for appellant.

Kerr & McCord, for appellee.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge. The appellee, Wing You, a Chinese person, seeks admission to the United States as a returning native-born citizen. He was denied admission after the usual investigation by the appellant, commissioner of immigration at Seattle, Wash. An appeal from the order of rejection was taken to the Secretary of Commerce and Labor, and after consideration the appeal was dismissed, and the order of rejection affirmed. While being detained at Seattle, his port of entry, awaiting deportation, in accordance with the order

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Secretary of Commerce and Labor, the appellee, through one Chin Leong, filed a petition in the United States District Court for the Western District of Washington, Northern Division, praying for a writ of habeas corpus, alleging, among other things, that Wing You was a native-born citizen of the United States, and was entitled to admission therein; that he had resided in the United States for some time prior to the 13th day of July, 1908, when he departed from the United States for the Empire of China; that before departing he made an application to the United States Circuit Court for the Western District of Washington for an order permitting him to perpetuate the testimony of certain witnesses as to his citizenship and as to his birth in the United States; that an order permitting the taking of testimony touching his citizenship and his right to remain in and re-enter the United States was duly made and entered by said court, and notice of the time and place of the taking of such testimony was given the United States district attorney for the Western District of Washington; that testimony was taken before a United States commissioner appointed for the purpose of taking such testimony, and that the United States attorney appeared at such hearing and cross-examined the witnesses whom the said Wing You produced to testify as to his birth and citizenship; that thereafter the testimony was taken and filed in said court, and said Wing You departed for China; that on the 11th day of June, 1910, said Wing You arrived at the port of Seattle, and made application to enter the United States; that the commissioner of immigration at Seattle, in considering the application of Wing You to re-enter the United States, refused to take into consideration the testimony so perpetuated. It is further alleged that Wing You was not given a fair and impartial hearing on his application to re-enter the United States by the commissioner of immigration at Seattle, and other officers of the Bureau of Immigration of the Department of Commerce and Labor.

Thereupon the writ of habeas corpus, as prayed for, was granted by the District Court. Thereafter the matter came up for hearing in open court, upon the petition for writ of habeas corpus and the answer and return of appellant thereto; said answer and return including the record of the hearing before the Bureau of Immigration. Thereafter the court directed the discharge of Wing You from custody. An order of discharge was signed and filed, from which order this appeal is taken.

The order of discharge recites the proceedings taken in the admission of the appellee into the United States in 1901, upon the claim that he was a native-born citizen of the United States and the son of a merchant then a resident of the United States; that the appellee remained in the United States until the year 1908, and desiring to visit his parents, then in China, he filed a petition in court, setting forth his citizenship in the United States and his desire to take testimony for the purpose of establishing his status as a native-born citizen and his right to re-enter the United States; that his petition was referred to a commissioner of the court to take testimony, and testimony was thereupon taken in his behalf; that an assistant United States attorney

appeared on behalf of the commissioner of immigration at Seattle and cross-examined the witnesses introduced on behalf of the appellee; that by such testimony it was established that appellee was a native-born citizen of the United States; that after such testimony was taken it was extended and filed in court, and a certified copy thereof procured, and a photograph of the appellee was attached thereto for the purpose of identification; that such certified copy was delivered to the appellee, to be taken by him on his voyage to China, for the purpose of identification when he should return to the United States; that upon his return the commissioner of immigration and local inspector at Seattle refused to admit the appellee, or to accept the proofs and instrument of identification, and denied the appellee admission into the United States. The order further recites that by reason of the premises, and by reason of the proofs in the case that the appellee is a native-born citizen of the United States; that when he desired to leave the United States he treated the government with the greatest fairness, advising it of his purpose and affording it an opportunity to contest his proofs, if it saw fit to do so; and that the government was estopped to deny the said appellee admission or to question his status as a native-born citizen of the United States. Wherefore it was ordered that the appellee should be discharged from the custody of the United States marshal, the officers of immigration, or any other person who might claim to have him in custody on behalf of the United States.

[1] The first question the court was called upon to determine was whether the appellee had in fact been denied a fair and impartial hearing on his application to re-enter the United States. If not, the Circuit Court could proceed no further. As said by the Supreme Court in Chin Yow v. United States, 208 U. S. 8, 13, 28 Sup. Ct. 201, 203, 52 L. Ed. 369:

"But unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

[2] The lower court did not pass upon this question, but in the order discharging the appellee from custody the court held that the testimony taken on behalf of the appellee upon his departure from the United States in 1908 established the fact that he was a native-born citizen of the United States, and that, because the United States had the opportunity to try out that question then, it was estopped to deny the right of the appellee to be admitted into the United States, or question his status as a native-born citizen of the United States.

We know of no law giving such effect to testimony of the character under consideration. The certificate of the United States commissioner before whom this testimony was taken is entitled, "In the Matter of the Application of Wing You to Have Depositions Taken in Perpetuam Rei Memoriam," and recites that "the following depositions were taken and proceedings had"; that Wing You, the applicant, William Morris, and C. D. Gaylord were called on behalf of the applicant, sworn and testified as recited in the depositions. It is fur-

ther recited that Mr. Newcomb, of Kerr & McCord, appeared as attorney for Wing You, and Mr. Charles T. Hutson, assistant United States attorney, appeared for the United States.

The taking of testimony by deposition is a creature of the statute. United States v. Hom Hing (D. C.) 48 Fed. 635. We are not aware of any statute or rule of court authorizing the perpetuation of testimony for use in these summary proceedings before the officers of immigration. Section 866 of the Revised Statutes (U. S. Comp. St. 1901, p. 664) provides that:

"Any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States."

These depositions were not taken for the purpose of being used in any court of the United States, but before the officers of immigration. But, further than this, we do not understand how such testimony, if admissible could bind the United States, or estop the officers of immigration from making the inquiries provided by law, and upon such inquiries determine whether the applicant was or was not to be admitted into the United States. There was no case pending in court when the depositions were taken involving any question as to the right of the appellee to be admitted into the United States, nor was there any case pending at that time involving his status upon any claim that he was a citizen of the United States. The testimony, if it could be used for any purpose, was to be used in the event the testimony of the witnesses could not be obtained when required for the information of the immigration officers when the appellee should present himself for identification, and in support of his claim to a right to land and be admitted upon his return to the United States. When he did return, in June, 1910, these same witnesses whose depositions had been taken appeared and were examined by the Chinese inspector under oath, thus dispensing with the use of depositions; but their later testimony, compared with that in the depositions, was so uncertain and unsatisfactory that it failed to establish the fact to the satisfaction of the immigration commissioner that the appellee was a native-born citizen of the United States.

The appellee does not, however, rely entirely upon the authority given to these depositions by the lower court to sustain the order of discharge. It is contended by the appellee that testimony in his behalf was not considered by the officers of immigration; that he was denied a fair and impartial hearing before such officers; that his rights were determined upon statements not made under oath, and with reference to matters which the appellee had no notice or opportunity of being heard. We have read the record very carefully, and we do not find this contention sustained. All the testimony on behalf of the appellee was before the officers, and the presumption is that it was considered.

The chief objection to the proceedings of the immigration officers is a letter of the commissioner of immigration at Seattle, addressed to the Secretary of Commerce and Labor at Washington, dated July

27, 1910. The letter transmits to the department the record on appeal in the case of the appellee, and calls attention to the testimony of the appellee and that of the witnesses in his behalf. The commissioner also inclosed, at the request of the appellee, the record of his former admission upon a previous arrival from China in 1901. In calling attention to the testimony of the witnesses who appeared upon the appellee's last arrival, the commissioner comments upon the character of the witnesses whose testimony is in the record, and refers to them as professional witnesses; that is to say, witnesses who so often appear to identify Chinese persons seeking admission into the country that they appear to make it a business. The testimony of the witnesses themselves in this case appears to justify this characterization of their relation to the case. In referring to the record inclosed upon appellee's former admission to the country, the commissioner also characterizes the witnesses in that case as professional witnesses, who had appeared in numerous cases on behalf of the Chinese seeking admission into the country.

It is not charged by the appellee that these statements were false, or that they were calculated to mislead, or did mislead, the Secretary of Commerce and Labor. It is to be presumed that these statements were based upon the records in the office of the commissioner and in the office of the Secretary of Commerce and Labor at Washington. In other words, there is nothing before us to show that these statements were untrue, or that they deprived the appellee of a fair and impartial hearing before the department. The testimony of the appellee of itself was so contradictory in material matters as to discredit his claim that he was a native-born citizen of the United States. In the deposition taken in 1908 to perpetuate his testimony, he stated that he had a brother and sister, both younger than himself, and both born in China; while at the time of his application for admission to the United States in 1910 he testified in the most positive manner that he had neither brother nor sister, and that he was the only child of his parents. In his last testimony he states that his father died in China about five years ago, while the witness Morris swears that Wing You was in the store of his father one or two years before the applicant started for China in 1908. These and other discrepancies and inconsistencies, we think, were sufficient to justify the action of the Department of Commerce and Labor.

The order of discharge will therefore be reversed, with directions to dismiss the petition for writ of habeas corpus.

FINCH v. CITY OF OTTAWA.

(Circuit Court of Appeals, Eighth Circuit. September 1, 1911.)

No. 3,523.

1. MUNICIPAL CORPORATIONS (§ 766*)—TORTS—STREETS—CONTROLLING ELECTRICITY.

Where a city conveyed a deadly current of electricity for lighting and power purposes along a public alley, and permitted a telephone company to maintain its poles and wires on the same alley and close to the light wires and directly above them, the city would be held to have known and anticipated that the telephone wires might break and fall on or near to the light wires, that the telephone company employés would be required to examine and inspect its wires to keep them in proper condition, and that others would be on its public streets, and hence it was the city's continuing duty through its proper officers to exercise reasonable care commensurate with the dangers incident to the transmitting of such current to prevent injuries to third persons rightfully on the street or alley by the escape of electricity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1621, 1622; Dec. Dig. § 766.*]

2. MUNICIPAL CORPORATIONS (§ 817*)—ELECTRICITY—PERSONAL INJURIES—BURDEN OF PROOF.

Where plaintiff, a telephone lineman, was injured by an electric current escaping from the city's electric light wires through a telephone wire into his body, the burden was on him in order to recover from the city to show that he received the injury by means of a current of electricity, and that the current escaped from the control of defendant city by reason of its neglect.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 817.*]

3. MUNICIPAL CORPORATIONS (§ 821*) — ESCAPE — INJURIES — NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries to a telephone lineman by the alleged escape of electricity from an electric light wire belonging to defendant city, evidence *held* to require submission to the jury of the question whether the current by which plaintiff was injured was negligently permitted to escape from the city's wire.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 821.*]

In Error to the Circuit Court of the United States for the District of Kansas.

Action by Clyde G. Finch against the City of Ottawa. Judgment for defendant, and plaintiff brings error. Reversed.

E. H. Gamble (Guthrie, Gamble & Street, and W. J. Costigan, on the brief), for plaintiff in error.

F. A. Waddle and A. L. Berger, for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. The plaintiff in error sued the city of Ottawa, a municipal corporation of Kansas, to recover damages for a personal injury to himself which he says was caused by the negligence of the city in permitting a current of electricity, which it had generated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and was using to operate a municipal light and power plant in the city, to escape from its control, and come in contact with a broken telephone wire stretched along a public alley of the city, which plaintiff was repairing, and charge said wire with a current of electricity which shocked and seriously burned the plaintiff, causing the injuries of which he complains. The defendant denied any negligence upon its part, and alleged contributory negligence on the part of plaintiff. At the close of all the testimony, the Circuit Court directed a verdict for the defendant upon which a judgment was rendered against plaintiff, and he prosecutes this writ of error.

The facts as shown by the testimony are substantially as follows: The plaintiff in June, 1907, was employed as a lineman by a telephone company operating a telephone system in the defendant city by its permission. The defendant at such time owned and was operating in the city an electric light and power plant. Upon the east side of a public alley running north and south from Fourth street to Fifth street a telephone pole was set near each of said streets and about 132 feet apart, upon which four telephone wires were strung through the alley from pole to pole some 25 feet or so above the surface of the ground. Upon the same side of this alley and within three or four feet of each telephone pole and in line therewith, an electric light pole was set upon which two electric light wires were strung through the alley from pole to pole; said wires being approximately three feet apart. The telephone poles were some feet higher than the light poles, and the telephone wires four to seven feet higher than the light wires and directly above them, or nearly so. About 36 feet north of the light pole at Fifth street and near the east line of the alley is a tree some 34 feet high, the branches of which start 8 to 10 feet from the ground and extend some distance into the alley and had grown around the light wires, both of which passed through its branches, as did the telephone wires some feet above them. Thirty feet south of Fourth street and east of the alley is a barn, the west end or gable of which comes within three feet of the east line of the alley, and from which the easterly light wire is kept by a bracket placed upon the ridge of the roof, and to which the light wire was fastened; the westerly light wire being some two feet to the west of the barn gable. During the night of June 22d a storm broke one of the telephone wires at or near the telephone pole at Fifth street, the broken end falling to the ground, whether between or outside of the two electric light wires does not clearly appear, the other end remaining attached to the telephone pole at Fourth street. The next morning the plaintiff was directed by the superintendent of the telephone company to repair this broken wire. He went to the Fourth street end of the alley, there discovered the broken wire, and followed it to a point about midway between the barn and the tree, where he picked it up with his bare hands, and started south with it towards the pole at Fifth street. He felt no shock in so seizing and handling the wire. When he reached the tree, he swung the wire from under its branches to the west, around them and up among them, and then continued south, pulling, as he says, the "slack out of the wire," and, when near the telephone pole at Fifth street

while still pulling the wire towards that pole, he received a severe electric shock which knocked him down, rendered him unconscious, burned him severely on the hands, and other portions of the body, causing the injuries of which he complains. The light and power plant had not been operated during the daytime prior to June 12th, since the previous season. On that day the city began operating it in the daytime, and notified the telephone company accordingly, but the plaintiff had not been informed thereof at the time of the injury, and did not then know that the plant was being operated during the daytime. He had been working for the telephone company at Ottawa since September, 1906, and had some five years' experience as a telephone lineman before that; but had never worked around or where there was an electric light or power plant. The telephone wires carried a voltage of only 22 to 24 volts, were not insulated, and could be handled without gloves or other covering of the hands with perfect safety. Two or three months before the plaintiff was injured the owner of the barn spoken of observed that the insulation of the light wires near the barn was worn off, or at least from the easterly wire. The other he did not particularly notice. He notified the city that the insulation of its line was bad, and requested it to remove it away from his barn, as it endangered it. The city then placed the bracket spoken of upon the gable of the barn to which it fastened the easterly wire as before stated; the other or westerly wire not being within two feet or so of the barn. The insulation was not repaired. The plaintiff in endeavoring to repair the telephone wire observed, as he says, that the covering of the insulation of the light wires had a ragged or broken appearance, but he supposed the insulation was sound. The light plant had been in use 12 or 15 years, and its wires carried a voltage of 1,100 volts, which is sufficient to cause the injuries sustained by the plaintiff. There was no other source from which this telephone wire could have been charged with electricity than from one or both of these light wires. The petition did not allege, and the proofs do not show, from which of the light wires, if either, the telephone wire was charged; but it conclusively appears that it was while the plaintiff was pulling the telephone wire through the branches of the tree that it received the charge which caused the injuries to the plaintiff. During the trial the plaintiff endeavored to show that the insulation of both light wires was defective, but he was limited by the court to showing the condition of the insulation upon the west wire only.

The ground for granting the motion for a directed verdict is that the testimony fails to show any cause of action against the defendant.

[1] The defendant was conveying along a public alley of the city a deadly current of electricity for lighting and power purposes. It had permitted the telephone company to maintain its poles and wires upon the same public alley and in close proximity to the electric light wires and directly above them, and it must be held to have known, and to have anticipated, that the telephone wires might break and fall upon or near to its light wires, that employés of the telephone company would be required to examine and inspect its wires to keep them in a proper condition of repair, and that others would be upon its public

streets; and it was its duty through its proper officers to exercise reasonable care, commensurate with the dangers incident to the transmitting or conveying of such current, to prevent injury to third parties rightly upon the street by the escape thereof from its control. This duty is a continuing one so long as it conveys such current along the alley; and the safety of the public permits of no intermission in its performance. Mather v. Rillston, 156 U. S. 391, 398, 399, 15 Sup. Ct. 464, 39 L. Ed. 464; Union Light, Heat & Power Co. v. Arntson, 157 Fed. 540–541, 87 C. C. A. 1; Newark Electric Light & Power Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; Memphis Gas & Electric Light Co. v. Letson, 135 Fed. 969–972, 68 C. C. A. 453; Colusa Parrot Mining Co. v. Monahan, 162 Fed. 276–280, 89 C. C. A. 256; Southwestern Telegraph & Telephone Co. v. Robinson, 50 Fed. 810–813, 1 C. C. A. 684, 16 L. R. A. 545; Memphis Gas & Electric Light Co. v. Bell, 152 Fed. 677, 678, 680, 82 C. C. A. 25; Glouchester Electric Co. v. Dover, 153 Fed. 139–141, 82 C. C. A. 291; Metropolitan Street Ry. Co. v. Gilbert, 70 Kan. 261, 78 Pac. 807; Gilbert v. Duluth General Electric Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; Griffin v. United Electric Light Co., 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; Walter v. Baltimore Electric Co., 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; Keasby on Electric Wires, § 245; Von Trebra v. Gaslight Co., 209 Mo. 648, 108 S. W. 559; Connell v. Electric R. & P. Co., 131 Iowa, 622, 109 N. W. 177; Martin v. Des Moines Edison Light Co., 131 Iowa, 724–740, 106 N. W. 359; Anderson v. Jersey City Electric Light Co., 63 N. J. Law, 387, 43 Atl. 654.

In sustaining the motion for a directed verdict the trial judge said:

"Now, I think the evidence is in such shape it would not be necessary to inquire whether the plaintiff used due care or not, because it will only be from speculating, from mere conjecture, that this jury would arrive at any conclusion as to how this charge (of electricity) was communicated. It evidently must have been something that was done at the time that he commenced pulling on the wire. It is not impossible, at all, that the current may have been received by this wire from some source the defendant company had no connection with. It is not proven, of course, that it did not, but the plaintiff in this case must prove that the city did it, and did it in a negligent manner. Indeed, it is not shown here what it would take—how much it would take—as they insulated these wires—how much force to tear off the wrapping, so you could know. The jury cannot determine this matter, the jury know nothing about it, more than the court. In short, the manner of the production of this contact which brought this charge of electricity to the plaintiff is not shown, except as you would get it by conjecture. It is not shown at all impossible that it may not have come from the telephone company's operating plant itself. The evidence here does show that they did not carry that voltage, but it does not show that it might not receive that voltage even from some other source. In other words, I think your evidence is so that this jury cannot determine more than the court what it was brought this current of electricity to this plaintiff. If your testimony had shown this essential fact, I could not admit the premises of the other side at all, if your testimony had shown that at the place where you received the current of electricity from—that you received it from the electric light wire, and that it was not insulated at this point when this plaintiff commenced with his wire there, I would send this matter to the jury with proper instructions, but you do not show where it did come from. * * * And I say here, gentlemen, as the proof stands, there is no possible

theory that I can send it to the jury, because I would merely allow them to speculate where this current came from. I would guess, and they would guess, perhaps, it came from one or the other of those wires about this tree where he was working, but they would still have to guess further that the insulation was off before he commenced working, and that plaintiff had no notice or knowledge of such defective condition, before he could recover. You do not show where this wire extended. The current might have come from a thousand places, because it was not there when he commenced—was not there when he threw it up on the tree, and not until he commenced pulling—where it might have been turned onto the telephone wire cannot be told from the evidence. * * * You never can establish anything by circumstantial evidence, unless you exclude every other reasonable hypothesis."

But we are of opinion that there was substantial evidence from which the jury could well have found that the current came from these electric light wires of the city, and could not have come from any other source.

It is true that in United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank, 145 Fed. 273–279, 74 C. C. A. 553, Mr. Justice Van Devanter, then Circuit Judge, speaking for this court, said, quoting from Asbach v. Chicago, etc., Ry. Co., 74 Iowa, 248, 37 N. W. 182:

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory for that may be true, and yet they may have no tendency to prove the theory."

In that case the question for determination was whether certain money taken from the chest of the bank and lost to it was lost because of the "personal dishonestly or culpable neglect" of a bonded employé of the bank, within the meaning of the undertaking of a surety company which had guaranteed his fidelity, or was taken by others, who had equal access to the chest where the money was kept that the bonded employé had, and over whom he had no supervision or control; the only evidence being that the money had disappeared from the chest in some manner not shown. Clearly the disappearance alone of the money would be equally as consistent with its theft, or removal from the chest by some other employé who had access thereto, as that it was lost through the "personal dishonesty or culpable neglect" of the bonded employé. As the burden was upon the bank to show that it was lost through such conduct of the bonded teller, the fact alone that the money was missing was not sufficient to warrant a finding that such was the fact.

It is not easy to formulate a general rule that will determine in advance the effect of, or the weight that shall be given to, the infinite variety of circumstances that may be offered to establish a principal fact under judicial investigation; and plainly it was not intended to do so in that case, or in the case from which the quotation is made. Each case must rest upon its own facts, and under the facts there shown it is entirely plain that the circumstances were insufficient to warrant a finding that the pecuniary loss of the bank resulted from the "personal dishonesty or culpable neglect" of the bonded teller. When

different inferences or conclusions may fairly and reasonably be drawn by impartial minds from the proven facts, it is the province of the jury, under proper instructions from the court, to draw them; and only when the facts are such that but one conclusion or inference can reasonable be drawn therefrom may the court declare that conclusion. Northwestern Fuel Co. v. Danielson, 57 Fed. 915–920, 6 C. C. A. 636; Goldsmith v. Thuringia Ins. Co., 114 Fed. 914–916, 52 C. C. A. 534; and this is all that is held in United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank, above.

[2] In the present case it was incumbent upon the plaintiff to prove (1) that he received the injury of which he complains by means of a current of electricity; and (2) that such current escaped from the control of the defendant city by reason of its neglect. That the first of these essentials was shown is not disputed.

[3] But the trial court held as matter of law that the proven facts were insufficient to warrant a finding that the current came from the electric light wires of the city; that from the established facts the conclusion was just as reasonable that the current came from the telephone plant itself, or from a "thousand other sources," as that it came from these light wires. To this we are unable to assent. That the current did not come from the telephone plant is shown by the fact that, when the plaintiff first picked up the broken wire and cast it into the branches of the tree, it was not then a "live wire," or one sufficiently charged with electricity that he felt it; and not until he pulled the slack out of the wire when it was among the branches of the tree and in close proximity to the light wires did it become a "live wire." A fair and reasonable inference therefore is that the telephone wire received its charge of electricity from the defendant's light wires at a place where the insulation had in some manner been worn from them; and a jury might well find that no other conclusion could fairly or reasonably be drawn from the facts proven.

Whether or not the defendant exercised the requisite care to keep its electric light wires properly insulated to prevent the escape of the electricity from them, and the plaintiff exercised such care in handling the broken telephone wire, under the circumstances shown, are questions for the determination of the jury under proper instructions from the court. Of the testimony in relation to them we express no opinion, other than that it should have been submitted to the jury for determination. The trial court, therefore, erred in directing a verdict for the defendant.

Its judgment is reversed, and the cause remanded to that court, with directions to grant a new trial.

COLT v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. September 1, 1911.)

No. 3,508.

1. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—INTENT.
In a prosecution for using the United States mails in furtherance of a scheme to defraud, evidence of defendant's connection in various similar transactions in which the mails were used in furtherance of similar fraudulent schemes from December, 1904, nearly to the time of the transactions charged in the indictment, was admissible to show intent.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

2. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS.
The correctness of a charge cannot be determined from excerpts taken therefrom and considered apart from other instructions bearing on the same subject.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990–1995; Dec. Dig. § 822.*]

3. CRIMINAL LAW (§ 925½*)—NEW TRIAL—MISCONDUCT OF JURY.
In a prosecution for using the mails in furtherance of a scheme to defraud, misconduct of one of the jurors in procuring from the bailiff a copy of the federal statutes while the jury were deliberating on a verdict was not ground for a new trial, where it did not appear that such misconduct influenced the verdict.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2248–2253; Dec. Dig. § 925½.*]

In Error to the District Court of the United States for the Western District of Missouri.

Olcott C. Colt was convicted of using the mails in furtherance of a scheme to defraud, and he brings error. Affirmed.

Hugh Gordon Miller (True Page Pierce, on the brief), for plaintiff in error.

Leslie J. Lyons, U. S. Atty., and Thaddeus B. Landon, Asst. U. S. Atty., for the United States.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. The plaintiff in error, who will be called the defendant, was convicted of having used the United States mails in furtherance of a scheme to defraud, in violation of section 5480 of the Revised Statutes of the United States, as amended (U. S. Comp. St. 1901, p. 3696).

The third count of the indictment, upon which alone the defendant was convicted, charged the scheme as devised by him substantially as follows: That defendant should falsely pretend and represent that he was engaged in a general real estate brokerage and money lending business in New York City, with offices there, and also in the Gibralter Building in Kansas City, Mo., where he pretended to conduct such business under the names of G. Mortimer Gaugh, and W. W. Gaugh; that he had large sums of money of his own, and a large number of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

 †Rehearing denied December 22, 1911.

clients in New York City and other Eastern cities who had large sums of money to loan upon real estate security in the various cities and states of the United States; that defendant advertised in the daily papers throughout the United States offering to purchase mortgages, notes, bonds, and other securities, to incite persons who might read such advertisements to open correspondence with him through the United States mails, and, upon receiving communication from such persons, he would correspond with them through the mails to induce, and attempt to induce them to pay large sums of money for an expert opinion and report of appraisers, designated by him, as to the condition and value of the securities offered for sale; that defendant was not engaged bona fide in the real estate brokerage or money-lending business as represented and pretended by him; that he did not have money of his own or of others to loan, or with which to purchase such securities; that his pretensions and representations were false, and that he did not intend to purchase any of such securities as might be offered in response to such advertisements; that his purpose in so scheming and advertising was to incite those who might read such advertisements to open correspondence with him through the mails, that he might in that way get into communication with them to induce or attempt to induce them to pay large sums of money for obtaining an appraisal and report of the property upon which the securities offered for sale were secured, which money, when received, he would fraudulently appropriate and convert to his own use, without rendering, and without intending to render, any equivalent therefor to the persons from whom the same should be so obtained; that having so devised such scheme, and in attempting to execute the same, he did on a date named unlawfully deposit in the post office at Kansas City, Mo., a certain letter to be sent and delivered by the post office establishment of the United States, addressed to a firm named, which said letter is set out in the indictment.

The principal errors assigned as having occurred upon the trial are that the court erred (1) in admitting over defendant's objections, certain testimony; (2) in its instructions to the jury; (3) in overruling a general demurrer at the close of all the evidence; and (4) refusing to grant a motion for new trial in which misconduct of the jury is alleged.

[1] The testimony alleged to have been erroneously admitted is that which shows, or tends to show, that defendant in 1906 was conducting in the state of New York a business similar to that charged in the indictment, and that he was in the latter part of December, 1904, conducting a similar business in the name of William D. Clyde as general manager of the Investor's Brokerage Company of Indianapolis, Ind., and that in 1905 he was connected in some manner with the Imperial Trustee Company of Jersey City, N. J., which was conducting a somewhat similar business. The objection urged against the admission of this testimony is that it relates to collateral facts and tends to show the commission by defendant of crimes other than that charged in this indictment, that such transactions were too remote, and would operate to his prejudice. The testimony was admitted as bearing upon

the intent or motive and good faith of the defendant in the various transactions, and its consideration by the jury was expressly limited by the trial court to such purpose only.

Evidence of other offenses committed by the accused having no connection with or relation to that for which he is upon trial is not, of course, ordinarily admissible. But, when the offense charged is one that involves the fraudulent intent or motive of the accused, it is permissible in criminal as well as in civil cases to introduce evidence of other acts and transactions of the party upon trial of a kindred nature to show his intent or motive in the particular act directly under investigation, even though it may show the commission of other offenses than that for which he is being tried. Indeed, in no other way, in many cases, could the fraudulent intent or motive of the accused be established, for the single act under investigation might not alone be decisive either way; but when that act is considered in connection with other transactions of a like or similar character occurring at or near the same time, which also involve the intent or motive of the party, the intent and motive in doing the act under investigation may thus be made to appear with almost conclusive certainty. Wood v. United States, 16 Pet. 342–359, 10 L. Ed. 987; Moore v. United States, 150 U. S. 57–60, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Williamson v. United States, 207 U. S. 425–451, 28 Sup. Ct. 163, 52 L. Ed. 278; Thomas v. United States, 156 Fed. 897–911, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Bryan v. United States, 133 Fed. 495–500, 66 C. C. A. 369; Olson v. United States, 133 Fed. 849–854, 67 C. C. A. 21; Commonwealth v. Jackson, 132 Mass. 16; People v. Harris, 136 N. Y. 423, 33 N. E. 65–74.

In Thomas v. United States, above, this court, speaking by Judge Adams, said upon this question:

"Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused of a kindred character to those charged in the case in hand and performed at or about the same time are admissible to illustrate and establish the intent or motive in the particular act directly in judgment."

In Commonwealth v. Jackson, 132 Mass. 16, a case cited in behalf of the defendant, it is said:

"It is not in general competent to show a distinct crime committed by the defendant for the purpose of proving that he is guilty of the crime charged. But as in all crimes, except a few statutory offenses, a criminal intent is necessary to be proved, evidence which legitimately bears upon this may be put in, even if it be derived from circumstances which also show the commission of another offense."

The transactions of the defendant in the name of the Investor's Brokerage Company and those in his own name in New York as testified by the witnesses were similar to those charged in the indictment. Those in connection with the Imperial Trustee Company were somewhat different. As to those, the testimony tended to show that defendant had advertised through the press that he or his clients had money to invest in mortgages or other securities, and upon receipt through the mails of offers of such securities prompted by such advertisements he would, through the mails, refer the persons so offer-

ing to the Imperial Trustee Company, which proposed to guarantee the stocks or securities upon a percentage basis, one-half of which the defendant was to receive if the deals were consummated. The transactions were upon the same general plan as the others, and those for which the defendant was on trial, and, if they occurred as testified by the witnesses, they involved a like fraudulent intent upon the part of the defendant in the use of the United States mails. These various transactions continued from December, 1904, to the time or nearly to the time of those charged in the indictment, and were not, therefore, too remote to render them inadmissible upon that ground. Some of this testimony may not have been strictly relevant or very material, but in criminal as well as civil cases which involve questions of fraud, or fraudulent intent, great latitude is allowed in the investigation of the facts, and judgments will not be reversed because unimportant, and possible irrelevant testimony may have been admitted, when the record satisfies that no substantial prejudice did or could have resulted because thereof. Williamson v. United States, 207 U. S. 425–451, 28 Sup. Ct. 163, 52 L. Ed. 278. In admitting the testimony in question, the court restricted its consideration by the jury to the question of the intent and good faith of the defendant in the various transactions; and in its charge to the jury instructed them that they should consider it for that purpose alone. As so restricted, the defendant has no valid ground of complaint because of its admission.

Some other errors are assigned upon the admission of evidence; and one upon the overruling of a general demurrer at the conclusion of all the evidence. We have examined the record relating to them, and deem them to be without substantial merit.

The error in the charge of which complaint is made is that in speaking of the evidence of the transactions in Indianapolis the court said:

"And this was offered and received solely for the purpose of showing the intent of the defendant when engaged in the business at a former time."

This is but an excerpt from a paragraph of the charge to which no exception was taken, and the assignment of error based thereon might well be disregarded for this reason alone. Standing alone even, the excerpt does not seem to be objectionable.

[2] But the correctness of a charge is not to be determined upon excerpts taken therefrom, and considered apart from other portions bearing upon the same subject. The charge as a whole upon that question must be considered. So considered it cannot be successfully contended that the charge in question is erroneous.

[3] The misconduct of the jury after the cause was submitted to it is made a ground of a motion for new trial. It is shown by affidavits of the bailiff in charge of the jury that about 11 o'clock p. m., after the cause had been submitted to it, some member thereof rapped upon the door. The bailiff opened it and one of the jurors came into the hall, and said "the jury wanted a copy of the federal statutes." The bailiff procured a copy of the "federal statutes" and took it into the jury room, and placed it upon a table before them. In about an hour afterwards the jury agreed.

The granting or denial of a motion for new trial rests very largely

in the judicial discretion of the trial court, and it is not ordinarily reviewable upon writ of error. Newcomb v. Wood, 97 U. S. 581–583, 24 L. Ed. 1085; Mattox v. United States, 146 U. S. 140–146, 13 Sup. Ct. 50, 36 L. Ed. 917.

In Mattox v. United States, above, it was shown by affidavits that, after the cause was submitted to the jury, a paper printed and published in the city where the trial occurred, commenting on the trial and unfavorably upon the defendant, was introduced into the jury room, and was read by them. The court excluded the affidavits and the paper read by the jury, and refused to consider them. This was held sufficient to warrant a review, upon errors assigned, of the action of the trial court; and the misconduct to be such as to warrant a new trial. See, also, Felton v. Spiro, 78 Fed. 576, 581, 582, 24 C. C. A. 321.

The ruling in the case before us was not excepted to, nor is it shown that the affidavit of the bailiff was not considered by the court in ruling upon the motion. The case does not, therefore, strictly fall within the rule which authorized the review of the Mattox Case. As the liberty of the citizen is involved, we have, however, considered the assignment, based upon the alleged misconduct of the jury. The authorities are not in accord as to what misconduct of a jury or others will vitiate a verdict. In some, as in People v. Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438, it is held that the presence of the bailiff in charge of the jury in the jury room during their deliberations is such an invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases without regard to whether any improper influences were actually exerted over the jury or not. And in Kansas v. Snyder, 20 Kan. 306, where the bailiff who had charge of the jury had been examined as a witness on behalf of the state, and had testified to material facts against the accused, his presence in the jury room during its deliberations was held to vitiate the verdict.

But in others it is held that if, under all the circumstances, it does not appear that the alleged misconduct influenced the verdict, a new trial should not be ordered upon that ground. Charlton v. Kelly, 156 Fed. 433–438, 84 C. C. A. 295; Fuller v. Fletcher (C. C.) 44 Fed. 34–38; State v. Allen, 89 Iowa, 49–51, 52, 56 N. W. 261; State v. Baughman, 111 Iowa, 71–74, 76, 82 N. W. 452; Gainey v. People, 97 Ill. 270, 37 Am. Rep. 109; People v. Priori, 164 N. Y. 199, 58 N. E. 669–672; Bernhardt v. State, 82 Wis. 23, 51 N. W. 1009–1011; State v. Hooper, 71 Mo. 245; Leach v. Wilbur, 91 Mass. 212. In Gainey v. People, 97 Ill. 270, 37 Am. Rep. 109, above, People v. Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438, and other cases are reviewed, and it is said:

"We prefer saying such a breach of duty on the part of the officer (his presence in the jury room) is a grave irregularity, which will or will not have the effect of vitiating the verdict, depending upon the circumstances in each particular case. Like most questions of that kind, which often arise in the course of a trial, we are of opinion it may be safely intrusted to the discretion of the court who tries the cause and this court would not feel at liberty to interpose, except where it can see there has probably been an abuse of that discretion."

This we believe to be the better rule. See United States v. Reid, 12 How. 361–366, 13 L. Ed. 1023; Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, above; Charlton v. Kelly, 156 Fed. 433–438, 84 C. C. A. 495; and Fuller v. Fletcher (C. C.) 44 Fed. 34–38.

The conduct of the jury in the case before us was quite improper, and, if its verdict was influenced because thereof, it should not be permitted to stand. But we are convinced that the verdict was not in the least influenced by the alleged misconduct. What volume of the "federal statutes" was taken to the jury room is not shown. If it may be presumed (which we do not intimate that it may be) that it was a copy of the Revised Statutes of the United States, or some other volume containing the section as amended upon which the indictment is based, and that the jury read the same, it obtained no other information than what the court had given it in its charge, for in that the court read the section in full and explained its meaning. It is not shown that any one connected with the prosecution caused the volume to be delivered to the jury. There is an entire absence of any showing that the verdict was influenced by the incident; and it is only urged in support of the assignment that the jury may have formed some erroneous impression of the law from reading the statute. If verdicts are to be set aside by the appellate courts for such reasons, few indeed will stand. But we are of opinion that, before a verdict can rightly be disturbed because of misconduct of the jury in reading papers or books not in evidence, it must be made to appear that the jury was influenced in arriving at the verdict by what they read, or that it was such that it would be presumed to have influenced the verdict. It is not so shown in this case, and such presumption cannot rightly be indulged from the facts shown. There was no error, therefore, in denying the motion for new trial.

The judgment is affirmed.

FITCH v. STANTON TP. et al.

(Circuit Court of Appeals, Eighth Circuit. September 1, 1911.)

No. 3,502.

1. APPEAL AND ERROR (§ 1207*)—REVERSAL—REMAND—PROCEEDINGS IN LOWER COURT.

Where the Kansas Court of Appeals in an action on certain coupons taken from municipal bonds reversed a judgment in favor of the holder and remanded the cause to the district court, that court was authorized to render a judgment not inconsistent with that of the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696–4699; Dec. Dig. § 1207.*]

2. JUDGMENT (§ 636*)—RES JUDICATA.

Where, in an action on certain municipal bond coupons, the Kansas Court of Appeals reversed a judgment for plaintiff, holding that the bonds themselves were void, and that plaintiff was not a bona fide purchaser thereof, and was not therefore entitled to recover interest, and no writ of error or appeal was taken therefrom, a judgment rendered by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

district court in conformity with the judgment of the Court of Appeals was res judicata between the parties and their privies of every question which was actually involved in and determined by the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 636.*]

3. JUDGMENT (§ 713*)—"ESTOPPEL BY JUDGMENT."

The essence of estoppel by judgment is that some right, question, or fact in dispute between parties has been judicially determined by a court of competent jurisdiction, and, where such judgment is pleaded in bar of a subsequent action, the question for determination is whether such question has been so determined between the same parties and their privies, and not upon what evidence it was determined or the reason therefor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234–1241; Dec. Dig. § 713.*

For other definitions, see Words and Phrases, vol. 3, p. 2497; vol. 8, p. 7655.]

4. JUDGMENT (§ 714*)—RES JUDICATA—IDENTITY OF ISSUES.

Where, in an action on certain interest coupons on municipal bonds, it was finally held that the holder was not a bona fide purchaser for value, and that the bonds were void, so that no recovery could be had on the coupons, such judgment was conclusive against the holder's right to maintain an action on other coupons subsequently maturing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 714.*

Conclusiveness of judgment as dependent on theory of action or recovery, see note to Millie Iron Mining Co. v. McKinney, 96 C. C. A. 163.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Action by Sherman K. Fitch against Stanton Township and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. F. Ware (W. B. Brownell, on the brief), for appellant.

Thomas A. Scates (Albert Watkins, on the brief), for appellees.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. The appellant, Sherman K. Fitch, a citizen of Minnesota, sued the townships of Stanton and Roanoke, in the county of Stanton, state of Kansas, municipal corporations created by, and existing under, the law of that state, upon 102 semiannual interest coupons of $30 each, attached to three certain alleged refunding bonds of $1,000 each, due in 30 years, issued by the predecessor of said townships February 7, 1890, upon a vote of the electors thereof in December preceding, authorizing the issuance of such bonds and others, and to require the defendants to levy a tax upon the property of the original township now within the limits of the defendant townships, to pay such coupons. The defendants demurred to so much of the bill as declared upon coupons which matured more than five years prior to the commencement of the suit, upon the ground that they were barred by the statute of limitations of the state of Kansas. They also filed a plea to the bill in which it is alleged that in a prior suit between the members of a copartnership of which the appellant was one, and the original township which issued the bonds, upon prior in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terest coupons attached to said three bonds, it was finally adjudged that the bonds upon which the interest coupons in suit are attached were void, and that said copartnership was not a good-faith purchaser of said bonds. The appellant took issue upon the plea. The Circuit Court overruled the demurrer, but upon the hearing of the plea sustained the same and rendered a decree dismissing the bill, from which the appellant prosecutes this appeal.

From the facts stipulated by the parties, and upon which the cause was submitted to and determined by the Circuit Court, it appears:

That Stanton county, and Faulkenstein township in said county, were organized by the Legislature of Kansas in June, 1887. On March 21, 1889, the proper officers of said Faulkenstein township in due form of law called an election to be held therein December 3, 1889, at which the question was submitted to the qualified electors thereof to determine whether or not refunding bonds should be issued by the township as authorized by law to refund an alleged indebtedness of $16,000, for which said officers on that day issued the warrants of the township. That such election was held at which a majority of the votes cast thereat was in favor of issuing said refunding bonds. Afterwards, and on February 7, 1890, in accordance with such vote, the proper officers of said township did issue 16 refunding bonds of $1,000 each, payable to bearer 30 years after July 1, 1889, with 6 per cent. semiannual interest, and for which interest, 60 coupons for $30 each were attached to each of said bonds, and the warrants of said township for $16,000 were taken up and canceled. That said bonds were thereupon delivered by said officers to the American Sugar Company who at the same time agreed to construct a sugar mill in said township therefor. Each of said bonds contained a recital as follows:

"This bond is one of a series of fifteen bonds of one thousand dollars each, and issued by virtue of and in accordance with the provisions of sections one, two, and three, of chapter fifty, of the Laws of 1879; being an act of the Legislature of the state of Kansas, entitled, 'An act to enable counties, municipal corporations, the boards of education of any city, and school district to refund their indebtedness,' which said act took effect March 10, 1879. And it is hereby certified and recited that all acts, conditions and things required to be done precedent to, and in the issuing of, said bonds have been done, happened and performed in regular and due form as required by law."

That three of said bonds, viz., Nos. 1, 2, and 3, respectively, were afterwards duly recorded by the county clerk of Stanton county and the State Auditor of Kansas, as required by the law of that state. That thereafter, and on December 15, 1891, a copartnership composed of this appellant and two of his brothers, doing business under the firm name of Fitch Bros., purchased said three bonds (from which the coupons maturing prior to that date had been removed, but were never paid by said township) from the holder thereof, and paid therefor the full value of $3,000 in good faith, and in reliance upon the recitals of said bonds, without notice of any defects or invalidity therein, or in the issuance thereof, if any existed, and received the possession of said bonds from said holder.

That on April 12, 1893, coupons Nos. 5, 6, and 7 of each of said bonds remaining unpaid and said township having made no provision for the payment of the same, said Fitch Bros., the then owner and holder of said bonds and coupons, brought suit in the district court of Stanton county, Kan., against said township of Faulkenstein to recover the amount due upon said coupons. That in said suit the said township answered and alleged in substance that said bonds to which said coupons were attached, and for the interest upon which said coupons were made, were issued without consideration, and without authority of law, and were, therefore, void, and that said Fitch Bros. were not good-faith purchasers thereof. That upon the trial of said suit the district court made a special finding of facts, among which are that said firm of Fitch Bros. purchased said bonds for a valid consideration; and found as a legal conclusion that such purchase was in good faith and without notice of any of the alleged defects in the issuance of said bonds, and were entitled to recover from said township the amount due upon said coupons, and rendered judgment against said township therefor. From such judgment the township appealed to the Court of Appeals of Kansas, which court on January 17, 1896, reversed the judgment of the district court, and said:

"The court (district court of Stanton county) erred in its conclusion of law. That the plaintiff in error (Faulkenstein township) is clearly entitled to judgment for costs. The judgment of the district court is reversed and the cause is remanded to the court below, with instructions to render judgment in favor of the plaintiff in error for costs."

No appeal was taken from such judgment, and upon the return of the mandate to the district court of Stanton county that court rendered judgment in favor of the township and against Fitch Bros. for costs, as directed by said Court of Appeals. No exception was taken to such judgment, and it has never been reversed, set aside, or modified in any way.

After such judgment, the territory which constituted the township of Faulkenstein was transferred to, and became a part of, the townships of Stanton and Roanoke, in said county of Stanton, the defendants in this suit; and the township of Faulkenstein ceased to exist. Fitch Bros. afterwards dissolved their partnership, and said three bonds and the coupons thereon were taken by the appellant as a part of his share of the partnership property. This suit is brought upon coupons Nos. 8 to 41, inclusive, upon each of said three bonds, being 102 in all, still attached to said bonds.

Upon the foregoing facts the Circuit Court sustained defendants' plea, dismissed the bill, and rendered judgment against the appellant for costs, upon the ground that the judgment in the case of Faulkenstein Township v. Fitch Bros., in the state court (2 Kan. App. 193, 43 Pac. 276), was a final adjudication that Fitch Bros. and the appellant as one of the members of said firm were not entitled to recover upon said bonds, or any of the coupons attached thereto.

The principal contention of the appellant is that the Court of Appeals of Kansas in reversing the judgment of the district court of Stanton county exceeded its jurisdiction in remanding the cause to

that court with directions to render a judgment for the township; that the judgment of the district court in accord with those directions is void; and that neither that judgment nor the judgment of the Court of Appeals estops the appellant from recovering judgment upon the interest coupons involved in this suit, which are coupons for interest accruing later upon the said bonds.

The Constitution and laws of Kansas seem clearly to authorize the Supreme Court of that state, upon reversing a judgment of the district court, to render such judgment as the district court should have rendered, or to remand the cause to that court with directions to render such judgment; and the act creating the Court of Appeals of Kansas conferred upon that court the same power that the Supreme Court possesses in causes that fall within its jurisdiction; and the case of Fitch Bros. v. Faulkenstein Township did fall within the appellate jurisdiction of the Court of Appeals.

[1] But, however this may be, the Court of Appeals of Kansas had undoubted authority to reverse the judgment of the district court in that case, and remand the cause to the court for further proceedings not inconsistent with the decision of the Court of Appeals. It did reverse that judgment and remand the cause to the district court. That court was then authorized to proceed with the cause and render judgment therein not inconsistent with that of the appellate court.

[2] It did so proceed, and rendered judgment against Fitch Bros., that the bonds upon which they sought to recover interest were void, that they were not good-faith purchasers thereof, and were not entitled to recover the interest sued for. To that judgment Fitch Bros. took no exception, and prosecuted no writ of error or appeal therefrom. It is therefore res adjudicata between the parties thereto and their privies, of every question that was actually involved in, and determined by, that judgment. Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683–691, 15 Sup. Ct. 733, 39 L. Ed. 859; Northern Pacific Ry. Co. v. Slaght, 205 U. S. 122–131, 132, 27 Sup. Ct. 442, 51 L. Ed. 738; Messinger v. Anderson, 171 Fed. 785–789, 96 C. C. A. 445; Cooley's Const. Lim. *47 et seq.

[3] The essence of estoppel by judgment is that some right, question, or fact in dispute between parties has been judicially determined by a court of competent jurisdiction; and, where such judgment is pleaded in bar of a subsequent action, the question always is, Has such question been so determined between the same parties or their privies? and not upon what evidence was it determined, or the reason therefor. Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 687–691, 15 Sup. Ct. 733, 39 L. Ed. 859; Sou. Pac. R. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

[4] Finally it is urged that the coupons involved in this suit are other and different coupons than those involved in the prior suit in the state court, and that the judgment there is not conclusive of the appellant's right to recover upon these coupons. But the right to recover any interest upon the bonds in question depends upon their validity in the hands of the appellant, or the copartnership of which he

was a member; and, if the bonds themselves were void in their inception, no interest will ever accrue thereon. The validity of these bonds was directly involved in that suit, and it was there adjudged that they are void. The estoppel against the appellant resulting from that judgment is not dependent upon the demand involved in this suit being the same as that involved in that suit; but is dependent upon the questions here involved being identical with those involved in, and determined by, that suit. New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Northern Pacific Ry. Co. v. Slaght, 205 U. S. 122–130, 27 Sup. Ct. 442, 51 L. Ed. 738; Sou. Pacific R. R. Co. v. United States, 168 U. S. 1–48, 49, 18 Sup. Ct. 18, 42 L. Ed. 355; Deposit Bank v. Frankfort, 191 U. S. 499–513, 514, 24 Sup. Ct. 154, 48 L. Ed. 276; Messinger v. Anderson, 171 Fed. 785–789, 96 C. C. A. 445. The identity of such questions being established, the fact that the coupons for interest here are for interest accruing later upon the same bonds, for which the coupons in the former suit were given, in no manner affects the estoppel arising from the judgment in that suit.

In New Orleans v. Citizens' Bank, 167 U. S. 395, 17 Sup. Ct. 913 (42 L. Ed. 202), above, it had been judicially determined in prior suits that the capital stock and certain other property of the bank were exempt from state taxation for certain years. Afterwards the state sought to tax such property for subsequent years, and contended that the prior judgments were not res adjudicata of its right to do so, because the taxes demanded were not the same. Mr. Justice White, speaking for the court, said:

"It results from the foregoing that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they, therefore, are conclusive, unless the proposition be sound that, a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year cannot be assessed or collected can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defense and of the facts upon which the defense is founded. * * * The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-books and enforced by many decisions of this court."

And in Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 27 (42 L. Ed. 355), Mr. Justice Harlan, speaking for the court, said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and

repose of society by the settlement of matters capable of judicial determination."

Whatever may have been the reason for the reversal of the judgment of the district court of Stanton county upon the facts found by it, and the rendition of judgment by that court upon those facts against Fitch Bros., that judgment is final and conclusive between these parties.

The decree of the Circuit Court is therefore affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. BRITTON.

(Circuit Court of Appeals, Eighth Circuit. September 1, 1911.)

No. 3,561.

CARRIERS (§ 318*)—INJURY TO PASSENGER—EVIDENCE.

In an action for injuries to a passenger, caused by an alleged sudden stop following the derailment of a car, physical facts *held* to require a verdict for defendant on the ground that plaintiff could not have been injured in the manner claimed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by Willa Britton against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

William T. Wooldridge (Samuel H. West, Frank G. Bridges, and Nicholas J. Gantt, Jr., on the brief), for plaintiff in error.

Frank Pace (Jeff Davis, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and MARSHALL and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. Willa Britton, as plaintiff, brought this action against plaintiff in error, as defendant, to recover damages for an alleged personal injury caused, as stated, by the negligence of defendant.

The evidence in the case discloses the sad life of a very unfortunate young lady. Plaintiff, at the trial November 2, 1910, testified that she was 19 years of age, and was married on August 6, 1906 (age 15). In June, 1907, after a miscarriage, her doctor performed a curetment. In September, 1909, she was operated upon, and a tumor removed from one of her ovaries. In December following she was operated upon for appendicitis, and in April, 1910, was operated upon for gall stones. At that operation it was discovered that she had adhesions of the intestines on the right side, and the doctor declined to proceed farther with the operation on account of the danger to her life. He said she would suffer from these adhesions until she was operated upon and had them broken up, and advised her to go to a specialist, recommending Mayo Bros.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

She left the hospital on the 23d of June, 1910, went to a boarding house, remained until the 8th of July, when she took a young sister to the country. Returning on the 11th, she purchased at the station of England a ticket to Little Rock, and became a passenger upon the train of the defendant road between England and Little Rock. The train consisted of an engine, tender, baggage car, and two passenger coaches. The seats in the coach were double cushioned seats. She seated herself near the center of the rear coach on the left-hand side of the car, facing in the direction the train was going. She was alone in the seat and sat near the aisle. After the train had left England some little time the forward wheels of the front trucks of the tender left the rails, supposedly on account of the lowering of the track, caused by the roadbed being softened from rains. The engineer, immediately discovering from the sound that these wheels were off, applied his air brake, slowed down, and stopped the train. Plaintiff testified that the train stopped with such a sudden jerk or jolt that she was thrown against the window sill and her left side and back injured. When the train stopped the male passengers got out of the car to ascertain the cause of the stoppage. There were three lady passengers in the coach in which she was sitting. They (with plaintiff) got up, walked to the rear of the coach, and looked out to see if they could ascertain why the train had stopped. In about 15 minutes the wheels were replaced on the rails and the train started. After returning to her seat, and after the train had started, the motion of the car made her sick. Her illness seemed to increase before the train reached Little Rock, and she received attention from some of the other passengers. On reaching Little Rock she was taken to a hospital, and has been attended by physicians since. She claims that the injury resulting from her being thrown against the window sill injured her back to such an extent that her lower limbs have become in a measure paralyzed. At the trial she was brought into court on a stretcher, and demonstrations were made to establish the paralyzed condition of her limbs by sticking pins into them in view of the jury.

As to whether or not the car stopped in a sudden manner, so as to throw her against the window sill, her testimony stands alone, unsupported by that of any other. In addition to the trainmen, who testified that the train stopped by slowing down gradually, nine passengers upon the train also testified that there was no sudden stop, jerking, or jolting of the train. One of the passengers testified that he was looking directly at her when the train came to a stop, and that she was not thrown against the window sill. Another one was writing, and observed nothing unusual until the train stopped. While the burden was upon the plaintiff to establish her injury by a preponderance of the testimony, the preponderance is not determined by the number of witnesses alone; and, were this all, we might not be inclined to disturb the verdict of the jury, who saw the witnesses and observed the manner in which they gave their testimony. But it is apparent, from a consideration of the physical facts, that plaintiff is mistaken. She was sitting in the seat, she testified, facing in the direction the train was going. She was not sitting next to the window, but near the aisle, and

a sudden stopping of the train would have precipitated her forward, not thrown her sideways some distance to the window. Sitting where she was, had she been suddenly thrown sideways against the window sill, she would not have been struck in the side and back below the ribs, but much higher up, at or about the shoulders.

Plaintiff's testimony was taken by deposition several weeks before the trial. Her testimony was somewhat different then as to the manner of her injury than that given at the trial. In her deposition she stated that her left side struck the window sill just below the ribs. Upon the trial her testimony was that it was the left side and back that struck the window sill. We, however, leave out of consideration any discrepancy in her statements. Plaintiff had at times suffered severe pains about her right side before and after the operation, which disclosed that she had adhesions of the intestines. Her sufferings were such that one and sometimes two or more hyperdermic injections of morphine were required to ease her pain, and she at times manifested symptoms of hysteria. However much plaintiff may enlist our sympathy, she is not entitled to a judgment against defendant, unless its wrongful act has contributed to produce her present condition. We are fully persuaded, from a careful consideration of all the testimony, viewing it in the most favorable light for plaintiff, that she was not injured by being thrown, and was not thrown, against the car window, but that she labors under an hallucination in this respect.

The requested instruction for a directed verdict in favor of the defendant, after the close of the trial, should have been given. For the refusal to give it, the judgment is reversed, and a new trial ordered.

CALIFORNIA NAT. BANK OF SACRAMENTO v. UTAH NAT. BANK OF SALT LAKE CITY.

(Circuit Court of Appeals, Eighth Circuit. September 25, 1911.)

No. 3,448.

1. BANKS AND BANKING (§ 170*)—COLLECTION AGENTS—MISCONDUCT OF SUBAGENTS—LIABILITY.

In the absence of any express or implied contract that a bank to which collections are sent would not be liable for the misconduct of its subagents in making the collection, it is responsible for the negligence of those so employed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 588, 589, 592; Dec. Dig. § 170.*]

2. BANKS AND BANKING (§ 170*)—COLLECTION AGENT—NEGLIGENCE OF SUBAGENT—CUSTOM OF BUSINESS.

Where defendant bank had been acting as plaintiff's collection agent for some time, with the understanding that it should not be liable for the misconduct of its subagents, and on receipt of the item in question for collection in accordance with its uniform prior practice acknowledged receiving the check and incorporated in the body of the receipt a statement that in receiving the same it acted only as agent, and assumed no responsibility for the acts, omissions, neglect, or default of agents or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subagents at other points, or for items lost in transit, it was not liable for the failure to collect the check, due to the negligence of a subagent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 588, 589, 592; Dec. Dig. § 170.*]

In Error to the Circuit Court of the United States for the District of Utah.

Action by the California National Bank of Sacramento against the Utah National Bank of Salt Lake City. Judgment for defendant, and plaintiff brings error. Affirmed.

Oscar W. Moyle (Le Grand Young, on the brief), for plaintiff in error.

Waldemar Van Cott (E. M. Allison, Jr., and William D. Riter, on the brief), for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

PER CURIAM. A check drawn by Philips upon the First National Bank of Ponderay, Idaho, payable to Albert Wonderlich, was forwarded by the California National Bank of Sacramento, which had received it from another bank, to its correspondent, the Utah National Bank of Salt Lake City, for collection. The drawee bank was so far distant from the Utah bank that the check necessarily had to be forwarded through subagents for actual presentation. It finally reached its destination and was protested for nonpayment. The California bank sued the Utah bank for damages alleged to have been occasioned by its negligence (the particulars of which need not be specified) in the transaction of the business, and, failing to recover in the Circuit Court, brings the case here for review.

The Utah bank had for several months prior to the transaction in question been acting as correspondent for the California bank in respect of its business at or near Salt Lake City, and also in respect of collections to be made at a distance through the intervention of subagents. The Utah bank acted with due diligence in forwarding the check in question, and no fault is found with its selection of a subagent. The actionable negligence, if any, was with the subagents, and it is claimed that under the authority of Exchange National Bank v. Third National Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, the Utah bank is liable for the misconduct of its subagents in the performance of their duties.

[1, 2] In the absence of any express or implied contract that it should not be liable for the misconduct of its subagents, we would be required under the authority of the last-mentioned case to hold the defendant responsible for the negligence of the agents employed by it; but it appears that the defendant had, from the inception of its business relations with the plaintiff bank, accepted items for collection beyond its immediate sphere of action, with the understanding that it should not be liable for the misconduct of its subagents. Upon receipt of the item in question in this case the Utah bank, in accordance with its uni-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

form prior practice, acknowledged its receipt, and in the body of the receipt, in like accord with former practice, incorporated these words:

"In receiving checks, drafts, or other paper on deposit or for collection, the Utah National Bank acts only as agent, and assumes no responsibility for the acts, omissions, neglect, or default of agents or subagents at other points, or for items lost while in transit. Any credit allowed for items on other banks or parties is only provisional until the proceeds thereof in money shall have been actually received by said bank.

"[Signed] W. F. Adams, Vice Pres."

The California bank received this receipt in due course of mail and made no objection to the terms specified. According to prior usage and contract alike, therefore, the defendant bank assumed no liability for the misconduct of its subagents, and the doctrine of the Exchange National Bank Case has no application.

The judgment below was right, and is affirmed.

In re IRONCLAD MFG. CO.

In re PIERSON.

(Circuit Court of Appeals, Second Circuit. July 29, 1911.)

BANKRUPTCY (§ 462*)—APPELLATE PROCEEDINGS—POWER TO GRANT STAY.

Where an order of a District Court in bankruptcy has been taken to the Circuit Court of Appeals for review by an appeal or petition to revise, an application for a stay to prevent action by a party pending the application must be made to the court, and cannot be granted by a judge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 462.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Petition to Revise Order of the District Court of the United States for the Eastern District of New York in Bankruptcy.

In the matter of the Ironclad Manufacturing Company, bankrupt. Petition by J. Fred Pierson to revise order of District Court. On motion for stay. Denied.

Before WARD, Circuit Judge.

WARD, Circuit Judge. If I were allowing an appeal, I could grant a stay; but the cause is already in the Circuit Court of Appeals by appeal, or petition to revise, or both, and an application for a stay would have to be made to the court. I have no power as a Circuit Judge to grant it. If I had, I would deny it, because in the absence of fraud the court has no right to interfere with the exercise of their legal rights as to collateral by pledgees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

IRVINE v. PUTNAM.

SAME v. DELANO.

(Circuit Court, S. D. New York. February 9, 1911.)

1. RECEIVERS (§ 210*)—FOREIGN RECEIVERS—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Where an assessment against stockholders of a railroad company was levied by an Ohio state court, a receiver appointed by such court was entitled to sue on the assessment and recover the same against stockholders in the courts of New York.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 417–420; Dec. Dig. § 210.*]

2. LIMITATION OF ACTIONS (§ 58*)—LIABILITY OF STOCKHOLDERS—ASSESSMENTS—ACCRUAL.

Limitations do not begin to run against an assessment against stockholders of a railroad company in insolvency proceedings prior to the entry of a decree levying such assessment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 327; Dec. Dig. § 58;* Corporations, Cent. Dig. §§ 1084–1093.]

Action by Ellsworth C. Irvine, as receiver, etc., of the Columbus, Sandusky & Hocking Railroad Company, against Henry W. Putnam, Jr., and against Warren Delano, Jr. On demurrer to complaint. Overruled.

Baldwin & Hutchins and McLaughlin, Russell, Coe & Sprague (Rufus W. Sprague, Jr., of counsel), for plaintiff.

Cravath, Henderson & De Gersdorff (Walker D. Hines, of counsel), for defendants.

COXE, Circuit Judge. [1] These actions are brought by the plaintiff, as receiver, appointed by the court of common pleas of Franklin county, Ohio, against the defendants as stockholders of the Columbus, Sandusky & Hocking Railroad Company to recover the amounts assessed against them by the said court of common pleas.

The defendants demur upon the following grounds:

First: That this court has no jurisdiction of the subject of the action.

Second: That the plaintiff has no legal capacity to sue: (1) He has no title to the alleged claim sufficient to authorize him to maintain these actions; (2) he has no power to sue outside the jurisdiction of Ohio and no power or authority to sue in this court; (3) the Ohio court had no jurisdiction to confer upon the plaintiff, as receiver or otherwise, the title to the claims against the defendants or the authority to maintain these actions; (4) that the words "Receiver, etc.," appearing after his name are merely descriptio personæ.

Third: That the complaint does not state facts sufficient to constitute a cause of action.

Fourth: That the laws of Ohio relied on by plaintiff are in contravention of the Constitution of the United States in so far as they attempt to authorize these actions.

The question, then, briefly stated, is this—assuming all the facts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged in the complaints to be true, can the actions be maintained? In the suit of this plaintiff against Henry W. Putnam—the complaint was almost identical with the complaint in these actions—a demurrer containing similar averments to those now under consideration was overruled by the Circuit Court for the Southern District of California. Irvine v. Putnam, 167 Fed. 174.

In July, 1910, the Circuit Court for the District of Maryland, in Irvine v. Bankard, 181 Fed. 206 (the issues being substantially the same as in the actions at bar), after carefully reviewing all the defenses, rendered a decision for the amount demanded and interest. This was a decision, apparently, made at the trial after issue joined on complaint and answer.

In Hamilton v. Simon, 178 Fed. 133, this court directed a verdict for the plaintiff in an action based on the Minnesota statute in which many of the questions here mooted were decided adversely to the defendants' contention.

[2] In the case of Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, the Supreme Court upheld an assessment under the Minnesota statute in a suit brought by the receiver in this court against stockholders who were not parties to the assessment proceedings. The Minnesota statute and the proceedings thereunder were attacked upon the same general lines as in the present case and the defense was interposed that the suit was barred by the statute of limitations. Regarding this defense the court says:

"The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay as required by the order of the Minnesota court of December 22, 1902, King v. Pomeroy, 121 Fed. 287 [58 C. C. A. 209]. Under the New York statute of limitations there was six years in which to bring the action after it accrued, under section 382 of the Code."

It is asserted that the question of the bar of the statute can be considered upon demurrer because it appears on the face of the complaint that the limitation is an inseparable qualification of the right and that more than 18 months elapsed between the time the obligation became enforceable against the defendants and the commencement of the action. On the other hand, the plaintiff insists that the statute of limitations is a defense which must be pleaded and cannot be considered on demurrer.

There is force in this contention but it is unnecessary to decide the point as, in my opinion, the cases cited dispose of the question of limitation adverse to defendants' contention. Some of the questions presented by the present demurrers differ in form from those considered in prior litigations, but I have no reason to think that those decisions would have been otherwise if the demurrers now under consideration had been interposed.

In any view, I think that the questions argued should not be disposed of on demurrer.

The demurrers are overruled, with leave to the defendants to answer within 20 days from the date of the orders overruling the demurrers.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. BROOKLYN BOTTLE STOPPER CO. et al. SAME v. AMERICAN CORK SPECIALTY CO. et al. SAME v. JOHNSON.

(Circuit Court, E. D. New York. June 12, 1911.)

1. PATENTS (§ 287*)—SUIT FOR INFRINGEMENT—PARTIES.
Individuals who organized a corporation with a small capital for the purpose of enabling them to infringe a patent through the corporation without subjecting themselves to personal liability may be joined with the corporation as defendants in a suit for the infringement, and held jointly liable therefor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 459; Dec. Dig. § 287.*

Persons liable for infringement of patent, see note to Westinghouse E. & Mfg. Co. v. Allis-Chalmers Co., 100 C. C. A. 414.]

2. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
In a patent suit, where the parties are not willing to rest the case on final hearing on the papers presented on an application for preliminary injunction, or where the attention of defendants has not been called to the patents by prior adjudications, sustaining their validity, exceptional circumstances must be shown to justify the granting of a preliminary injunction in advance of the taking of the testimony.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 481; Dec. Dig. § 297.*]

In Equity. Suit by the Crown Cork & Seal Company of Baltimore City against the Brooklyn Bottle Stopper Company, Emilio Alberti, James Alberti, and John Alberti. Same against the American Cork Specialty Company and Joseph Mundet, otherwise known as "Jose Mundet," and same against Aaron Johnson. On motions for preliminary injunction. Motions denied.

Philipp, Sawyer, Rice & Kennedy (Robert H. Parkinson and James Q. Rice, of counsel), for complainant.

Robert B. Killgore (Alfred C. Coxe, Jr., of counsel), for defendants.

CHATFIELD, District Judge. [1] Three actions have been brought against different parties who occupy substantially similar positions so far as the present application for a preliminary injunction is concerned. One of them, Johnson, is an individual who seems to be financially responsible. In the other cases the principal defendant is a corporation, but individual defendants have been joined, because the corporation has been so organized, with such a small amount of paid-up capital and so little corporate responsibility, that it must be held that the individual responsible stockholders are the parties actually interested, and that they are proper defendants in a suit involving, not only the rights as to certain patents, but questions of accounting for profits and personal decrees with reference to the operations of those corporations. Crown Cork & Seal Co. of Baltimore City v. Brooklyn Bottle Stopper Co. (C. C.) 172 Fed. 225.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

But it is urged that the method of organization of these corporations and the secrecy with which they have conducted the making of the product (by the use of machines which will be considered later) indicate that some knowledge, or at least apprehension, has existed on the part of the defendants. Yet in the same breath the complainant urges that no defense of laches is available, although the record shows that it has had knowledge that these various defendants were putting upon the market a product which is now discovered to be produced by machines which the complainant contends infringe its method and machine patents. None of these questions seem to be sufficient ground upon which to rest a determination of the application for preliminary injunction. As has been said, the personal defendants are proper parties, and their apparent desire to avoid personal financial responsibility, and their knowledge of the zeal with which the complainant has ordinarily investigated all machines affecting the complainant's business explains their actions; so that it cannot be conclusively held upon affidavits that these personal defendants knew or expected that they were actually infringing any patents. Even the remarks attributed to Mr. Johnson are not admitted in the form in which they are charged. But, whichever language be taken, they do not show more than ordinarily explainable precautions, provided the defendants' intentions and knowledge be innocent of the idea of infringement, and hence a preliminary injunction cannot be based upon such statements alone.

Articles like the complainant's product, generally known as metal caps or closures for bottles, are becoming more and more extensively used. It appears that there is also a considerable independent trade, and that a total output last year of over 30,000,000 gross of these caps was consumed. Some one-third of this output came from independent sources; that is, from makers other than the complainant. But the complainant by its license system, through which it controls the various machines for applying these caps and limiting their use to caps bought of the complainant and also machines for making the caps (which the complainant alleges are covered by its patents), has built up for the complainant an exceedingly profitable business, and one in which absolute perfection of operation and preservation of the contents of the bottles capped is of the greatest importance. An examination of the record shows that imperfect caps, in the form known as "puffers," were for a long time the object of experimentation, and have to do directly with the patents involved on this motion. The cap of the complainant, consisting of a tin shell with fluted rim, a thin layer of cork, and in between the cork and the tin a disk of paper treated with some adhesive gum, requires (especially when used for highly charged contents like ginger ale or soda) perfect union between the lip of the bottle and the cap. The natural imperfections or interstices in the cork are partially filled up by the exertion of pressure. The gummed paper, more or less adhering to the cork and tin, aids in the effective closing of these openings or imperfections. The construction of these caps, with the application of heat and pressure, forces out any gas or steam, so that the melted gum makes a close or impervious seal, with a much more

nearly uniform percentage of perfection than when the cork disks were first used in caps of this sort.

These general objects are what were sought to be obtained by the complainant's patents. One Painter, who took out the original patent for the cap itself in the year 1892 (which therefore expired by limitation in 1909, since which time the defendants have largely increased the output of such caps) also patented a method in 1905, on an application filed June 6, 1902, under No. 792,284, in which he describes the method of compressing the cork disk, gummed paper, seal, and the tin cap in a feeding device which would cause the disks, under pressure, to be passed over a heating apparatus, allowing a supply of heat sufficient to melt the gum upon the paper disk, and then to keep the disks under compression until sufficient chance for the gum or adhesive portion of the disks to cool or set and retain the cork in close adhesion to the inside surface of the cap, with little chance for dislodgment in handling and applying to the bottles, and also without much likelihood of the formation of bubbles or air spaces between the tin and the cork. It was found, however, that sufficient caps showed imperfections to make improvement necessary, and one Wheeler upon the 19th of May, 1908, obtained letters patent No. 887,883, upon an application filed in 1905, in which he patented a machine for carrying out an improvement of the Painter method in the patent above referred to. On the same day, Painter himself had obtained a patent, No. 887,838, on an application filed May 24, 1905, for a machine to carry out the method described by him in his earlier patent. Both the Wheeler patent and the Painter patent were intended to produce machines for doing the same work, but Wheeler's idea actually came later, and was an improvement upon Painter's idea, even though the patents were issued at the same time. In the Wheeler patent the essential difference from the Painter machine lay in the application of the heat first and the exertion of pressure against the cork disk after sufficient heat had been exerted upon the cap, not only to melt the gum and to render adhesion easy, but also to expand any air, liquid, or gas which might be contained in any part of the cap, and which could with difficulty be forced out even by the amount of heat used, if pressure had already been applied. It is easy to see that the Painter machine, assuming that the quantity of gas were not so small in amount as to be substantially negligible, would have to exert a bursting strain before it would be expelled, if the cap were under severe pressure, whereas in the Wheeler machine the application of heat would cause expansion and probable expulsion of this gas, even if small in quantity, before or at the time of the application of pressure.

The machines used by the defendant companies are substantially alike in principle, and were made, or some of them were made, by the defendant Johnson, who admittedly constructed the one produced as an exhibit. The substantial feature of the defendants' machines is the use of two disks, the first of which carries the caps in oval spaces or depressions around the outside of its upper face, during which time a section of the plate and the caps thereon is subjected to the intense heat of an arrangement of Bunsen burners. The second disk has a

series of plungers around the upper face, held in place each by a separate spring, and released automatically by a cam, which allows the plunger to rise sufficiently to give space for the transfer of a heated cap from the first disk to one of the spaces immediately under a raised plunger upon the outside edge of the surface of the second disk. The release of the plunger, when the disk has turned beyond the operation of the cam, applies pressure to the cap, already heated to a point where the gums have melted and the gas has been expelled or expanded, and the cap thus under pressure is carried completely around to a point where, when the cam raises the plunger, the cap will be touched by a finger which throws it out into a chute. As has been said in the first Painter machine patent and in the Painter method patent, the caps appear to have been subjected to pressure, then heated, and then allowed to cool somewhat before the pressure is removed. In the Wheeler patent, the caps are carried upon the face of a disk, and by an arrangement of spaces and a spiral track are meanwhile moved from the center toward the circumference. The heat is applied by steam near the center, and then the plungers exert pressure while the caps are carried a certain distance. Then, the plungers being released, the caps are expelled upon the outer or cooled portion of the disk, where the temperature is rapidly reduced, under the influence of a water-jacket.

In the defendants' structure no cooling apparatus or water-jacket is used, but some lowering of temperature (to whatever extent this may be effected) is accomplished by the removal of the caps from the zone in which heat is applied before the plungers act. The real point, so far as the question of infringement is concerned, depends upon whether or not the use of the two disks, the application of pressure to the caps after they have left the heated zone, but while they are still in a position to receive more or less heat, and the lack of any attempt to cause great reduction of temperature or artificial cooling, is a patentable invention by itself, or is so different from the operation of the Wheeler process as not to be an infringement thereof. Unusual as it may seem, when considering the question of use of the Painter and Wheeler patents, no adjudication has ever been had. Public acquiescence, to the extent of great sale of the product and recognition of commercial availability, and general respect for the scope of these patents and for the probability of valid ownership on the part of the complainant, is indicated. But, again, the natural effect of these elements is counteracted by the license system which the complainant has so generally endeavored to protect, and by the fact that the patent upon the cap itself has but recently expired, thus opening the field to persons desiring to make these caps, without thereby involving them in an infringement suit over the caps themselves.

The defense of laches would not seem to be so persuasive upon the affidavits presented, and there seems to be strong probability that the Painter and Wheeler patents, especially in view of the fact that no patents in the prior art have been set up in the affidavits or presented by the expert who furnished one of the affidavits, other than the Painter patent for the formation of the cap, are likely to be sustained

as describing and covering valid inventions. On the other hand, while discussion upon these motions has been limited to certain claims, and while the general purpose of the defendants' devices depends upon similar processes and produces the same results as the Wheeler improvement of the Painter patents, nevertheless the determination as to the claim of infringement of the machine accomplishing these results will depend, to a great extent, upon the testimony of the witnesses, and a comparison of the operation of these machines, in connection with a study of their construction, upon final hearing. Painter in his method patent, No. 792,284, says:

"My novel method or process consists, first, in interposing a suitable fusible protecting and binding medium between the packing or sealing disks or gaskets and the coincident inner surfaces of the metal co-operating therewith and of which the crown-caps are composed; secondly, while the caps, disks, and fusible binding medium are properly heated for fusing said medium subjecting the whole to appropriate pressure, and, thirdly, while still heated and the packing held under controlling pressure hardening the binding medium or permitting it to harden by cooling it, the disk, and cap. Inasmuch as the slow cooling of these parts precludes many of the valuable economic advantages accruing from hardening the fused medium as promptly as possible, one feature of my invention consists (in this final step) in subjecting the cap, disk, and fused binding medium to artificial cooling influences for promptly cooling them while under controlling pressure."

His claim is as follows:

"First, in interposing a suitable fusible protecting and binding medium between the packing or sealing gasket and the coincident surfaces of the metal co-operating therewith; secondly, heating the metal, the gasket and the binding medium for properly fusing the latter, and in the meantime subjecting the whole to appropriate pressure; and thirdly, cooling the metal and avoiding injury to the gasket from undue heating and hardening the fusible medium while maintaining said appropriate pressure."

It will be seen that he uses the words "in the meantime"; that is, at some time during the process of heating and fusing. But his drawings show and the other language of his patent indicates, that he actually had in mind the converse of what he said; that is, that he intended to exert the metal gasket and the medium to pressure, and in the meantime fuse the medium by heat. His machine patent similarly says: "Properly heating the cap, gasket and the medium, and meantime subjecting the whole to appropriate pressure." And, again: "But however heated the organization of the heater with the timing-table should be such as to appropriately heat the caps on the loaded presser blocks during their progressive movement." The claims of this patent which are relied upon, viz., 2 and 6, however, use the words "heating means and means for engaging the packing to hold it under compression while the closure is cooling." And "holding the said members under this pressure and while cooling." If this language alone were considered, we might have the exact idea suggested by the Wheeler patent, which in claims 1, 4, 7, 23, and 27 (the ones directly affected by the motion) provide for means for heating the assembled members of the closure, while free to allow the expanded air to escape, and means for pressing the parts together while cooling. Under this language of Wheeler, a machine like that

of the defendants, if the closures or caps are reduced in temperature at all, so as to cause cooling of the parts or hardening of the interposed binding material, as is provided for in claim 6, would seem to be within the broad language of the Wheeler claims.

But, again, the defendants suggest that no appreciable change in temperature occurs while the caps are being carried around the second disk of their machine. They claim that Wheeler intended by his patent only to suddenly or quickly cool the caps after pressure had been exerted, and they thus seem to ignore the idea, which Wheeler undoubtedly appreciated and expressed, that the application of heat, and the accompanying expansion of gases, while melting the binding medium, is to be accomplished to the necessary point before any pressure is exerted. Even if Wheeler had the idea that a sudden and extreme cooling was advantageous, and if the defendants find that a great change in temperature is not necessary, they will have to show that their device does not produce such a change of temperature by transfer from the heating disk where pressure is to be exerted as to free them from the language of the Wheeler claims, and they immediately lay themselves open to the charge of being within the general idea of the Wheeler patent, as to the order in which or the time at which pressure should be applied. To avoid this they charge that Painter really suggested the idea which Wheeler tried to patent, and that Wheeler, or any one else, should have realized from the Painter patent that applying pressure in the meantime did not mean or did not suggest the application of pressure, and then heating; and if the Painter patent covered this idea, making the Wheeler patent invalid —that is, if the Patent Office was wrong in ascribing invention to the Wheeler patent—then the defendants say that the bill in the present action is multifarious, in that it is trying to sustain two patents, which cannot validly exist as the basis of a single right, or that the complaint could be objected to as multifarious.

This objection has not been taken to the pleadings, but points out one of the defenses. The amount of testimony involved in this case should be extremely small in amount, owing to the peculiar circumstances involved in the charge of laches, and the entire lack of attack upon the Painter patent up to the present time, coupled with the almost complete barrenness of the prior art upon the subject. The questions of fact as to the operations of the machines can be easily ascertained, and while a determination would seem almost within the scope of this hearing upon affidavits, and while the testimony of experts may be of little use other than to state the object of their empirical observations, and while there would seem to be sufficient acquiescence and freedom from laches to make it possible to satisfy the court even upon preliminary hearing; nevertheless, the advantage to be gained and the likelihood of inability on the part of the defendants to comply with the order of the court, even if the complainant should recover, would not seem to be sufficient to justify an assumption by the court that it can by its own study and upon preliminary affidavits anticipate the exact form in which a thorough presentation of the testimony may set forth the issues as a whole.

[2] In a case where the parties are not willing to rest their final hearing upon the papers presented for the consideration of the application for preliminary injunction, or where the attention of the defendants has not been called to the patents by prior adjudication sustaining their validity, it seems to this court that exceptional circumstances must be shown to justify the use of a preliminary injunction in advance of the taking of testimony. Wright Co. v. Hering-Curtiss Co., 180 Fed. 110, 103 C. C. A. 31; Same v. Paulhan, 180 Fed. 112, 103 C. C. A. 32.

The withholding of such an injunction will facilitate and quicken the final hearing of the case. The granting of such an injunction may prevent the hearing of the case, even if any valid defense exists, or may lengthen the time necessary to take the testimony, both because no immediate haste is called for on the part of the complainant, and because the defendants are anxious to get away from the scope of the preliminary injunction, even at the expense of unnecessary taking of testimony.

For these reasons this court has set forth the questions as they occur upon this application, and has indicated its impressions of the scope of the proposition advanced, but will refuse to make an ultimate determination until the parties leave the matter in its hands for final determination.

Motion for preliminary injunction denied.

BERARDINI v. TOCCI.

(Circuit Court, S. D. New York. July 3, 1911.)

1. PATENTS (§ 328*)—SUBJECTS OF PATENTS—ARTS—SYSTEM OF CODE MESSAGES.

The Berardini patent, No. 889,094, for a "code message," but which is really for a system of devising code messages, is not for an art in the sense of the patent law, and is void. Claims 7 and 8, which are for a record book for use in drafting and deciphering code messages, are also void for lack of invention.

2. PATENTS (§ 328*)—INFRINGEMENT—CODE MESSAGE.

The Berardini patent, No. 889,095, for a code message, *held* not infringed.

In Equity. Suit by Michael Berardini against Felice Tocci. On final hearing. Decree for defendant.

Action upon letters patent issued to complainant and numbered 889,094 and 889,095. All the testimony in the case was adduced in open court.

Mr. Von Briesen, for complainant.

Mr. Hardie, for defendant.

HOUGH, District Judge. [1] The first patent, 889,094, is described as "for a code message." Its history is this: Complainant is a banker of this city, dealing principally, if not wholly, with his fellow countrymen, who often wish to transmit comparatively small

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sums of money to Italy and do it quickly. He keeps a list of his customers in appropriate books. On a line of a given book is to be found the name of the person who may wish to remit money, the name of the person to whom he so remits it, and the address of the payee. This line is numbered, and duplicate books are kept in the United States and in Italy. Thus it is seen that each line of the book enables any one having access thereto and being furnished with a given number to identify by that number the remitter and the payee, with the latter's address.

Complainant made known to his Italian customers that he would transmit money by telegraph in any sum which was a multiple of 10. If, therefore, any person whose name was inscribed in complainant's book, and also in that of complainant's correspondent in Italy, wished to transmit 100 lire to the individual in Italy whose name and address were also to be found in both books, a code message reading "12584" would produce that result; "1" being the number of hundreds of lire to be transmitted and paid, and "2584" being the record number on both sides of the Atlantic of remitter, payee, and payee's address. Five figures being the limit of transmission at one-word rate by trans-atlantic cable, the system as above explained is only valid for record numbers from 1 to 9999, and also only for hundreds of lire. Within these limits many scores of remittances might be made in a single cable message, and by the prefixing of a word arbitrarily agreed upon it might be stated that the first figure stood, not for hundreds of lire, but for thousands or for tens. If all the figures necessary to convey the meaning did not amount to five, prefatory ciphers would be filled in, so that every given message would consist of a series of blocks of five figures each, all to be read in the manner above sufficiently described. This obviously exposed the Italian correspondence charged with paying the orders, to many risks from errors in cable transmission, and complainant therefore added to his figures in blocks of five a statement in uncoded language of the number of remittances intended to be covered, the total value of the remittances in money, and the sum total of the cipher numbers used to indicate remitter, payee, and address.

It is obvious that this is really a system of telegraphic remittance, and it is this system which is described in the specification of the patent, with many amplifications and variations; e. g., for the use of the system when the record numbers extend to and beyond 10,000, and for the use of letters instead of figures by an arbitrary pre-arranged equivalence between figures and letters. Yet the claims of the patent from 1 to 6 are not for a system nor method of telegraphic communication, but are in language best illustrated by claim 4, which is as follows:

A code message comprising a series of elements, the number of which is a multiple of the number of elements constituting a code unit, each code unit consisting of two portions, one of which indicates the value or amount of the order, while the other is a record mark identifying the parties to the transaction, the message also including means indicating the value of the elements representing the amounts of the orders."

Claims 7 and 8 are each for a "record book for use in drafting and deciphering code messages," and containing the information above sufficiently set forth.

It must be obvious, from the description of the system above given, that it would be (humanly speaking) impossible to so distribute error in telegraphic transmission as to permit the receiver of the message intended to direct the payment of (say) 20 different sums to 20 different people to think the message correct when it was really incorrect, after he had tested it by the additional information as to the number of payments intended, the total of such payments, and the total of the arbitrary key numbers. Yet while the receiver might detect error, he could not locate it, and it would be necessary to ask (perhaps) for several repetitions of the message until accuracy had been reached.

To this point the second patent (889,095) is directed. This invention consists in the application of an old (though perhaps not very well known) arithmetical curiosity to the business of sending figures by telegraph.

The patentee learned that, if any number of numerals arranged in columns as for addition be added, each horizontal line and each perpendicular column separately, the grand total obtained by the horizontal addition of the digits will be the same as the grand total of the perpendicular addition of digits.

Therefore this patentee proposes that the transmitter of the message arrange his figures in blocks of five as for addition, and, having added the digits used both horizontally and perpendicularly, he should then add to a cable sent according to the system of the earlier patent a line of figures containing the totals of the digital horizontal and perpendicular addition above described. Assuming this last transmission to be correct, experiment will show that certainly one, and possibly two or three, errors in transmission of the original blocks of five numerals can be detected, and correction made without repetition of the cable. Therefore complainant claims as his invention (taking the first claim as an examplar):

"A code message comprising a number of code units each consisting of a number of elements having a numerical significance and test totals indicating the proper results of the addition of said elements upon the arrangement of said units in columns and rows."

The foregoing is thought to be a fair summary of complainant's addition to the sum of human knowledge as revealed by these patents.

As to claims 7 and 8 of the earlier patent, it is sufficient to say that they are overwhelmingly shown to embody a system of assigning arbitrary meanings to words and figures which is very old in cable code systems. They are therefore void for lack of invention.

[2] As to the second patent, it is enough for the purposes of this case to point out that, whatever may be the merits of digital addition of code numbers as a means of detecting errors in the transmission of the same, there is no proof that defendant ever used that method, and therefore the bill as to the second patent must be dismissed.

The evidence reveals that for a very short time defendant, who is also a banker transacting the same kind of business as complainant,

did use for the same purpose as does the complainant a system of telegraphic transmission of money which involved the use of arbitrary words and figures in substantially the same way as complainant used them, and he did add statements of the number of payments ordered, totals of such payments, and totals of key numbers. With slight variations there was a time for a few weeks, shortly before the beginning of this suit, when the practical method of transmitting money to Italy used by both parties hereto was the same.

It would, I think, be quite possible, if the earlier patent were for a combination of elements producing a new result, to show, first, that the elements were not new, and that the result was not new; but the patent must be judged according to its wording, and claims 1 to 6 thereof are not for any "composition of matters," nor a manufacture, nor a machine, but they are for (eo nomine) a "code message," and it necessarily follows that a code message must be an art within the meaning of Rev. St. § 4886, as amended by Act March 3, 1897, c. 391, § 1, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3382).

It might be enough to bluntly hold that a code message cannot be an art, but that perhaps is interpreting the mere language of the claims too narrowly. It is therefore thought better to inquire what is an "art" within the meaning of the patent laws.

"In the sense of the patent law an art is not a mere abstraction. A system of transacting business, disconnected from the means for carrying out the system, is not, within the most liberal interpretation of the term, an art. Advice is not patentable." Hotel Security, etc., Co. v. Lorraine Co., 160 Fed. 469, 87 C. C. A. 451, 453, 24 L. R. A. (N. S.) 665.

A patent will not be "held valid for a principle, or for an idea, or any other mere abstraction." Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103.

Speaking of a patent which resulted in famous litigation, Shepley, J., said:

"It must be sustained, if it be sustained, as a patent for an art. The statute term 'art,' used as it is in the sense of the employment of means to a desired end or the adaptation of powers in the natural world to the uses of life, is perhaps a better term than the word 'method' used by the patentee, or the word 'process,' the term of description used by the experts. A process eo nomine is not made the subject of a patent in the act of Congress; an art may require one or more processes or machines in order to produce a certain result or manufacture. It is for the discovery or invention of some practical method or means of producing an essential result or effect that a patent, is granted, not for the result or effect itself. 'Process' or 'method,' when used to represent the means of producing a beneficial result, are in law synonymous with 'art,' provided the means are not effected by mechanism or mechanical combination." Piper v. Brown, 4 Fish. Pat. Cas. 175, Fed. Cas. No. 11,180.[1]

If, therefore, this patent be construed as not merely for a thing called a "code message," but for a system of transmitting code messages, for a process or method of cable communication in cipher, the

[1] NOTE.—The patent that was involved in this case was also tested in Piper v. Moon, 10 Blatchf. 264, Fed. Cas. No. 11,182. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 196, the decision of Shepley, J., was reversed, but without affecting the importance of the above-quoted discussion of the meaning of the statutory word "art."

question arises whether such a process or such an art is patentable upon the evidence. Numerous cases have been cited relating to patents for index books, checks, and check books, and certain arrangements of printing upon books of account. Johnson v. Johnston (C. C.) 60 Fed. 618; Carter Crume Co. v. American Salesbook Co. (C. C.) 124 Fed. 903; Thomson v. Citizens' Bank, 53 Fed. 250, 3 C. C. A. 518; Waring v. Johnson (C. C.) 6 Fed. 500; Dugan v. Gregg (C. C.) 48 Fed. 227; Safeguard Acct. Co. v. Wellington (C. C.) 86 Fed. 146. Upon examination each of these cases holds no more than a particular book, pamphlet, or sheet of paper treated to a particular style of printing, or arranged in a particular manner, could be patented as an article of manufacture, which is as much as to say that the paper, ink, and perhaps binding, when arranged as a composition of matter, became patentable by the presence of utility, novelty, and invention.

Such is not and cannot be the case here. No particular code message can be produced which in every exemplar thereof is the single subject of this patent. Indeed, the claims are misnomers. The patent is not intended to be for a code message, in the sense that patents have been granted for books of a peculiar kind. The patent is really for a system of devising code messages, and as such (upon a most liberal reading of the claims) it is in my judgment obnoxious to the remarks above quoted from Hotel Security Co. v. Lorraine Co. The patent is really for advice. It is for an art only in the sense that one speaks of the art of painting, or the art of curving the thrown baseball. Such arts, however ingenious, difficult, or amusing, are not patentable within any statute of the United States.

The bill is dismissed, with costs.

PARSONS NON-SKID CO. et al. v. E. J. WILLIS CO.

(Circuit Court, S. D. New York. September 16, 1911.)

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR DECISION.

Where, in an infringement suit, an alleged anticipating patent was in the record and discussed in the briefs in the Circuit Court of Appeals, the decision sustaining the patent should be construed as overruling such claim of anticipation, and should be followed in that respect by a Circuit Court of another circuit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. § 327;* Courts, Cent. Dig. § 328.

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHAIN TIRE FOR AUTOMOBILES.

The Parsons patent, No. 723,299, for an armor for pneumatic tires, *held* not anticipated, valid, and infringed.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Parsons Non-Skid Company and others against the E. J. Willis Company. On motion for preliminary injunction. Motion granted.

See, also, 176 Fed. 176.

Duncan & Duncan, for complainants.

Lucius E. Varney, for defendant.

LACOMBE, Circuit Judge. [1] The main reliance of the defense is the Clark English patent, 18,003 of 1897. It is conceded that this patent and testimony concerning it were in the record before the Circuit Court of Appeals of the Seventh Circuit in Excelsior Supply Company v. Weed Chain Tire Grip Company (July, 1911) 192 Fed. 35. It is not disputed that the English patent was discussed in the briefs filed in that case. Under these circumstances it would seem that the decision of the Court of Appeals sustaining the validity of the Parsons patent and construing its claims should be followed at circuit here. Warren v. City of New York (C. C. A. Second Circuit, April 10, 1911) 187 Fed. 831.

[2] Aside, however, from this rule of practice, it is not perceived that upon the record here made the position of the Clark English patent in the prior art is materially changed. Inspection of that patent shows that Clark was concerned with a nonslipping band or contrivance to be affixed to the pneumatic tires of bicycles. He points out expressly that the plates, which with the links fit snugly around the tire, shall become imbedded sufficiently in the jacket of the tire, so as to prevent all shifting of the band upon the tire. This is the exact reverse of the operation of the Parsons device. Clark also points out how this imbedding may be effected with the tires to which his device is applied, and with such tires his method of imbedding is successful. The whole teaching of this English patent is for the production of a band imbedded to prevent slipping. That is all the art would learn from his patent. It does not change its teaching to show experimentally (conceding for the purpose of the argument that defendant in this case has so shown) that when the Clark band is applied to a kind of tire different from those with which Clark was concerned, to a tire so large, so thick, compact, and rigid, that it is not possible to imbed Clark's band in it, such band, not being thus so secured, will move or "creep."

Complainant may take interlocutory decree in the usual form for injunction and accounting.

HICKS et al. v. CRAWFORD COAL & IRON CO. et al.

(Circuit Court, M. D. Tennessee, N. E. D. April 29, 1911.)

No. 16.

COURTS (§ 344*)—FEDERAL COURTS—SERVICE OF PROCESS BY PUBLICATION—CONDITIONS PRECEDENT.

Under Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), which provides that in local actions, where one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or more of the defendants shall not be an inhabitant of or found within the district, the court may make an order directing him or them to appear, "which order shall be served on such absent defendant or defendants if practicable wherever found," and that where such service is not practicable the order may be served by publication, the court is not authorized to direct service by publication, unless it is shown that personal service is not practicable.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 344.*]

In Equity. Suit by Phillis A. Hicks and husband against the Crawford Coal & Iron Company and others. On motion by complainant for order of publication as to nonresident defendants. Motion denied.

R. T. Colston and R. B. C. Howell, for plaintiffs.

John F. McNutt and Barthell & O'Connor, for defendants.

SANFORD, District Judge. The complainant's motion for order of publication as to the nonresident defendants must be denied.

Section 8 of the judiciary act of March 3, 1875, provides that when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, real property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or, where such personal service upon such absent defendant is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. It is clear that under this statute an order of publication is not authorized except where personal service of the order requiring the absent defendant to appear and plead is not practicable.

In the present case it merely appears from the marshal's return that these defendants are not to be found within this district, but from anything that appears to the contrary, if the complainant shall make proper application for an order directing them to appear and plead by a day certain, it might be entirely practicable to serve such order upon them at their places of residence in other districts. See Batt v. Proctor (C. C.) 45 Fed. 515, and In re Burka (D. C.) 107 Fed. 674. In the first-named case it is said that in order to warrant an order of publication the applicant shall distinctly state the known places of residence of the nonresident defendant, or show the diligence used to ascertain the places of residence when unknown, in order that the court may have before it the data to direct personal service in the one case and publication of the order in the other, and there is quoted with approval the language of Judge Dillon in Bronson v. Keokuk, 2 Dill. 498, Fed. Cas. No. 1,928, to the effect that the practice under the act "should be such as to secure personal service

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in all cases when the residence of the absent defendant is known, or can be ascertained; and to substitute or resort to constructive service by publication only where the better mode is not practicable within a reasonable time, and by the exercise of reasonable diligence."

An order will accordingly be entered denying the present motion for order of publication, with costs.

UNITED STATES v. FIRST NAT. BANK OF ANAMOOSE.

(District Court, D. North Dakota. September 27, 1911.)

1. COMMERCE (§ 61*)—INTERSTATE COMMERCE—FEDERAL STATUTE REGULATING SHIPMENT OF INTOXICATING LIQUORS—CONSTRUCTION.

Section 239 of the Criminal Code (Act March 4, 1909, c. 321, § 239, 35 Stat. 1136 [U. S. Comp. St. Supp. 1909, p. 1464]), which makes it a criminal offense for "any railroad company, express company or other common carrier or any other person, in connection with transportation" of intoxicating liquors in interstate commerce, to "collect the purchase price or any part thereof before on or after delivery from the consignee," or in any manner act as the agent of the buyer or seller of any such liquor for the purpose of buying or selling or completing the sale thereof, applies to a bank to which a draft for the purchase price of a shipment of liquor is sent by the seller in another state, with a bill of lading for such liquor attached, and which collects the draft from the consignee, and delivers the bill of lading to him upon which he obtains the liquor from the carrier.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 61.*]

2. STATUTES (§ 199*)—CONSTRUCTION—"PERSON."

The word "person" in federal legislation includes corporations.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 277; Dec. Dig. § 199.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

Criminal prosecution by the United States against the First National Bank of Anamoose. On motion in arrest of judgment. Motion overruled.

Edward Engerud, U. S. Dist. Atty.

George A. Bangs and A. W. Cupler, for defendant.

AMIDON, District Judge. [1] The defendant, the First National Bank of Anamoose, is charged in the indictment with a violation of section 239 of the Criminal Code of the United States, which reads as follows:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, on or after delivery, from the consignee, or from any other person, or shall in any manner

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars."

The indictment charges the offense to have been committed in the following manner: One Dan Meyers, residing at Anamoose, sent an order to the Hamm Brewing Company, doing business at St. Paul, Minn., for a case of beer. The brewing company in filling the order delivered the beer to the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, and received from it a bill of lading, with an agreement on the part of the company that it would not deliver the beer to Meyers until he presented the bill of lading to its agent at Anamoose. Thereupon the brewing company attached a sight draft for the purchase price of the beer to the bill of lading, and sent the same to the First National Bank of Anamoose, which undertook and agreed with the brewing company to collect the draft from Meyers and deliver to him the bill of lading, so that he could present the same to the railway and receive the beer, and thereby complete the sale and delivery of the same, and that the bank carried out this agreement with full knowledge of all the facts above stated.

The defendant appeared by its president while the court was engaged in a jury term, and entered a demurrer to the indictment on the ground that it did not state facts sufficient to constitute a public offense. The demurrer was overruled, with the understanding that the same question would be renewed by motion in arrest of judgment at a time when the court had more leisure for its consideration. The defendant accordingly entered a plea of guilty, and the case is now before the court upon a motion in arrest of judgment, and has been fully argued by counsel.

An understanding of section 239 requires a brief history of the conflict between liquor dealers claiming the protection of the commerce clause of the federal Constitution, and states prohibiting the sale of intoxicating liquors. That conflict arose as soon as the prohibition measures of Kansas and Iowa had been sustained in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. The sale of intoxicating liquors in the usual method at retail then became illegal in those states. The liquor dealers at once attempted to carry on the traffic under the protection of the commerce clause of the federal Constitution. They shipped their goods into those states, and sold them in their original packages by means of resident agents, giving rise to what became known as "Original Package Saloons." In Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, the Supreme Court sustained their right to do this. That decision led immediately to the passage of the Wilson act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), which by its terms subjected liquors, when shipped in interstate commerce, to the police power of the state "upon their arrival" within the state. This statute was assailed as an unconstitutional delegation to the states of power reposed exclusively in Congress. To meet that objection the court changed the point of emphasis in its ruling. In the Leisy Case, following Brown

v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, the court held that the right to sell articles shipped in interstate commerce in their original packages was an "essential incident" of such commerce, and therefore within the exclusive jurisdiction of Congress. In Re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, and Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, it was declared that interstate commerce in its "fundamental aspect" consists in the transportation and delivery of goods, and that, although the right to sell goods shipped in interstate commerce is an "essential incident" of that commerce, it is "but an incident," and could be subjected to the police power of the state without violating the commerce clause of the federal Constitution. This distinction between interstate commerce in its "fundamental aspect" and the "incidents" of that commerce has since been an important feature of the decisions of the Supreme Court in liquor cases (Heyman v. Southern Ry. Co., 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178), and had an important bearing upon the statute involved in the present case.

The Wilson law, as thus sustained, put an end to the sale of liquor in original packages by means of resident agents. Liquor dealers then sought to accomplish the same result by means of C. O. D. shipments. This was carried on in two forms: First, the usual form which made the carrier an agent of the shipper for the collection of the purchase price of the liquor at or before its delivery; second, by means of bills of lading with drafts attached for the purchase price of the liquor. In the latter case a dual agency was employed. The carrier transported and delivered the liquor, while a bank or some other agency collected the purchase price and delivered the bill of lading by means of which the purchaser obtained the liquor from the carrier. The states assailed these practices by numerous criminal prosecutions, claiming that they amounted to a sale of liquor within the state, so as to subject the transaction to the local police power under the Wilson act. The defendants based their defense upon the claim that under the Wilson act liquors were not subjected to the police power of the state until after their delivery to the consignee, and that a C. O. D. shipment, including the collection of the purchase price, was under the protection of the commerce clause. Their contention was again sustained by the Supreme Court in the case of American Express Co. v. Iowa, 196 U. S. 139, 25 Sup. Ct. 182, 49 L. Ed. 417. In the meantime the territory in the United States in which the sale of intoxicating liquors was prohibited by state law had greatly increased. The decision of the Supreme Court in the case last cited resulted immediately in the introduction of a multitude of bills in both houses of Congress having for their object the prevention of this new form of the old evil. Some of these bills attempted to subject intoxicating liquors to local authority before their delivery to the consignee. But there had been several intimations in the decisions of the Supreme Court that such a law would be an unconstitutional delegation of federal power to regulate commerce among the states. To avoid the danger from that source, other bills attempted to relieve the states by dealing with all agency employed in the state, either in the collection of the

purchase price of the liquor, the making of the sale, or the completing of the sale, and to restrict the right of intoxicating liquor shipped in interstate commerce to its "actual transportation and delivery." For several years these bills were before various committees, both of the Senate and the House of Representatives. They resulted in much learned discussion as to the constitutional power of Congress to deal with the subject. Finally, all such bills pending in the Senate were referred to a subcommittee of the judiciary committee of that body, of which Senator Knox of Pennsylvania was made chairman. After a full hearing, a majority of this committee reported a bill favorably, which embodied the provisions now contained in sections 238, 239, and 240 of the Criminal Code. This measure was drafted by Senator Knox, and was known in the debates in Congress as the "Knox Bill." It was not passed as a separate bill, but while the Criminal Code was pending it was inserted in that act as an amendment, constituting the only important original legislation contained in the Code (43 Cong. Rec. pt. 3, p. 2583). Senators Knox and Fulton submitted scholarly opinions in support of the bill at the time it was reported to the Senate. See 2 Senate Rep. 60th Cong. 1st Sess. Rep. 499, pp. 3, 17. Their arguments are based on the distinction between interstate commerce in its "fundamental aspect," consisting in the transportation and delivery of goods, and the "incidents" of that commerce, consisting in the sale of the goods, collection of the purchase price, and any other acts of agency, "save only the actual transportation and delivery." Inasmuch as no state had prohibited the use of intoxicating liquors, a majority of the committee were of the opinion that Congress ought not to deny them admission to the channels of interstate commerce, as had been done in the case of lottery tickets. They proposed, therefore, to leave "the actual transportation and delivery" of such liquors free, but to cut off all other agency between the seller and the buyer.

We have thus clearly presented the mischief with which Congress attempted to deal in this legislation, and the field within which it considered itself confined in correcting that mischief. Did it accomplish its purpose?

The answer to that question will depend to some extent upon the manner in which the statute is construed. Counsel urges with great force that the statute is penal, and should therefore be strictly construed. That rule has long been subject to qualification in federal courts. Chief Justice Marshall early in the case of United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37, said of it:

"The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the Legislature has obviously used them, would comprehend."

Following that decision, the court again, in United States v. Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830, stated the true rule in language whose accuracy cannot be improved:

"When the words are general, and include various classes of persons, there is no authority which would justify a court in restricting them to one class, and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words

which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the Legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

See, also, United States v. Corbett, 215 U. S. 233, 242, 30 Sup. Ct. 81, 54 L. Ed. 173. The last part of section 239 reads precisely upon the acts of the defendant, as charged in the indictment. That it collected the purchase price of liquors shipped in interstate commerce, and that it acted as agent of the seller of such liquors for the purpose of completing the sale thereof, is too plain for controversy.

Were the defendant's acts done "in connection with the transportation" of the liquors? It is first urged with apparent hesitation that the phrase beginning with the quoted words qualifies the word "person," and requires him to be in some way connected with the carrier as agent or employé. Such a construction would do violence to ordinary English speech. If that had been the meaning intended, the section would either have read "any other person who is connected," or "any other person connected." Section 239 was derived from a bill which was before the committee, and had been introduced in the Fifty-Ninth Congress by Representative Brantley of Georgia. It provided as follows:

"That any railroad company, express company or other common carrier, or other person who shall, in connection with the transportation of spirituous, vinous, malt, and intoxicating liquors of all kinds from one state or territory into another state or territory, collect on, before or after delivery, from the consignee or other person, the purchase price, or any part thereof, saving only in the actual transportation and delivery of the same, shall be subject in so doing to all the police powers of the state or territory into which such liquors are transported and delivered, and for this purpose, in all cases of the sale of spirituous, vinous, malt, and intoxicating liquors of all kinds in interstate commerce, where the sale is sold 'Collect on Delivery,' the place of delivery shall be deemed and held the place of sale."

The phrase "in connection with the transportation," etc., clearly limits the latter part of the section, and qualifies "shall collect." It would have been placed in section 239, the same as it was in Congressman Brantley's draft, had not Senator Knox employed the long and involved phraseology which he did for the purpose of covering the entire field of federal jurisdiction. To have inserted the phrase as he framed it between the word "shall" and "collect" would have separated the parts of the verb so widely as to have obscured the meaning.

The primary purpose of the whole phrase beginning "in connection with" was to confine the statute within the scope of federal jurisdiction. It occurs in each of the three sections, and has been carefully framed to comprehend the whole field of federal authority. It embraces, not only interstate and foreign commerce, the District of Columbia, and organized territories, but under the words "place noncontiguous to, but subject to the jurisdiction thereof," also extends to Alaska, an unorganized territory, and to our island possessions. The draftsman is at great pains to employ this somewhat involved form

of expression, so as, on the one hand, to confine the statute within the limits of federal authority, and, on the other hand, to extend it over the whole field of that authority. Congress had recently, in the employer's liability act, experienced the result of a failure on its part, when dealing with interstate commerce, to confine its legislation in express terms to the field of its jurisdiction. Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. At the very session at which the statute here under consideration was passed, Congress had been compelled to re-enact the employer's liability act to supply such an omission.

Undoubtedly the secondary object of the phrase was to require that the forbidden acts should be done in connection with interstate commerce. It is plain that, if a liquor dealer should sell intoxicating liquor shipped in interstate commerce on credit, that Congress could not make the act of collecting the purchase price either by a bank or an attorney months after the transaction was closed criminal under its power to regulate interstate commerce, because such an act would not be a part of that commerce. Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737. I entirely agree with counsel for the defendant that it is an element of every act forbidden by the statute that it should be done "in connection with the transportation" of the liquor. But it seems to me the acts of the defendant fully meet that requirement. The statute forbids any person to act "in any manner as the agent of the buyer or seller of any such liquor for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same." Giving effect to the previous part of the section, this agency must be done "in connection with the transportation." When the whole language is read together, however, it clearly indicates that there may be an agency in connection with the transportation of the liquor for the purpose of buying or selling or completing the sale thereof, which shall not consist in its actual transportation or delivery. By a familiar rule of construction, the exception proves the existence of that from which it is excepted. Brown v. Maryland, 12 Wheat. 438, 6 L. Ed. 678; Gibbons v. Ogden, 9 Wheat. 190, 6 L. Ed. 23; Bend v. Hoyt, 13 Pet. 270, 10 L. Ed. 154; Arnold v. United States, 147 U. S. 499, 13 Sup. Ct. 406, 37 L. Ed. 253. By expressly excepting from the forbidden agency the actual transportation and delivery of the liquor, the statute clearly indicates that there was an agency "in connection with the transportation" "for the purpose of buying or selling or completing the sale," which did not consist in the actual transportation or delivery. That being the case, it may be seriously asked what act, for the purpose of completing the sale, could possibly have a more intimate connection with the transportation, and yet not be a part of the actual transportation, than the acts charged against this defendant. As the agent of the seller, it held the bill of lading, and thereby prevented the consummation of the transportation by the delivery of the goods, until, as agent of the seller, it received the purchase price, and then as such agent delivered the bill of lading to the purchaser so that he could present the same to the carrier, and thereby complete the sale by obtaining a delivery of the liquor. In Norfolk & Western Ry. Co. v.

Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254, the identical acts which are charged against the defendant here are held to be so intimately connected with the transportation and delivery of goods as to be a part of interstate commerce, and for that reason exempt from state authority. We must assume that the able lawyer and experienced business man who framed this legislation was familiar with that form of C. O. D. shipment which is accomplished by means of a bill of lading with a draft attached. The opinion in American Express Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417, which gave rise to the statute, and had been constantly before the committee for months, gave great prominence to this form of the transaction. See 196 U. S. 144, 25 Sup. Ct. 182, 49 L. Ed. 417. The authority mainly relied on by the court is Norfolk & Western Ry. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254. There the transaction took the form of a bill of lading and draft, which, as in this case, were sent to an independent agent for collection. But in both decisions the transaction is referred to as a C. O. D. shipment, the same as if the collection had been made by the carrier.

We must give some meaning to the phrase "for the purpose of buying or selling or completing the sale," and not make this language synonymous with collecting the purchase price which had already been expressly forbidden. "Collecting the purchase price" was the act of the carrier at which section 239 is aimed. Other wrongs of carriers had been provided for by section 238. The language, "for the purpose of buying or selling or completing the sale," must be without meaning, unless it was intended to cover C. O. D. shipments by means of draft and bill of lading.

It was immaterial whether the carrier collected the purchase price or a bank did so. In either case the transaction amounted to a sale of the liquor within the state in violation of local law. Regardless of when the title passed as a matter of law, what actually occurred was this: The liquor dealer by means of acts done wholly within the state first collected the purchase price from the buyer, and then turned over to him the liquors. There would be no reason in forbidding carriers to act as collecting agents, if other familiar agencies were to be left free to perform the same service, and accomplish the very evil which all concede the statute was intended to remedy. All agree that either form of the transaction is within the mischief of the statute. The language of the statute on its face is clearly broad enough to cover both forms. That being the case, the court ought not to exempt the defendant from its penalties by the mere force of a narrow construction. It is conceded that, if the acts done by the defendant had been done by a carrier, they would have been sufficiently "connected with the transportation" to make the act a violation of the statute. In view of the charge of the indictment that the contract between the seller of the liquor and the bank was for the express purpose of collecting the purchase price and delivering the bill of lading, so that the purchaser could present the same to the carrier, and complete the sale, and that this arrangement was entered into with full knowledge as to the transaction between the seller and the buyer, it

is impossible for me to say that the acts of the bank are not as intimately connected with the transportation of the liquors as they would have been if they had been done by the carrier. In either case the acts are done after the transportation is completed. They intervene between the actual transportation and the delivery. They have the same relation to the transportation, and serve the same purpose, whether done by a banker or a carrier. In my judgment, therefore, the acts of the bank were done "in connection with the transportation" in such a way as to constitute a violation of the statute, if it is possible for any person other than a carrier to commit the forbidden act.

Counsel for defendant invokes the rule of ejusdem generis, and says that the words "any other person" are confined by the earlier specifications of the section to those who are engaged in the carriage of the liquors either as principal or employé. The rule invoked is not much in favor at the present time. Stroud's Judicial Dictionary, after a full review of the English authorities on the subject, says: "It may be doubted whether the rule is of much practical value at the present day." Sutherland on Statutory Construction cites many cases, beginning at section 278, which hold that the rule amounts to hardly more than a suggestion. At section 279 he defines its limits accurately in the following language:

"In cases coming within the reach of the principle just illustrated, general words are read, not according to their natural and usual sense, but are restricted to persons and things of the same kind or genus as those just enumerated. They are construed according to the more explicit context. This rule can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the lawmaker. It affords a mere suggestion to the judicial mind that, where it clearly appears that the lawmaker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the Legislature is to be found in the ordinary meaning of the words of the statute. The sense in which general words, or any words, are intended to be used, furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated. To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention. Hence, though a general term follows specific words, it will not be restricted by them when the object of the act and the intention is that the general words shall be understood in their ordinary sense."

In United States v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77, the Supreme Court quotes with approval from National Bank of Commerce v. Ripley, 161 Mo. 132, 61 S. W. 587, the following language with reference to the rule:

"But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule. It does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute as that purpose may be gathered from the whole instrument."

The court also cites with approval Gillock v. People, 171 Ill. 307, 49 N. E. 712, and Winters v. Duluth, 82 Minn. 127, 84 N. W. 788,

where courts refused to apply the rule to statutes whose inferences in support of it were much stronger than those of the statute here under consideration. See, also, State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, especially opinion of Grantt, P. J.; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69, 72. All decisions upon the rule go back to Woodworth v. State, 26 Ohio St. 196, and Foster v. Blount, 18 Ala. 687. Both involved penal statutes, and, if the rule had been applied with academic rigor, the conviction of the defendants would have been set aside. But the courts restricted the rule within limits which have since been universally approved in American decisions. The rule itself is an "artificial, conventional rule," from which the Supreme Court has said "the judicial mind should free itself in the construction of criminal as well as other statutes." United States v. Union Supply Co., 215 U. S. 55, 30 Sup. Ct. 15, 54 L. Ed. 87, a case which forcibly illustrates the present standard of the highest court in construing penal laws.

It is first urged that the words "any other persons" must be confined to those engaged in the carriage of liquor; otherwise the preceding words, "any railroad company, express company or other common carrier," would have no significance at all, because, if the statute extends to all persons, there would be no reason in specifying particular classes. The argument disregards a well-known practice in the drafting of statutes. Particular words are used more often than otherwise for the purpose of emphasis, and to remove all possible doubt. Judge Valliant in the case of National Bank of Commerce v. Ripley, 161 Mo. 133, 61 S. W. 588, states the argument, and answers it as follows:

"But why should the particular words have been used in this instance if the Legislature intended to allow all creditors who could show good cause to come in after the assignee had closed the door? Doubtless because the Legislature did not want to leave it a debatable question that sickness and absence from the state were good excuses."

Here the evil with which Congress was dealing had manifested itself chiefly in the acts of railroad companies and express companies. The statute, therefore, specifies them in order that they might surely be brought within its provisions. If the rule were rigidly enforced, there would have been no sense in using the terms "railroad company" and "express company" because they are comprehended in the general term "common carrier." The truth is that the use of all these specific terms was not for the purpose of restricting the scope of the statute, but to leave the application of the statute to railroad companies and express companies and other common carriers to no mere inference to be drawn from the general term "any person."

Counsel again says the phrase "any other person" was used to cover the agents, servants, and employés of the previously mentioned carriers. The words are not well chosen for that purpose. If that had been the object of Congress, there was a precise formula to express the thought which was familiar in federal legislation, and which had been used in the previous section of the same act, namely, "any officer, agent or employé thereof." Not only this, but the bills that were pending before the committee, for example, the bill introduced by Senator

Bacon, expressly confined itself in the manner indicated, using the words, "any railroad company, express company or common carrier, their officers, agents or employés." In section 239, the formula was rejected, and it must have been rejected for the purpose of giving to the statute a larger application.

In my judgment the words, "any railroad company, express company or other common carrier," exhaust the whole genus of carriers, and in such a case Lord Tenterden's rule is never used for the purpose of restricting a general term. United States v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69. Counsel, to meet this objection, says the words "any other person" were used to cover private carriers. That suggestion seems to me purely fanciful. Private carriers have long since ceased to be factors in interstate commerce. Such a private carrier would probably have been subject to the police power of the state under the Wilson law. Delameter v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724. I cannot myself believe that the subject of private carriers of intoxicating liquors in interstate commerce was at all before the mind of Congress in this legislation. No such evil is disclosed in the reports of the committee or the hearings before the committee. I think the general words should be given their broad meaning so as to make the statute comprehend the mischief with which Congress was attempting to deal.

Reference is made to the following language from the report of the subcommittee of the Senate:

"By the proposed substitute, if it be enacted into law, Congress will, under its constitutional authority, bring its powers to bear directly upon the common carriers prohibiting them from acting as agents of the vendors of liquor in other states."

The whole report is embodied in a few lines. It does not attempt to discuss the statute or to define its limits. To restrict the language of the statute by such a general reference in a report would be much worse than to use the debates in Congress for that purpose, and the Supreme Court has held such debates inadmissible. United States v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. The reference simply seizes upon the most prominent feature of the act, and calls attention to that without any intent to restrict the statute within the terms of the reference.

The statute was not primarily aimed at carriers, but at all acts done wholly within the state for the purpose of completing the sale of intoxicating liquors shipped in interstate commerce. At the time the law was framed, the form of such agency which employed a bill of lading with a draft attached was brought clearly before Congress in the decision of the Supreme Court which gave rise to the legislation. It would have been idle for Congress to deny such agency to carriers, and leave it open to other equally well-known forms. The contest had been a long one to prevent the interstate commerce clause of the federal Constitution from being used as a means for carrying on traffic in intoxicating liquors through local agencies in violation of state laws. In my judgment Congress intended by the present statute to cut off

all agency in the sale of intoxicating liquors to be shipped in interstate or foreign commerce, "saving only the actual transportation and delivery" of such liquors. Its language is broad enough to attain that object. The court ought not to narrow it so as to make possible the very mischief which the statute was intended to prevent by a mere change of form, especially when that form of transaction was well known, and was brought clearly to the attention of Congress in the decision which gave rise to the statute.

[2] The word "person" in federal legislation covers corporations. Rev. St. U. S. § 1 (U. S. Comp. St. 1901, p. 3); United States v. Union Supply Co., 215 U. S. 50, 54, 30 Sup. Ct. 15, 54 L. Ed. 87. It cannot be urged, therefore, that the bank is not included in the words "any other person" because it is a corporation.

The motion in arrest of judgment must be denied.

EAST TENNESSEE TELEPHONE CO. v. BOARD OF COUNCILMEN OF CITY OF FRANKFORT, KY., et al.

(Circuit Court, E. D. Kentucky. September 25, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 10*)—PERMISSION TO ERECT TELEPHONE POLES IN STREETS—CONSTRUCTION.

Where a city council granted "permission" to erect telephone poles in different parts of a city and to carry it across the city bridge, and the telephone company thereupon expended $90,000 in erecting a line thereunder, such permission constituted the grant of a franchise, and was not a mere license revocable at the will of the city.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*]

2. COURTS (§ 369*)—FEDERAL COURTS—DECISION OF FEDERAL QUESTION—EXCLUSIVENESS.

The decision of the highest court of the state as to the validity and effect of state action claimed to make a contract, the obligation of which is attempted to be impaired by subsequent state action, raises a federal question, and is not binding on federal courts, but it is the duty of the latter when the question is properly brought before them to determine it by the exercise of independent judgment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 369.*

Jurisdiction of federal court in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Mining Co., 35 C. C. A. 7; Earnhart v. Switzler, 105 C. C. A. 262.]

3. JUDGMENT (§ 740*)—RES JUDICATA—QUESTION NOT WITHIN ISSUES.

A city council, having granted an alleged franchise to plaintiff's assignor to erect and maintain a telephone line, attempted to revoke the same by resolution on the contention that it was a mere revocable license, and thereafter passed an ordinance providing a penalty for telephone companies doing business without a franchise. Plaintiff thereupon brought suit in the state court to enjoin defendants from proceeding to enforce the penalty ordinance, and, defendant's demurrer to the petition having been sustained and the demurrer dismissed, plaintiff appealed, in which the court held that defendants were not entitled under the then existing conditions to enforce the ordinance, as plaintiff was not without any right whatever on the streets, and further, that the nature of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff's right under the grant was a mere license revocable by the city, and that, after the expiration of 90 days after notice of revocation, plaintiff could be ejected from the streets. *Held*, that such construction of plaintiff's grant was not within the issues, and hence was not res judicata in a subsequent action by plaintiff in a federal court to restrain the city from enforcing such revocation ordinance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1268; Dec. Dig. § 740.*]

In Equity. Suit by the East Tennessee Telephone Company against the Board of Councilmen of the City of Frankfort and others. On plaintiff's motion for preliminary injunction. Granted.

W. Pratt Dale, Humphrey & Humphrey, and W. L. Granbery, for plaintiff.

Guy H. Briggs and Scott & Hamilton, for defendants.

COCHRAN, District Judge. This cause is before me on a motion for a preliminary injunction.

It is a suit by a Kentucky public service corporation, the East Tennessee Telephone Company, against a Kentucky municipal corporation, the city of Frankfort, and certain of its officials. The jurisdiction thereof rests on the ground that it has arisen under the laws and Constitution of the United States. The plaintiff claims to be the owner of a right to operate and maintain a telephone line on and over the streets of the defendant city granted by it to the East Tennessee Telephone Company of New York, a corporation of that state, April 11, 1881, and duly assigned by it to the plaintiff July 28, 1887. Shortly after the granting of the alleged right, plaintiff's predecessor erected a line pursuant thereto, and same has been maintained and operated thereunder ever since, first by plaintiff's predecessor, and then by plaintiff. The bill alleges that the line, as it now stands, is of the reasonable value of $90,000. The defendants deny that the plaintiff now has any such right. They claim that it now maintains its line on and over the streets of the defendant without any right whatsoever. They concede the alleged grant of April 11, 1881, but claim that it was a mere license revocable at the will of the defendant city, and that same was revoked by a resolution duly adopted by it on January —, 1911, by which plaintiff was given 90 days from the delivery of a copy thereof by the city marshal to plaintiff to remove its line from the streets of the city. Theretofore, to wit, on June 13, 1910, the defendant city duly passed an ordinance providing a penalty for telephone companies doing business without franchises. In view of the revocation of plaintiff's license by the resolution of January —, 1911, and the expiration of the 90 days called for by it, defendants claim that plaintiff is now doing business without a franchise, and is subject to the penalties prescribed by the ordinance, and they are threatening to enforce same against the plaintiff. The plaintiff claims, on the other hand, that the resolution of January —, 1911, is a law of the state impairing the obligation of the contract of April 11, 1881, assigned to it July 28, 1887, under which it has a right to perpetually maintain and operate a telephone line on and over the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

streets of the defendant city, and is hence in violation of section 10, art. 1, of the United States Constitution, and by reason thereof is null and void. The defendant city passed another ordinance on June 13, 1910, prescribing certain rentals to be charged by telephone companies and a penalty for charging a rental in excess thereof which it is threatening to enforce against plaintiff also. Plaintiff claims that this ordinance is confiscatory as to it, and deprives it of its property without due process of law, in violation of the fourteenth amendment to the United States Constitution. The bill seeks an injunction restraining the defendant from enforcing either of said ordinances against it. It is not seriously contended that it is not entitled to a preliminary injunction as to the rate ordinance. Indeed, defendant's position is that plaintiff is without right doing a telephone business in the city, and has no right to charge any rates whatever. I will therefore confine this opinion to that feature of the case.

[1] The disposition of the motion hangs on the question whether first the grant of April 11, 1881, was the grant of a mere license revocable by the city at will, or of an irrevocable and perpetual right to maintain and operate a telephone line on and over the streets of the city, and then, if it be held to be a mere license, whether it was revocable after the licensee and plaintiff had expended $90,000 in erecting the line. The language of the grant is that the petition for "permission * * * to erect telephone poles in different streets of the city and to carry it across the city bridge was presented and granted." The permission granted in words went no further than to erect telephone poles on the streets and to carry it across the city bridge. It will not be disputed that it also included the permission to stretch wires on those poles, and not only to erect the poles and stretch the wires, but to maintain and operate the line after it had been erected. All this at least was involved in the grant. The defendants' position then amounts to this: That it was the thought and intent of the parties to the grant that the grantee could expend $90,000 in erecting a line thereunder, and immediately after its erection the defendant city could revoke the grant, and upon 90 days notice could compel the grantee to remove its line from the streets. If it can so do after the lapse of 30 years, it could have so done immediately after the erection and putting in operation of the line. In construing the grant one has to be on his guard against allowing the policy of the state as evidenced by its present Constitution and laws to affect his judgment. It is its policy now that no such privilege shall be given away under any conditions. It shall only be sold to the highest bidder and that for a limited period of time, not exceeding 20 years. When this grant was made, no such policy was in existence. This circumstance has a bearing upon the construction of the grant. It has what has been termed "a contemporary equation." It contains "a standpoint as well as a subject." In ascertaining its meaning, therefore, one must transport himself to those days and look at it through their eyes. I think that it must be conceded on all hands that these general considerations applicable to a determination of the question are sound.

But I am met at the outset by the fact that the Kentucky Court of

Appeals, the highest court of the state, in recent litigation between the parties hereto has already held in accordance with defendant's contention (143 Ky. 86, 136 S. W. 138). It has held not only that the grant in question was a mere license revocable at the will of the city, but that the right to revoke can be exercised notwithstanding $90,000 has been expended in erecting the line and the line as it now stands is of that value. Shortly after the passage of the ordinance providing a penalty for telephone companies doing business without franchises, the defendants took the position that plaintiff had no right to maintain and operate its line on and over the city streets as matters then stood—i. e., without any revocation of the grant—and were proceeding to enforce it against plaintiff. Thereupon it brought suit in the Franklin circuit court to enjoin defendants from so proceeding. The defendants demurred to the petition, and that court sustained the demurrer and dismissed the petition. On appeal to the Court of Appeals, that court reversed the judgment of the lower court holding that the defendants were not entitled under the then existing conditions to enforce the ordinance of June 13, 1910, against plaintiff, as it was not without any right whatsoever on the streets of the city. The court, however, went further than this, and, as stated, held that the nature of plaintiff's right under the grant in question was a mere license revocable by the defendant city, and that after the expiration of 90 days from notice of a revocation plaintiff could be ejected from the streets. 141 Ky. 588, 133 S. W. 564; 143 Ky. 86, 136 S. W. 138. It does not appear what has become of the case since then. It is to be taken I suppose that it is still pending in the lower state court. Am I bound, then, by this decision, or am I free to form my own opinion in regard to the matter? Indeed, is it or not my duty to exercise my own judgment?

It is well settled that the decision of the highest court of the state as to the validity and effect of state action claimed to make a contract and whose obligation is attempted to be impaired by subsequent state action, thereby raising a federal question, is not binding on the federal courts. It is the duty of the federal court when the same question comes before it to exercise its own independent judgment. The authorities are so numerous to this effect that no reference to them need be made.

[2] Yet I conceive it to be possible for such a question, even when decided by the state court, to be res adjudicata, so that the federal court is bound by it. As, for instance, had the plaintiff, instead of bringing this suit in this court, brought it in the Franklin circuit court, and had it been decided therein on appeal to the Court of Appeals that the grant was a license revocable at will, and this decision allowed to become final without an appeal to the Supreme Court of the United States, I apprehend that such decision by the Court of Appeals would be binding on this court, and it could not question it in a like suit subsequently brought therein. The decision of the Franklin circuit court alone to that effect allowed to become final would be res adjudicata in such a subsequent suit.

The question, then, is whether this decision of the Kentucky

Court of Appeals in the other litigation between the parties hereto is res adjudicata here. In deciding as it did it seems to me that the Court of Appeals went beyond the requirements of the case before it. The only question presented by the record therein was whether under the then existing conditions as set forth in plaintiff's petition it was on the streets of the defendant city without right. The defendants by their demurrer were claiming that it was. This contention plaintiff was disputing. This was the only controversy between them raised by the pleadings. Whether under other circumstances—i. e., upon an attempted revocation of the grant—plaintiff would then have been on the streets without right, was not in the case, and in the very nature of things could not have been, for the defendant city had not at that time attempted any revocation of the grant, and it was not set forth in the petition that it had or was even contemplating a revocation. The only question involved in that case was whether plaintiff had any right whatever, not how much right it had. It does not seem to have been claimed that it did not have some right if the resolution of April 11, 1881, was a valid grant and plaintiff owned the right conferred by it. The contention was that it was not a valid grant, and, if it was, plaintiff did not own the right conferred by it because not assignable. This being so, I do not see how it is possible for the decision in question to be res adjudicata. A single consideration I think is sufficient to convince one that it is not. If it is, then we have a decision by a state court against a federal right not questionable in a federal court. It could not have been questioned in the Supreme Court by an appeal from the final judgment in that case, because plaintiff could take no appeal therefrom to that court. The judgment would be in its favor, and grant it all the relief which it sought therein. It cannot be questioned here because it is res adjudicata. This cannot be. It is not possible for a state court to decide against a federal right, and for the party affected thereby not to be able in some way to question it in a federal court. This consideration seems to me demonstrates that the decision in question is not res adjudicata. The question was not made res adjudicata because of the fact that plaintiff filed a petition for rehearing, and urged therein that the decision of the question as to the nature of the grant and the effect of an attempt at revocation was erroneous. Its petition for rehearing was not an acquiescence in the court's right to pass on the question, but an objection to its so doing. All that was said on the subject of the decision in this particular being erroneous was in furtherance of plaintiff's claim that the question was not involved, and should not be passed upon.

The defendants cite the cases of Clay v. Deskins and Hennessey v. Tacoma Smelting & Refining Co., 63 Fed. 330, 11 C. C. A. 229, 129 Fed. 40, 64 C. C. A. 54, in support of this proposition stated in them, to wit:

"A decree or judgment of a state court between the same parties in a suit duly commenced before that in a federal court is res adjudicata in the latter."

But this goes no further than what I have already conceded. That is, that if this suit had been brought in the Franklin circuit court and

upon appeal from its judgment the Court of Appeals had held therein in accordance with its decision in the former litigation, the judgment therein, if allowed to become final without an appeal to the Supreme Court of the United States, would have been res adjudicata. The judgment of the Franklin circuit court to that effect allowed to remain final would have been such. If the former litigation had been brought in this court, and it or a higher court had decided therein that the extent of the grant was as the Court of Appeals held it to be, its decision would not be res adjudicata. This would be because the decision would go beyond the case before it—beyond that made by the pleadings and submitted to it. In the case of Munday v. Vail, 34 N. J. Law, 418, it is said in the opinion:

"A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that upon general principles such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit a court can decide any matter in which they are interested whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises."

In the case of Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464, Judge Brewer, after making a quotation from the opinion in that case, including what I have quoted, said:

"We regard the views suggested in the quotation from the opinion as correct and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit inter partes."

Counsel for defendant in arguing in support of their contention that the decision in question is res adjudicata say that "the parties are the same, the pleadings are practically the same, the relief prayed for practically the same." They did not have the courage to say that the pleadings are the same. Possibly they might well have said that the relief prayed for is the same, to wit, an injunction against the enforcement of the ordinance of June 13, 1910. But it could not truthfully be said that the pleadings are the same. They are indeed, not "practically" the same. In plaintiff's petition therein it was not alleged that defendant city had attempted a revocation of the grant in question, and the question was hence not raised whether or not it was revoked. That question was not and could not be up for decision therein. In the bill here it is alleged that subsequent to that litigation, at least subsequent to the decision of the Court of Appeals therein, the defendant city has attempted a revocation of the grant, and for the first time has the question as to whether the grant was revocable been raised and come up for decision.

It follows then from all that I have thus far said that I am at least free to exercise my own judgment on the question as to the nature of the grant under which plaintiff claims; yet I cannot help but realize the very great delicacy of the situation. What I am asked to do is to take position against that of the highest court of the state, and

that as to the validity of state action; yet, if it is my duty so to do, I must not shirk it. The situation oppresses me. But,

"It fortifies my soul to know
That though I perish, truth is so."

And in speaking the truth as I saw it I would do it "in love," or, more expressively, I would truth it in love"; for I have the very highest respect for the Court of Appeals. I would much prefer to be with it than not with it, and it pains me whenever in the course of the performance of my duties I am constrained to differ from it.

[3] But in this case, though I were of the same mind as the Court of Appeals, I would not have the moral power to follow in its footsteps. This is so because the Sixth Circuit Court of Appeals, which is above me and whose views of the law I am bound to follow, has, as I see it, decided the identical question we have here, and which the Court of Appeals in the manner stated passed on in the other litigation, to wit, as to the nature and extent of the grant under which plaintiff claims, and it has decided that it is not a revocable license, but the grant of a permanent easement in the streets. This it so did in the case of Board and Mayor of Morristown v. East Telephone Co., 115 Fed. 304, 53 C. C. A. 132. That case involved a grant of a municipal corporation, to wit, the city of Morristown, Tenn., to the plaintiff here. The only difference between the two grants is that here the permission to erect poles is granted; whereas, there the right to erect poles was granted. I can see nothing in the slight difference of verbiage in the two grants to differentiate that case from this. The grant of permission to erect poles was the grant of a right to erect poles. But, however this may be, the opinion of the court was to the effect that the mere consent by a municipal corporation to the erection of a permanent structure on its streets by a public service corporation is the grant of an irrevocable easement in the streets. Judge Lurton said:

"The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved. This principle has been too many times disclosed and applied by this court to require further elaboration. Detroit Citizens' St. Ry. Co. v. City of Detroit, 12 C. C. A. 365; 64 Fed. 628, 26 L. R. A. 667; Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296; Iron Mountain Ry. Co. v. City of Memphis, 37 C. C. A. 410, 96 Fed. 113; Citizens' Ry. Co. v. Africa, 23 C. C. A. 252, 77 Fed. 501."

I am therefore constrained to sustain the motion, but it is on the condition that the plaintiff execute bond in the sum of $10,000 to pay defendants and either of them any damages, if it be finally decided that the injunction should not have been granted, and to account and pay to each telephone subscribed the excess he, she, or it is required to pay since the issuance of the temporary restraining order and above the rentals fixed by the ordinance of June 13, 1910, in case it is finally decided that that ordinance is binding upon plaintiff.

GEORGE H. LEE CO. v. WEBSTER.

(Circuit Court, D. Kansas, First Division. June 29, 1911.)

COMMERCE (§ 64*)—STATUTES (§ 64*)—INSPECTION (§ 2*)—KANSAS STATUTE RELATING TO FEEDING STUFF—CONSTITUTIONALITY.

Laws Kan. 1907, c. 407, § 2, which requires every brand of concentrated feeding-stuff sold or offered for sale within the state to be registered in the office of the director of the experiment station of the State Agricultural College, and provides that such director shall register a brand where it is shown by a statement of the ingredients presented by the manufacturer or seller that none of the same are unwholesome, deleterious, or fraudulent, and on payment of an annual registration fee of not less than $10, is not an inspection law, and, as applied to products made in another state and shipped to dealers in Kansas for sale, is unconstitutional and void, as imposing a tax on interstate commerce. Section 5, however, as amended by Laws Kan. Sp. Sess. 1908, c. 75, which imposes an inspection tax of 25 cents per ton on all cotton seed meal, cotton seed cake, linseed oil meal, etc., sold or offered for sale in the state, to defray the expenses of actual inspection of such products, is a valid inspection law, within the constitutional power of the state, and its validity is not affected by the invalidity of section 2.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 64;* Statutes, Cent. Dig. §§ 58–66; Dec. Dig. § 64;* Inspection, Dec. Dig. § 2.*

Inspection, quarantine, and sanitary regulations interfering with interstate commerce, see note to Smith v. Lowe, 59 C. C. A. 191.]

In Equity. Suit by the George H. Lee Company against Edward H. Webster, individually and as manager and director of the Agricultural Experiment Station of the Kansas Agricultural College. On final hearing. Decree for complainant in part, and for defendant in part.

E. G. McGilton, W. S. McClintock, and A. L. Quant, for complainant.

F. S. Jackson, John Marshall, and Chas. D. Shukers, for defendant.

POLLOCK, District Judge. This suit was brought by complainant, a corporation of the state of Nebraska, engaged in the business of manufacturing within that state and transporting and selling within this state various compounds and preparations for poultry, stock, and other animals, under the name of "Lee's Egg Maker," "Lee's Best Conditional," "Lee's Hog Remedy," "Lee's Worm Powder," etc., against defendant, in his individual capacity, and as manager and director of the agricultural experiment station of the state, to secure a perpetual order of injunction against defendant from enforcing, or attempting to enforce, against complainant's business, the provisions of sections 2 and 5 of an act of the Legislature, entitled, "An act regulating the sale of concentrated feeding-stuffs, forbidding their adulteration, providing for their inspection and analysis, providing penalties for its violation," etc., same being chapter 407, Laws 1907, as amended by chapter 75, Laws Sp. Sess. 1908. The suit is based on the ground said sections, in so far as the business of complainant is concerned, are in violation of the national Constitution, because levy-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing a tax on interstate commerce, and therefore void. Said section 2 reads as follows:

"Every brand of concentrated feeding-stuff offered or held for sale or sold within the state of Kansas shall be registered in the office of the director of the agricultural experiment station of the Kansas State Agricultural College, and each sale of any concentrated feeding-stuff not so registered shall constitute a separate violation of this act. The manufacturer or seller of any concentrated feeding-stuff shall apply to the said director of the experiment station for registration and analysis of the feeding-stuff, and in his application for such registration and analysis he shall submit a statement of the several ingredients used in preparing the concentrated feeding-stuff, and the sources from which they are obtained, which information shall be filed for reference, but shall not be disclosed by said director, if none of the ingredients are unwholesome, deleterious or fraudulent. If the feeding-stuff, as described by the manufacturer or seller, is found to consist of wholesome materials, and the name or brand used to designate it is not false or misleading, the said director of the experiment station shall register the name, brand or other designation of the concentrated feeding-stuff, its guaranteed composition, in the terms stated in this section, and the name and address of the manufacturer or seller applying for the registration. Such registration shall be made annually, and the manufacturer or seller shall pay a registration fee of ten dollars for each brand of concentrated feeding-stuff registered: Provided, that any manufacturer of condimental or medicinal stock foods shall pay a registration fee of fifty dollars for each brand selling for more than forty dollars per ton."

Section 5, as amended by act of 1908, reads as follows:

"An inspection tax shall be collected upon all cotton seed meal, cotton seed cake, linseed oil meal, linseed oil cake and feeding-stuff by-products of starch factories, glucose factories, cereal breakfast-food factories, breweries, and distilleries, meat-packing establishments or slaughtering houses that are sold, offered for sale, or held for sale within the state of Kansas, which tax shall be at the rate of twenty-five cents per ton, except as hereinafter stated. Every sack, box, carton or other package of the feeding-stuffs named in this section that is sold, offered for sale, held for sale, or in the possession of any one within the state of Kansas shall bear at least one tag certifying that the tax aforesaid has been paid on one hundred pounds or a fraction thereof. If any package contains more than one hundred pounds it shall bear one tag for each one hundred pounds or fraction thereof, and in case the concentrated feeding-stuff is sold in bulk one tag shall be delivered with each one hundred pounds or fraction thereof. All tags required under the provisions of this section shall be obtained from the aforesaid director of the experiment station in lots of four hundred or multiples thereof, and he shall receive from the manufacturer or seller five dollars for each four hundred so furnished. Such tags shall be good until used, but counterfeiting them or using them more than once is prohibited. The tax so collected, together with all registration fees collected, shall be used, so far as may be necessary, in defraying the expenses of inspection and analysis of concentrated feeding-stuffs as hereinafter provided, and if any residue remains it shall be turned into the general funds of the experiment station aforesaid: Provided, however, that employés of the state upon salaries shall not receive any additional compensation for making such inspection and analysis."

Defendant answered the bill, and proofs have been taken from which it is found complainant in the conduct of its business was making sales of its several different products manufactured in the state of Nebraska and shipped into this state to some 500 customers in this state at the time the suit was instituted; that all of complainant's products sold to its customers in this state were sold at a price ex-

ceeding $40 per ton. The facts necessary to confer jurisdiction are admitted by the answer, and it is further admitted therein the products of complainant are neither deleterious nor harmful.

While defendant was not endeavoring to directly enforce collection of the registration fee of $50 per annum on each brand of the products of complainant so manufactured and sold by it, he was pursuing the course of sending letters and circulars to merchants doing business in the state who purchased and sold the products of complainant, threatening them with prosecutions for violations of said law, and suits to compel the payment from them of the registration fee and exactions found in the statutes quoted, and further warning them not to deal with complainant because its said products were not registered under the provisions of the law, but to deal with other manufacturers who complied with the law, all to the very great annoyance and injury of complainant in its trade and business in this state. From all the proofs it clearly appears, if the exactions required by said statutory provisions are unconstitutional as claimed by complainant, it has just ground for the relief prayed. If not, there is no ground for this suit.

The sections above quoted will be considered separately, and in so far as section 2 of the act quoted is concerned, complainant asserts it is a tax on interstate commerce therefore void. The defendant insists (1) it is an inspection law of the state which is expressly recognized by the national Constitution, therefore valid; (2) that said act is intended to operate only on articles of commerce after such articles have been intermingled with the great mass of property within the state, and therefore does not in any way touch interstate commerce or constitute a tax or impose a burden thereon. It is evident, however, complainant has the right on compliance with all lawful demands of the state to bring his products within the state, and to there dispose of them to his customers without let or hindrance from the state, or its authorized agents, either through exactions made directly upon complainant in reference to such interstate business, or by interference with such business by the state indirectly through complainant's customers, to his injury and the detriment of such business. In Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, Mr. Justice Marshall, delivering the opinion, said:

"A tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution."

In Robbins v. Shelby Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, Mr. Justice Bradley, delivering the opinion of the court said:

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way, as other goods are. * * * But to tax the sale of such goods, or the offer to sell them, before they are

brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself. It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states, that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state."

In Norfolk, etc., Railroad Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394, Mr. Justice Lamar, delivering the opinion of the court, said:

"It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

In Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, Mr. Justice Harlan, delivering the opinion of the court, said:

"But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

In like manner it must be held the imposition of an annual registration fee of $50 for each of the several brands of products manufactured by complainant before the same may be sold or offered for sale in this state is a tax on the privilege of doing business in the state, and is therefore a tax on the business itself.

The question, therefore, is, Does said section 2, rightly construed, provide for an inspection tax on the products of complainant coming within the state for the protection of the inhabitants of the state from imposition or injury in the purchase and use of the same? If so, the right of the state to exact the same is clearly recognized by the federal Constitution, and the provision above quoted is valid. If, however, the same be found to be not an inspection fee or tax, it is a tax or burden on interstate commerce prohibited by the national Constitution, hence invalid, and affords no warrant of authority to defendant, either individually or in his representative capacity, to interfere with complainant's business.

By reference to the act it is seen the manufacturer or seller of any concentrated feeding-stuff, before he is entitled to dispose of the same in the state, shall apply to have it registered, submitting a statement of the ingredients thereof, and from what source the same are obtained, and, if it be found from such statement the feeding-stuff is wholesome and the brand thereon neither false nor misleading, then the name or brand of such feeding-stuff shall be registered on payment of an annual registration fee of $50 for each brand in case the stuff sells for more than $40 per ton, and $10 for each brand of such feeding-stuff selling for less than $40 per ton, and thereafter the manufacturer or seller of such stuff may, within the year for which the registration tax or fee is paid, sell without limit of such brand, from all of which it is entirely clear the fee here imposed has no semblance or relation to an inspection fee whatever, but is, as the statute

denominates it, an annual registration fee of $50 required of complainant for each brand of its product sold in the state as a prerequisite to engaging in the business of disposing of the same within the state.

Mr. Justice White, delivering the opinion of the court in Vance v. W. A. Vandercook Company (No. 1) 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, in speaking of a similar exaction as here required, said:

"It is claimed in argument that this law is an inspection law passed for the purpose of guaranteeing the purity of the product to be shipped into the state for the use of a resident therein, and therefore it is but a valid manifestation of the police power of the state exerted for the purposes of inspection only. But it is obvious that this argument is unsound, as the inspection of a sample sent in advance is not in the slightest degree an inspection of the goods subsequently shipped into the state. The sample may be one thing, and the merchandise which thereafter comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the state from other states, when, in fact, it exacts no inspection whatever."

In the case at bar the fee imposed is not for the examination of a sample of the products sold by complainant, but is merely a fee exacted of complainant for registering the brand of goods offered by him, and this registration is made, not from an examination of the goods themselves, or even a sample of the goods, but from a statement as to the ingredients of the goods and from whence obtained, submitted by complainant. There can be no question under the authorities but that the registration fee required by section 2 of the act, in so far as complainant is concerned, is a tax on his right to engage in the business of selling his products to his customers in this state, and is therefore unconstitutional and void.

Coming, now, to a consideration of the provisions of said section 5, above quoted, as amended by act of 1908, it is seen to provide for an inspection of all cotton seed meal, cotton seed cake, linseed oil meal, linseed oil cake, and feeding-stuff by-products of starch factories, glucose factories, cereal breakfast food factories, breweries, distilleries, meat-packing establishments, and slaughterhouses sold or offered for sale in this state, and a level charge of 25 cents per ton on all said products without discrimination as to value of the product is made. It further provides for the actual inspection of all such products sold within the state, and the manner in which the fact of such inspection shall be evidenced, from all of which it is plain, in so far as the provisions and exactions of said section are concerned, it is purely one of actual inspection of the goods sold, for which service a flat rate of 25 cents per ton is charged. While it is true inspection charges laid by a state on articles of interstate commerce must be limited to the necessary cost of the making of such inspection, under that provision of the national Constitution which authorizes the charging of the commerce with such inspection, which provides, as follows:

"No state shall without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Clause 2, § 10, art. 1, Const.

Yet the exaction of a reasonable flat rate to defray the expense of actual inspection similar to that here provided for has been upheld as within the power of the state. Patapsco Guano Co. v. North Carolina, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191, which involved the validity of an act of the state of North Carolina by the provisions of which a level inspection fee of 25 cents per ton was charged on all fertilizers brought into the state for sale. Mr. Chief Justice Fuller, delivering the opinion of the court, upholding the validity of the enactment, after a review of many authorities, said:

"The act of January 21, 1891 [Laws 1891, c. 9], must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of 25 cents per ton as intended merely to defray the cost of such inspection. It being competent for the state to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly, this cannot be so as to foreign commerce, for clause 2 of section 10 of article 1 expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce."

In any view, the effect on that commerce is indirect and incidental, and "the Constitution of the United States does not secure to any one the privilege of defrauding the public."

In the light of reason and authority, that case appears to be controlling here, and to establish beyond dispute the validity of the flat fee of 25 cents per ton exacted in this case by the state to defray the expense incurred by it in making an actual inspection of the products of complainant which fall within the classification made by said section of the act.

It follows as the imposition of the registration fee of $50 per ton exacted by the provisions of section 2 of the act as above quoted can in no just sense be regarded as an inspection fee, but must be regarded as a tax on the business of complainant in the manufacture of concentrated feeding-stuffs in the state of Nebraska brought into this state for sale, levied, and collected by the state as a condition to the right of complainant to engage in such interstate business, the same is beyond the power of the state, violates the second clause of section 10 of article 1 of the national Constitution, and is therefore void, and affords to defendant neither in his individual nor his representative capacity any authority of law to demand said exactions either direct of complainant engaged in said business, or to interfere with the transaction of said business through his patrons in the manner charged by the bill of complaint in this case. On the contrary, the fee of 25 cents per ton provided in section 5 of the act of 1907, as amended by the act of 1908, is an inspection fee which may be levied and collected by the state in the protection of its citizens from impositions in the sale of such products. That said section is well within the power of the state, and does not violate any provisions of the national Constitution. That said sections, while found in the same act, are clearly separate in purpose and design, and, although said section 2 be as declared invalid and stricken down, the remainder of said act may stand as complete within itself and valid.

It follows from the proofs found in the record the prayer of the bill must be granted unto complainant in so far as the defendant is attempting to proceed under authority of said section 2 of the act, and that he be restrained, as prayed in the bill, from further, either directly or indirectly, attempting the enforcement of said provisions of section 2, as against complainant; that from the proofs in so far as said section 5 of the act is concerned the same is valid and within the constitutional power of the state, and a decree against the enforcement by defendant of said section must be denied for want of equity, and the bill in that respect be dismissed.

It is so ordered.

UNITED STATES v. BILLINGS.

(Circuit Court, S. D. New York. March 8, 1911.)

1. TAXATION (§ 16*)—POWERS OF UNITED STATES—CONSTITUTIONAL LIMITATIONS.

In the exercise of the taxing power by the United States, so long as Congress follows the particular constitutional provisions relating to the levying of taxes, there are no limitations upon its right to discriminate in selecting the subjects of taxation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 16.*]

2. CONSTITUTIONAL LAW (§ 283*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—DUE PROCESS.

Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1057), which imposes an annual tonnage duty "upon the use of every foreign-built yacht, pleasure boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States," is within the constitutional powers of Congress. The tax, being an excise, geographically uniform and within the special limitations regulating the exercise of the taxing power, cannot be held invalid as in violation of the due process of law clause of the fifth amendment because it discriminates between owners of foreign and home built yachts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 283.*]

3. TAXATION (§ 16*)—POWERS OF UNITED STATES—PROPERTY WITHOUT TERRITORIAL JURISDICTION.

The rule that the power of a state to impose taxes is limited with respect to tangible personal property to property within its territorial jurisdiction, does not apply in the same degree to federal legislation, since the underlying principle on which such rule is based is that taxes are the consideration for protection afforded, and the federal government, unlike that of a state, has power to afford protection to the persons and property of its citizens although they may be domiciled and the property located in a foreign country.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 16.*]

4. SHIPPING (§ 7*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—CONSTRUCTION OF STATUTE.

Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1057), which imposes an annual tonnage tax upon the use of every foreign-built yacht or pleasure boat, owned or chartered for more than six months by a citizen or citizens of the United States, in the absence of language clearly expressing a contrary intention, must be presumed to apply only to subjects within the territorial jurisdiction of the United States, and to bring a case within the statute it must be shown

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that a foreign-built yacht is used, to some extent at least, within the limits of the United States, and especially where the owner, although a citizen of the United States, is domiciled in a foreign country.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 7.*]

5. SHIPPING (§ 7*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—CONSTRUCTION OF STATUTE.

Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1057), imposes a tonnage tax to be collected annually on the 1st day of September "upon the use of every foreign-built yacht, pleasure boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months, by any citizen or citizens of the United States." *Held*, that the limitation of six months applied only to yachts chartered, and no particular length of ownership was necessary to subject the owner to the tax; that it was the intention of the act that the tax should be levied on the 1st day of every September after its enactment and the full annual tax was therefore collectible on September 1, 1909, and that the tax was not on the actual use but on the privilege of using, and was collectible although a yacht had been out of commission during the entire preceding year.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 7.*]

6. TREATIES (§ 11*)—EFFECT AS TO INCONSISTENT LAWS—SUBSEQUENT STATUTES.

A treaty with a foreign country cannot be invoked by an individual to defeat liability for a tax imposed by a subsequent act of Congress.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. § 11.*]

7. SHIPPING (§ 7*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—METHOD OF ENFORCEMENT.

The tonnage tax imposed on the use of foreign-built yachts by Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1058), may be collected by an action in the nature of debt against the yacht owner.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 7.*]

8. STATUTES (§ 6*)—CONSTITUTIONALITY OF REVENUE ACT—AMENDMENTS PROPOSED IN SENATE.

That a provision of a revenue act originating in the House of Representatives was added as an amendment in the Senate, and afterward concurred in by the House, does not render it invalid as a bill for raising revenue originating in the Senate, in violation of Const. art. 1, § 7.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 5; Dec. Dig. § 6.*]

9. CONSTITUTIONAL LAW (§ 251*)—"DUE PROCESS OF LAW."

"Due process of law," guaranteed in both the fifth and fourteenth amendments to the Constitution, means the law of the land. The guaranty implies the administration of equal laws according to established rules by competent tribunals having jurisdiction and proceeding upon notice and hearing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 732; Dec. Dig. § 251.*

For other definitions, see Words and Phrases, vol. 3, pp. 2227–2256; vol. 8, p. 7644.]

At Law. Actions by the United States against Cornelius K. G. Billings, against James Gordon Bennett, against Harriet Goelet, against H. Clay Pierce, and against Roy A. Rainey. On demurrer to answer in each case. Demurrers overruled as to defendants Bennett and Goelet, and sustained as to other defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Henry A. Wise, U. S. Atty.

Guthrie, Bangs & Van Sinderen, for defendants Billings, Bennett, Goelet, and Pierce.

C. Andrade, Jr., for defendant Rainey.

NOYES, Circuit Judge. These actions are brought by the United States to recover annual tonnage tax upon the use of foreign-built yachts under section 37 of the tariff act of 1909, which is printed in full in the footnote.[1]

The complaint in each action alleges in substance that the defendant therein was, on September 1, 1909, a citizen of the United States and the managing owner of a foreign-built yacht and that the tax in question was duly levied and has never been paid.

The defendants have severally answered, setting up separate defenses and each presenting defenses of a different nature. These defenses go both to the constitutionality of the statute and its application upon different states of facts, so that upon the several demurrers of the government the questions of constitutionality and interpretation are clearly presented and are presented in different phases. The important questions so raised may properly be considered in this order:

(1) Is the statute so discriminatory in its provisions as to violate the fifth amendment to the Constitution of the United States?[2]

[1] "There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter, owned or charted for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States.

"So much of section five of chapter two hundred and twelve of the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, as relates to yachts built outside the United States and owned by citizens of the United States is hereby repealed.

"This section shall not apply to a foreign-built vessel admitted to American registry."

[2] Questions under other constitutional provisions are considered in the briefs. Thus the brief of the government contains an elaborate consideration of the question whether the annual tonnage tax is an excise or a direct tax within the meaning of the Constitution. The briefs of the defendants, however, apparently concede that the tax is an excise and would be valid if it were not discriminatory and did not affect property outside the jurisdiction in violation of the fifth amendment. Consideration of the question whether the tax is a direct tax is, therefore, unnecessary in this opinion, although by omitting to discuss it I would not seem to indicate that I have any doubt that the government's contention in the matter is correct.

One of the defendants raises another constitutional question by contending that the 35 per cent. ad valorem duty which the owners of foreign-built yachts

(2) Does the statute conflict with the fifth amendment by levying taxes on property situated outside the territorial jurisdiction of the United States?

(3) Was the annual tax properly leviable on September 1, 1909?

(4) How far is it necessary to show actual use of the yachts during the year prior to September 1, 1909?

(5) Can the owner of a foreign-built yacht acquire immunity under an earlier treaty which will exempt him from the operation of the statute?

With respect to the first question: It is pointed out by the defendants that the test of the application of the statute is (1) the place or origin of the yacht and (2) the citizenship of the owner or charterer and it is contended that the "due process of law" clause of the fifth amendment requires Congress, if it desire to tax yachts, to make an enactment of an essentially different nature applicable to all yachts of similar character and whether owned by citizens or resident aliens. It is urged, in support of this contention, that there is no real difference between the use of a foreign-built yacht and the use of a similar vessel built in the United States; nor between the use of such a vessel by a citizen and by a resident alien, and that the classifications made by the statute are arbitrary, discriminatory and without any basis.

On the other hand, it is stated by the government that the object which Congress sought to accomplish was the protection of the American shipbuilders, and the promotion of American shipbuilding by forcing the American citizens to buy yachts built in this country. And it is not obvious how taxing the use of foreign-built yachts already purchased would promote American industries, and it is said that Congress made the statute applicable to past purchases in order that the owners of all foreign-built yachts should be taxed equally.

If the validity of this legislation depended upon satisfying this court of its wisdom, fairness and justness, other reasons and facts than those thought necessary to be included in the government's brief would be required. But as the Supreme Court has said (District of Columbia v. Brooke, 214 U. S. 138, 29 Sup. Ct. 560, 53 L. Ed. 941):

"The courts cannot be made a refuge from ill advised, unjust or oppressive laws."

The only inquiry to be considered here is whether this statute deprived these defendants of their property without due process of law.

have the privilege of paying in lieu of the annual tonnage tax, is a direct tax and is invalid because not apportioned among the states. This contention is at least doubtful. The owner is not required to pay this duty. He is merely given the option of paying it. In its nature it would seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions and effect be given to the latter.

[9] "Due process of law"—guaranteed in both the fifth and fourteenth amendments to the Constitution—means the law of the land. The guaranty implies the administration of equal laws according to established rules by competent tribunals, having jurisdiction and proceeding upon notice and hearing. It affects the operations of the different departments of the government. It prevents arbitrary executive action. It applies to judicial proceedings and requires orderly procedure. It operates against confiscatory legislative enactments. It safeguards the rights of the citizen even in the exercise of the paramount rights of the state.

The power of taxation is a paramount right incident to the sovereignty of every state and is exercised by the legislative department of the government. It rests upon the theory that the public welfare requires the sacrifice of private rights and that the value of taxes exacted from the citizen is returned to him in the benefits conferred by the government. The power to tax is broad. Chief Justice Marshall said in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579:

"The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse."

But broad as is the taxing power of the federal government, there are constitutional limitations attached to its exercise. The special restraints imposed by the Constitution are that no capitation or direct tax shall be laid without apportionment; that no tax or duty shall be laid upon any article exported from a state, and that "all duties, imposts and excises shall be uniform throughout the United States." Const. art. 1, § 8, par. 1; § 9, pars. 4 and 5. There are also undoubtedly general limitations imposed by the due process of law clause of the fifth amendment. Due process of law requires at least the exercise of the taxing power only for public purposes and regularity in the processes for the assessment and collection of taxes.[8]

These defendants, however, as I have already indicated, contend for a far broader application of the due process clause than that just pointed out, and, in effect, urge that this court should declare the statute in question unconstitutional, because the selection for taxation of the use of foreign-built yachts is arbitrary and discriminatory. They say that that which is essential to due process of law in taxation, whether by the nation or the state, is "that a tax law must apply impartially to all persons in the same class, that is, similarly situated, and that it must operate equally and uniformly upon all persons in like circumstances and under like conditions."

If the fifth amendment were as broad as the fourteenth, there would be more ground for these contentions of the defendants. But

[8] There will be occasion later to consider how far the principle that the due process clause in the fourteenth amendment prevents a state from taxing property located outside its territorial jurisdiction applies in the consideration of acts of Congress in relation to the fifth amendment.

the fourteenth amendment differs from the fifth amendment in that in addition to the "due process of law" clause, it contains the provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision is directly aimed at discriminatory legislation. Its object is to secure equality and generality in state statutes. Under this clause many decisions, both federal and state, have been rendered holding different state enactments unconstitutional as lacking the character of generality and as containing discriminatory classifications. The Supreme Court of the United States, however, has never held that the equality clause adds nothing to the scope of the fourteenth amendment so that decisions under it have controlling force in determining the application of the fifth. It is true that it seems to be assumed by text-writers and that there are dicta in the decisions to the effect that discriminatory legislation is as much in conflict with the due process clause as with the equality clause. [1] But however this may be with respect to the exercise of other powers, I am satisfied that in the exercise of the taxing power, so long as Congress follows the particular constitutional provisions relating to the levying of taxes, there are no limitations upon its right to discriminate in selecting the subjects of taxation.

In McCray v. United States, 195 U. S. 27, 59, 61, 63, 24 Sup. Ct. 769, 778, 779, 49 L. Ed. 78, in sustaining the validity of the Oleomargarine Act, the Supreme Court, through the present Chief Justice, said:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. * * * Whilst undoubtedly both the fifth and tenth amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motives of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject. * * *

"Conceding merely for the sake of argument that the due process clause of the fifth amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. * * * That provision (the fifth amendment), as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

And in the very recent case of District of Columbia v. Brooke, 214 U. S. 138, 149, 29 Sup. Ct. 560, 563, 53 L. Ed. 941, Mr. Justice McKenna, said:

"The other objections expressed the same fundamental idea, to wit, that the act discriminates between resident and nonresident owners of property, and because it does it is void. * * *

"The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all powers conferred by the Constitution. This court, however, has just held, in the case of United States v. Delaware and Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, that Congress may, in the exercise of the powers to regulate commerce among the states, discriminate between communities and between carriers engaged in such commerce. And it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.' In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." [4]

It is clear that Congress, in enacting the statute in question, acted within all the limitations of the Constitution regulating the exercise of the taxing power. As we have seen, the tax is an excise and not a direct tax. It also possesses the uniformity required by the constitutional provision. It is assessed equally on all citizens throughout the United States who own or charter foreign-built yachts. It is geographically uniform and that which the Constitution prescribes is geographical and not intrinsic uniformity. This principle has been consistently adhered to in a series of decisions: Patton v. Brady Executrix, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; Pollock v. Farmers' Loan & In. Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; United States v. Singer, 15 Wall. 111, 21 L. Ed. 49.

[2] The statute, then, being in accord with all the special constitutional limitations, I should be unable to hold it in violation of the fifth amendment even if I were of the opinion that there exists no fair and reasonable basis for the discrimination which it makes between the owners of foreign and home built yachts, and even if I were of the opinion that a similar discrimination would bring a state statute into conflict with the fourteenth amendment. It is my opinion that Congress had the right to select a certain class of property, to wit, foreign-built yachts, and to tax the use thereof by all citizens owning or chartering the same, and that such a tax cannot be set aside by the courts because it is held to be unreasonably discriminatory. But it is unnecessary to go so far in order to decide this case. Whatever may be said of the justness of the statute, it cannot be said that the

[4] The court further said in this opinion that while it was not necessary to decide whether Congress had, broadly considered, the power to discriminate, no stricter limitation upon its power was possible, in any event, than that imposed upon the states by the fourteenth amendment.

discrimination which it makes against citizens owning foreign-built yachts, is without any substantial basis. Taxing the use of foreign-built yachts may tend, in some degree, to protect and promote American shipbuilding. Citizens stand in a position different from aliens, whether resident or nonresident. Regarding the statute from any point of view I cannot say that it is unconstitutional class legislation.

[3] The next inquiry is whether the statute conflicts with the due process of law clause by levying taxes on property outside the jurisdiction of the United States.

The answers of the defendants Goelet and Bennett allege that their yachts were not within the jurisdiction of the United States for several years prior to the passage of the statute and that each had acquired a permanent situs in a foreign country. The question of the defendant Goelet further alleges that she was and is domiciled in France, and is now a resident of that country.

The first question raised by the demurrers to these answers is a constitutional one; the second, one of interpretation. Assuming that the statute applies to the yachts of these defendants, is it constitutional? Should it be so construed as to apply to them?

The constitutional question presented is, as already stated, another phase of that just considered, viz., the relation of the due process clause to this statute. If it be unconstitutional as taxing property outside the jurisdiction of the United States, it is so because the levy of a tax upon such property denies due process of law to the owner thereof.

As we have seen, the theory upon which taxes are levied is that the taxpayer receives back in benefits from the government the value of the taxes exacted from him. Theoretically, the benefit received should be in exact proportion to the obligation imposed. As a corollary to these propositions it is held that the power of the state to impose taxes is limited to property within the territorial jurisdiction, because only with respect to such property is the state in a position to afford the protection and benefit due as consideration for the tax imposed. These principles are clearly stated in the opinion of Mr. Justice Brown in Union Transit Co. v. Kentucky, 199 U. S. 194, 202, 204, 26 Sup. Ct. 36, 37, 50 L. Ed. 150:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the Legislature and a taking of property without due process of law. * * *

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property, which is wholly and exclusively within the jurisdiction

of another state, receives none of the protection for which the tax is supposed to be the compensation."

In the application of these principles distinctions are necessarily drawn according to the different kinds of property. Real estate is taxed at its actual situs, irrespective of the owner's domicile. The maxim mobilia sequuntur personam may determine the situs of intangible personal property for purposes of taxation.

But in respect of tangible personal property the law of the owner's domicile has yielded to the law of the place where the property is kept or used. So far, at least, as the states are concerned, tangible personal property may be regarded as separated from its owner and may be taxed where located although that may not be the place of the owner's residence or domicile. And the converse of the proposition is equally true, that such property outside the boundaries of the state may not be subjected to taxation there.[5]

Upon these principles it is clear that foreign-built yachts having a permanent situs in a state other than that of their owner's domicile are with respect to state legislation subject to the lex situs rule. Such vessels are not entitled to be registered or enrolled, and can only become "vessels of the United States" by special acts of Congress. They stand for the purposes of taxation in the same position as other tangible personal property. A state tax upon a foreign-built yacht used only in another state or in foreign waters would unquestionably be invalid, irrespective of the owner's residence or domicile.

The question then is whether the principles which prevent state tax legislation from having extraterritorial force apply in the same degree to federal legislation. The underlying principle, as we have seen, is that taxes are the consideration for protection afforded, and it is contended by the government that while state tax laws may be invalid as affecting property outside the state because the state is powerless to furnish protection, yet that a national enactment cannot

[5] The lex situs rule with respect to tangible personal property should be stated in modified form when considering vessels registered under the laws of the United States when incidentally or temporarily in a state other than that of their home port. As said by the Supreme Court in Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 23, 11 Sup. Ct. 876, 878, 35 L. Ed. 613:

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one state, are not subject to taxation in another state at whose port they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicile of their owners."

When, however, even a registered vessel has a continuous presence—an actual situs—in a state other than that of the owner's domicile or port of register, it is subject to taxation there. Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059; Hays v. Pacific Mail Steamship Co., 17 How. 596, 15 L. Ed. 254. See, also, Ayer & Lord Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082; St. Louis v. Ferry Co., 11 Wall. 423, 20 L. Ed. 192.

fail for that reason because the United States government has power to afford protection to the persons and property of its citizens abroad. It is said that a nation has power to protect property beyond its territorial limits which no component part of it can have and, consequently, that limitations upon the taxing power of the states have no necessary effect upon the validity of the present statute.

I think it the better view that these contentions of the government are correct. The national government has a far-reaching arm. It may afford in many ways protection to the property of its citizens located in foreign countries. In case of injury it may demand indemnity from other nations. Congress has already enacted laws with respect to the issue of certificates of ownership and passports to unregistered vessels owned by citizens (Rev. St. § 4190 [U. S. Comp. St. 1901, p. 2836]) which might afford some protection in foreign countries, and it has, unquestionably, power to enact laws of much broader scope. I should be unable to hold that legislation clearly and unequivocally imposing taxes upon foreign-built yachts owned by citizens and located in foreign countries would be unconstitutional because by reason of the inability of the United States to afford protection to such property, there would be no consideration for the payment of such taxes, and the owner would be, consequently, deprived of his property without due process of law.

[4] But such a tax would be extraordinary in its nature. If imposed it should be by clear and express enactment. It ought not to depend upon any doubtful construction. If Congress desire to exercise the power of the national government to go beyond its territorial jurisdiction in levying taxes—a power inherent in the United States because it is a nation and more than a state—it ought to employ language leaving no doubt as to its intention. The presumption should be that a tax law applies only to subjects within the territorial jurisdiction. Although Congress might provide for the grant of documents to foreign-built yachts owned by citizens which would have great protective value, the steps which it has taken in that direction have been slight and the passports which it has provided for are granted only to vessels departing from the United States. The statute uses broad language, but I find nothing in it or in prior legislation clearly evidencing an intention on the part of Congress to tax the use of foreign-built yachts in foreign waters and wholly outside the limits of the United States. The provisions are, in my opinion, consistent with an intention to tax only the use of such yachts in the waters of this country. Possibly the extent of such use may be immaterial, but I think that such use, to some extent, must be shown to bring a case within the statute.[6]

[6] It must be clearly understood that this conclusion is reached with reference to the allegations in the Bennett and Goelet answers that the yachts belonging to these defendants have not been and are not within the jurisdiction of the United States and that each has acquired a permanent situs abroad. I construe these allegations to wholly negative use in the United States and I have no intention to hold that a yacht belonging to a resident citizen may acquire any such situs in a foreign country as will permit her owner to use her to any considerable extent in the waters of the United

Furthermore, whatever doubt there might be as to the application of the statute in the case of a citizen of the United States residing in this country and owning a foreign-built yacht used only in foreign waters, there can be no question, in my opinion, that a citizen domiciled in a foreign country and owning such a yacht is not liable to the tax. Certainly the liability of a citizen domiciled and resident in France for the use of a foreign-built yacht in foreign waters should be established by clear and certain language, and in this case it is not only doubtful whether the statute applies to such use, but its language is inconsistent with its application to nonresidents. The section in question provides that the tax shall be levied and collected "by the collector of customs nearest the residence of the managing owner." Who is the collector of customs nearest the residence of the defendant Goelet? Is it the collector of the most eastern district in Maine because that district is nearest to Paris? It seems evident from this provision alone that Congress considered that it was dealing with, and intended only to deal with, yacht owners residing in this country.

[5] The next question is whether the tax was properly leviable on September 1, 1909.

The act went into effect on August 6, 1909. The section provides, as we have seen, that a tonnage tax "shall be levied and collected annually on the first day of September * * * upon the use of every foreign-built yacht * * * now or hereafter owned or chartered for more than six months."

In my opinion the six months' limitation applies only to yachts chartered. Such is the natural interpretation of the language used. It might fairly be expected that a charter should run for some extended period to subject a charterer to a tax, but no particular reason appears why continued ownership for any stated period should be required. Indeed, a requirement of six months' ownership would be a direct invitation to transfer to avoid the tax.

Does, then, the fact that less than a month elapsed between the passage of the act and September 1, 1909, establish that the full tax was improperly levied upon that date?

It is urged by the defendants that as the tax is one upon use, it ought to have some fair relation to the actual enjoyment of the privilege taxed, and that it must have been the intention of Congress, in enacting the legislation just prior to the close of the year, to lay an annual tax upon future use and not to penalize past use, and that if a tax for past use be levied it should be apportioned according to the period of actual use prior to September 1, 1909.

There is much force in these contentions but I think that they are not well founded. The language of the statute, speaking on August

States without paying the tax. Whether she could be so used to any extent whatever is a question not presented by the pleadings and upon which no opinion is expressed.

I construe the allegations in the Billings Case to state a substantial use partly within and partly without the waters of the United States and such use I think comes clearly within the statute.

6, 1909, is that the use of yachts "now or hereafter owned" shall be taxed on September 1st. The section says that the use of yachts owned at the time of its passage or thereafter acquired shall be taxed and, in my opinion, Congress intended that such tax should be levied on the first day of every September following the enactment of the statute. While the tax is collectible annually according to a given situation on September 1st, there is nothing in the statute to indicate that a full year's use is a prerequisite to liability, nor is there any provision for apportionment. I, therefore, hold that the tax was properly leviable on September 1, 1909. If this construction gives the statute a retrospective operation—and I fail to see that it does—it is nevertheless adopted, because it is, in my opinion, required by the unequivocal language used.

The fourth question is as to the necessity of showing actual use of the yachts during the year prior to September 1, 1909.

One of the defendants alleges in his answer that his yacht was out of commission during the year preceding the 1st of September, 1909; was laid up during that year, and was not actually used by any person.

The statute seems to distinguish between use and ownership. It imposes a novel tax—a tax on use. There is nothing by way of precedent to aid in the determination whether Congress intended that the statute should apply only in cases where owners use their yachts for yachting purposes during the year prior to the assessment of the tax, or whether it intended that the tax should cover the privilege of using. Considering the object of the statute and the reason of the matter, I think the latter interpretation the correct one, although I fully appreciate the very narrow distinction between such a tax on the privilege of using and a tax on ownership. Still, I can see no reason why Congress should distinguish between the yacht owner who chooses to put his yacht in commission and employ it as a pleasure craft, and the owner who prefers in a particular year to keep his yacht laid up. The latter has in one sense the use of his yacht, although he does not choose to sail it. I have already held that use by the owner for any particular length of time is not necessary to the application of the statute, and I now feel constrained to further hold that no particular kind of use is required—that a yacht owner who keeps his yacht laid up is nevertheless liable to the tax.

[6] The final question to which it is necessary to give any extended consideration is whether the owner of a foreign-built yacht can acquire any immunity under a treaty which will exempt him from the operation of this statute.

The defendant Rainey contends that as the treaty of 1815 with Great Britain provided that no higher or other duties or charge should be imposed in the United States upon the British vessels than those imposed upon vessels of the United States he—as the owner of a British-built vessel—is not subject to the statute.

The defendant does not claim to be a British subject, and it is by no means clear that he is entitled to invoke the protection of the treaty. But, however that may be, it is well settled that when a

treaty is inconsistent with a subsequent act of Congress, the latter will prevail. Taylor et al. v. Morton, 2 Curtis, 454, Fed. Cas. No. 13,799; and see Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227; Ropes v. Clinch, 8 Blatchf. 304, Fed. Cas. No. 12,041.

Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty.

It is now only necessary to briefly state the conclusions reached with respect to the less important questions considered upon the various briefs.

[7] (1) I am satisfied that an action in the nature of debt will lie against the yacht owners to enforce the collection of the tax, and that the complaints state good causes of action.[7]

[8] (2) I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated act of Congress, it is not for this court to determine whether the amendment was or was not outside the purposes of the original bill.

For the reasons stated, the demurrers of the government to the answers in the Billings, Pierce and Rainey cases are sustained. The demurrers in the Bennett and Goelet cases are overruled.

[7] The defendants in these cases are liable as owners of the yachts. Why they should be described in the complaints as "managing owners" is not apparent. The only reference to managing owners in the statute seems to be for the purpose of fixing the jurisdiction of the collector of customs in cases where there are several part owners. Still, a sole owner is undoubtedly the managing owner of his yacht and there is no contention but that these defendants are the sole owners of their yachts. Consequently I think the presence of the word "managing" should not be held to affect the sufficiency of the complaint.

UNITED STATES v. BLAIR.

SAME v. INVESTORS' & TRADERS' REALTY CO.

(Circuit Court, S. D. New York. May 1, 1911.)

1. SHIPPING (§ 7*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—CONSTRUCTION OF STATUTE—"FOREIGN BUILT."

A yacht is "foreign built" within the meaning of Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1057), imposing a tonnage tax on the use of such yachts owned by citizens of the United States, if it was originally built in a foreign country, so long as it retains its identity, so that if a registered vessel of the United States, it could not be renamed, under Rev. St. § 4179 (U. S. Comp. St. 1901, p. 2831), without the consent of the Commissioner of Navigation; and short of such complete change of identity no amount expended thereon in this country for alterations, betterments, or even rebuilding, will convert it into a home-built vessel.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 7.*]

2. SHIPPING (§ 7*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—PROCEEDINGS FOR COLLECTION.

The tonnage tax imposed on the use of foreign-built yachts owned by citizens of the United States by Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1057), being a tax upon the privilege of use is assessable to and collectible from the personal user, and the provision of the statute that such tax shall be levied and collected "by the collector of customs of the district nearest the residence of the managing owner" requires that where the owner resides in one district the collector of that district shall levy and collect the tax, and the attempted action of the collector of another district to that end is unwarranted and ineffective, and will not support an action to recover the tax.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 7.*]

3. SHIPPING (§ 7*)—TONNAGE TAX ON USE OF FOREIGN-BUILT YACHTS—ASSESSMENT OF TAX—TONNAGE.

Where a foreign-built yacht, whose owner was subject to tonnage tax under Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 1057), had been enlarged so that her tonnage was increased, the collector in assessing the tax was entitled to have her remeasured.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 7.*]

4. WORDS AND PHRASES—"BUILT"—"REBUILT."

Anything which is "built" is formed "by uniting materials into a regular structure," and that which is "rebuilt" is constructed "after having been demolished."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 887, 888; vol. 7, pp. 5986, 5987.]

At Law. Actions by the United States against C. Ledyard Blair and against the Investors' & Traders' Realty Company. On trial by court on consent. Judgment for defendant in first case, and for plaintiff in second.

Actions to recover one year's tax under section 37 of the tariff act of 1909; defendants being severally the owners of yachts alleged to be foreign built.

The material facts in the Blair case are as follows:

Defendant is a citizen of the United States and domiciled and resident therein. On September 1, 1909, he was the owner and managing owner of the yacht Diana, a vessel of a gross tonnage of 785.6 tons. On or about said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

last-mentioned date the collector of customs at the port of New York assumed to levy a tax alleged to be pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of the said yacht, the amount of said tax being $5,502.

The Yacht Maria was built in Glasgow, Scotland, in 1896; in 1902 she was sold to an American citizen (Mr. Bourne), who renamed her the Delaware; he used her as a pleasure vessel until 1905. During Mr. Bourne's ownership of her approximately $30,000 was spent in improving and bettering the Delaware, said expenditures being exclusive of those payments properly chargeable to maintenance or upkeep. In February, 1905, while lying at Hoboken, N. J., the Delaware was burned, most of her upper works being totally destroyed, her engines so injured that they had to be dismantled, and her steel plating badly warped. So much water was pumped into her to put out the fire that she sank, though apparently there was not enough water at her berth to permit her to go out of sight. The wreck passed into the hands of Mr. Chubb, apparently as agent for underwriters. That gentleman raised and rebuilt the yacht at an expense of approximately $86,000, and he renamed the rebuilt vessel Diana. In 1906 Mr. Chubb sold the Diana to the defendant, and between the date of his purchase and the date of levying the tax Mr. Blair has expended on the Diana for betterments and improvements approximately $34,000. Exclusive of salvage the actual expenditures for rebuilding of and improvements upon the wrecked Delaware amount to approximately $121,000, and Mr. Chubb paid for the wreck $35,500 after, as above noted, Mr. Bourne had expended for new construction on the Delaware, about $30,000. She is not worth as much as the amount expended upon her in America.

At the time of the action aforesaid by the collector of the port of New York the defendant was a resident of Peapack, N. J., and there had his domicile, being also a citizen of the state of New Jersey. The collector of the port of New York is not the collector of the district nearest the residence of the defendant. The bill of sale from Mr. Chubb to defendant was recorded in the office of the collector for the port of New York. Defendant has largely used the Diana within the territorial jurisdiction of the United States as well as in foreign waters.

The material facts in the case of the Investors' & Traders' Realty Company are as follows:

Defendant is a citizen of the United States and is a corporation whose "residence" is nearest the collection district in charge of the collector of the port of New York. On September 1, 1909, it was the owner and managing owner of the yacht Allita, a vessel of unknown gross tonnage. On or about said last-mentioned date said collector of customs at the port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $504.

The Allita was originally the Gadabout, of 71.86 tons, built at Montreal, Canada. As the Algonquin she passed into the possession of J. H. Flagler in 1900. It does not appear that at the time of her transfer to Flagler she had been injured or received substantial changes in structure. Having paid $10,000 for the Algonquin, Mr. Flagler lengthened her by inserting approximately 26 ft. amidships. He also changed the shape of her stern and rebuilt the bow. The vessel had auxiliary steam, and as lengthened and enlarged the old engine, boilers, and wheel were not suitable and were not used. The old boilers and engine were traded for new ones, and including the difference paid for the new propulsive power Mr. Flagler expended upward of $46,000 in changing the Algonquin, which he then renamed the Allita. In 1908 he transferred her (in the process of a real estate transaction) to the defendant company, which has never used her as a yacht, and evidently accepted the vessel only to sell again. The bill of sale from Flagler to defendant was recorded in the collector's office of the port of New York, July 7, 1909.

Mr. Pratt, Asst. U. S. Atty.
Mr. Byrne, for defendant Blair.
Mr. Miller, for Investors' & Traders' Realty Co.

HOUGH, District Judge (after stating the facts as above). These actions raise a point not discussed in the decision of Noyes, J. (190 Fed. 359), lately filed in these cases, viz., what is meant by the phrase "foreign-built yacht." The Blair case also requires answer to the inquiry: What is the force and effect of the statutory words that the tax "shall be levied and collected by the collector of customs of the district nearest the residence of the managing owner"? The action against the Investors' & Traders' Company also suggests (though it was not argued) the inquiry as to how the gross tonnage by which the tax is measured is to be ascertained.

[1] I. The meaning of the phrase "foreign-built": This may be considered from three points of view: (a) What is its signification in the shipping trade and among those familiar with maritime affairs? (b) What light is cast on the inquiry by general usuage as evidenced by lexicographers? (c) Are there any decisions of authority?

(a) No expert evidence as to the meaning of the phrase was introduced at the trial, but an investigation of congressional publications shows that it was suggested to Congress by those who petitioned for the legislation which finally became the section now under consideration. It appears from House document 1505, 60th Congress, 2d Session (Tariff Hearings, vol. 7, p. 7526 et seq.) that a considerable number of ship chandlers, and one shipbuilder, petitioned for the passage of an act laying an ad valorem duty of 75 per cent. on any *foreign-built yacht* thereafter purchased by any citizen of the United States, and several amusing if not instructive reasons were advanced in favor of the proposed law, one of them being that the tariff would not be prohibitive because "a certain proportion of the very rich men of America are apparently determined to possess foreign-built yachts at any price without regard to circumstances." Congress was furnished with a long list of obnoxious vessels alleged to be foreign built and American owned, which list is thought to include every yacht now under consideration. It may fairly be presumed that in legislating upon the prayer of any portion of the shipbuilding community Congress used language in the sense in which it was proposed, and it is in my judgment common knowledge that any person using the language of the sea means by a "foreign-built" vessel one originally constructed outside the United States, no matter how extensive the changes, alterations, or repairs bestowed upon her here may have been.

[4] (b) Anything which is built is formed "by uniting materials into a regular structure," and that which is rebuilt is constructed "after having been demolished." Changing the name of the Algonquin to Allita, or of the Delaware to Diana, effected nothing. Neither of these vessels was strictly speaking even rebuilt, for neither had been demolished. The Allita was merely enlarged, while the Diana was both repaired and enlarged.

(c) It appears to me that the reasoning of The Grace Meade, Fed. Cas. No. 15,243, is plainly applicable here. Rev. St. § 4179 (U. S. Comp. St. 1901, p. 2831) prohibits changing the name of any "vessel of the United States"; i.e., of any vessel lawfully registered, enrolled,

or licensed pursuant to legislative authority. The object of that statute is plainly to mark and preserve the identity of any named vessel. As long as the vessel is the same the name must be the same unless changed pursuant to other (and here unimportant) statutes. That decision laid down very clearly the rules by which identity should be determined:

"It may be held as a principle that where the keel, stem and sternposts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt and not of a new vessel. Indeed without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up is built upon, the law holds that in such a case it is the old vessel rebuilt and not a new vessel."

The Diana and the Allita in their present condition are either foreign built or home built. If they are home built they must have been constructed when Messrs. Chubb and Flagler respectively expended such extraordinary sums on them. The same vessel can only be built once; she may be rebuilt many times, but that does not destroy identity under the decision quoted. If they were not new vessels, and new vessels in the technical sense of that word, when they were respectively put into commission after lengthening the Algonquin and after the fire on the Delaware, then they are the same vessels as they were before, however greatly changed in outward appearance, in value, or material. If these two yachts had been originally home built, and that had been done to them which was done, could their respective owners have given new names to them without due application to the Commissioner of Navigation? Plainly not, under the language of the decision above quoted. And if the identity of the vessels was not sufficiently destroyed to authorize rechristening if they had been vessels of the United States, they must remain foreign built. Even American rebuilding cannot change that. It is therefore held that both the Allita and the Diana are foreign-built yachts as that phrase is used in the statute under consideration.

[2] II. The force of the phrase designating the officers by whom the tax "shall be levied and collected." However shadowy in practice the difference is between a tax upon the potential use of a yacht and the yacht itself, especially when such tax may be perpetually commuted by the payment of an ad valorem duty, it is admittedly essential to the government's position that the taxation be directed against the privilege of use, and therefore assessable to and collectible from the personal user. It is then highly appropriate that, like almost every other personal tax, the place of taxation shall be the residence of the person taxed, and such is the plain direction of the statute. It is therefore obvious to me that when the act declares that a particular collector shall levy and collect the tax, it means that he must do something by way of apprising the person who is called upon to pay of the claim made. It seems elementary that if one particular officer is charged with the duty, no other officer can lawfully perform that duty.

The word "levy" in law has had many meanings attributed to it (see a collection of them, Words and Phrases, tit. "Levy"), but

nothing suitable to any meaning given was done by the collector nearest the residence of Mr. Blair. Whatever was done was the act of the corresponding functionary in New York. It is not for the defendant to declare what is necessary; it is enough that the designated official did nothing, so that the government to prevail in this action must assert (as is done arguendo) that if in any way, or by any person, notice of the tax is given to the yacht owner and he does not pay, an action such as this can be maintained. For this claim no basis is perceived.

[3] III. The measurement of tonnage. The complaint against the Investors' & Traders' Company alleges that the collector of customs "duly levied upon the use of the said yacht * * * a sum equivalent to a tonnage tax of $7 per ton, to wit $504." This is evidently $7 a ton on the original tonnage of the vessel. It is common knowledge that the result of what was done to the Allita was to increase her tonnage; yet in her last recorded bill of sale she is still described as being of the same tonnage that she was when she was 26 feet shorter. The fact appears to be that the tonnage has been taken from her documenting, and the documents not being required by any statute of the United States have been continued without any remeasurement. This tax is therefore incorrect, but as it is plainly less than the government would be entitled to demand, the defendant is not in a position to object.

Judgment is directed in accordance with these findings.

PEALE v. MARIAN COAL CO.

(Circuit Court, M. D. Pennsylvania. August 24, 1911.)

No. 55.

1. SALES (§ 8*)—CONSTRUCTION—CONTRACT FOR DELIVERY OF PRODUCT OF COAL WASHERY—RIGHT TO TERMINATE.

A contract between complainant and defendant coal company, which was operating a washery under leases of a culm dump, required complainant to make advances to pay claims against defendant and improve its works; such advances to be secured by a mortgage on defendant's interest in the dump and its machinery. It further provided that all coal produced until the culm bank was exhausted should be delivered to complainant on board cars at the washery and be sold by him for the best prices obtainable without further restriction except as to coal of a specified grade, and that on the 20th of each month he should pay to defendant "the aggregate selling price on board cars at the washery of all coal delivered during the preceding month to his customers on sales made by him," less a commission and a certain sum per ton to be reserved and applied on his advances until the same were repaid. *Held*, that such contract was not one of agency or factorage under a del credere commission, but was essentially one for the sale by defendant to complainant of its entire product, which gave him a vested interest in the coal and could not be terminated by defendant except upon the strongest grounds, amounting to actual fraud or its equivalent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18–19; Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SALES (§ 96*)—EXCUSES FOR NONPERFORMANCE—CONTRACT FOR SALE OF COAL PRODUCTION.

Evidence considered, and *held* insufficient to justify a defendant coal company in repudiating and refusing to further perform a contract by which, in consideration of advances made to it by complainant, it agreed to deliver to him all of the output of its washery until the culm bank on which it was working was exhausted, such coal to be sold by complainant and paid for to defendant monthly, less a commission, no fraud on complainant's part being charged, and no substantial breach by him shown.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 96.*]

8. SPECIFIC PERFORMANCE (§ 68*)—CONTRACTS ENFORCEABLE—CONTRACT FOR SALE OF COAL PRODUCTION.

A contract by which defendant, a coal company engaged in reclaiming coal from the culm bank of a large colliery, in consideration of advances made to it by complainant, agreed to deliver to him for sale all of the output of its washery until the bank was exhausted, such deliveries, less a commission deducted, to be paid for monthly, *held* specifically enforceable in equity, where the time required to exhaust the dump and the quantity which would be produced therefrom were wholly contingent and uncertain, and the damages resulting to complainant from its breach were incapable of ascertainment at law except by a multiplicity of successive actions extending over an indefinite time.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 68.

Right to specific performance as affected by adequacy of remedy at law, see note to Marthinson v. King, 82 C. C. A. 368.]

4. EQUITY (§ 53*)—JURISDICTION—ADEQUATE REMEDY AT LAW—TIME FOR OBJECTION.

If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that plaintiff had a plain and adequate remedy at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 173–176; Dec. Dig. § 53.*]

In Equity. Suit by John W. Peale against the Marian Coal Company. Decree for complainant.

See, also, 172 Fed. 639.

Robert Snodgrass, F. D. Peale, and O'Brien & Kelly, for plaintiff.

Frank E. Donnelly, for defendant.

WITMER, District Judge. The plaintiff, by bill in equity, here seeks relief for an alleged breach of the defendant's agreement to deliver to him coal from its washery at the Holden Culm Dump, which it undertook to do, in return for money advanced by the plaintiff to lift defendant's obligations and to enable it to make necessary improvements and developments for the successful operation of its washery.

The complaint sets forth:

That on the 11th day of April, 1907, a contract was entered into, between the plaintiff and the defendant, which, in so far as is considered pertinent, provides as follows:

Now therefore, in consideration of the premises and of the mutual covenants herein contained, the parties hereto respectively agree as follows:

The party of the first part agrees to use his best efforts to procure a lease from the Hoysradt Estate of its interest in said Holden Bank upon terms as to rate of royalty similar to those contained in said leases from Isaac B.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Felts now owned by the party of the second part, and in case he succeeds in obtaining such lease to transfer the same to the party of the second part in consideration of the issue of twenty-five thousand ($25,000) dollars full-paid and nonassessable capital stock of said party of the second part; it being understood that the capital stock of the party of the second part shall be increased from fifty thousand ($50,000) dollars to seventy-five thousand ($75,000) dollars for that purpose. The party of the first part further agrees to advance from time to time as the same may be required as aforesaid to meet outstanding obligations of the party of the second part twenty-five thousand ($25,000) dollars, and in addition thereto a sum not to exceed ten thousand ($10,000) dollars to defray the expense of making improvements in said plant and to defray the expense of taking such steps as may seem advisable to protect said bank from destruction by fire by cutting off the portion of said bank that is already on fire.

The party of the second part agrees to accept an assignment of said proposed lease of the Hoysradt interest, provided the terms thereof are satisfactory to it, and to issue to the party of the first part twenty-five thousand ($25,000) dollars of its full-paid and nonassessable capital stock as a consideration for said transfer; to deliver to the party of the first part or his assigns the entire output of the culm bank and washery above referred to, not only until the repayment of the moneys to be advanced hereunder, with interest, but also until the entire exhaustion of said culm bank, including materials deposited hereafter by the Delaware, Lackawanna & Western Railroad Company or its successors or assigns in connection with the operation of the Holden Colliery, except such part thereof as may be sold by the party of the second part under provisions hereinafter contained.

The party of the second part agrees to prepare all the coal to be delivered to the party of the first part as to the sizes, the percentage of impurities and the merchantability and appearance thereof according to the standard of the Delaware, Lackawanna & Western Railroad prevailing in the region where said washery is situated. Railroad weights taken at the scales nearest said washery are to be conclusive between the parties, but upon such weights the usual allowance for water is to be made. The party of the first part shall not, however, be charged for weight of coal shipped to tide water in excess of the weight of coal found upon the cars as determined by the railroad company's scales at tide, nor upon line shipments for weights in excess of the weight charged for by the railroad company in their freight bills. All weights shall be taken in tons of 2,240 lbs. The coal may be inspected at the colliery by a competent inspector appointed by the party of the first part, but satisfactory to the party of the second part, who shall be the agent of both parties and whose wages shall be paid by the party of the first part and one-half thereof shall be charged against the party of the second part and deducted from the price realized by the party of the first part upon the sale of said coal. Whenever possible the coal shall be inspected as it comes from the chutes. In case of disagreement, a test shall be made by taking a bucketful of coal from each end and each side of the car in dispute and if the coal thus taken shall be found fully up to the standard of the railroad company aforesaid, then said car is to be deemed to have passed the inspection. The party of the first part is not authorized to sell coal that is up to said standard for less than the average tide water price paid by the railroad coal companies under the so-called "sixty-five per cent. contracts." After the inspection of the coal the party of the second part shall deliver the same to the party of the first part on board cars to be placed at the colliery by the party of the second part, and said deliveries shall be made in approximately equal monthly proportions. The party of the first part shall not be held responsible for failure on the part of the railroad or transportation companies to furnish facilities for transporting the coal, nor for failure to sell the entire output when prevented from so doing by causes beyond his control. The party of the first part agrees, however, to render such assistance as is in his power to have cars placed to receive the coal. For the purpose of this agreement, the respective sizes of the coal shipped from said washery shall conform to the standard, and be made over meshes corresponding in size to the meshes

used by the Delaware, Lackawanna & Western Railroad Company in the Lackawanna region.

The party of the first part agrees to use due diligence to market the coal delivered to him hereunder so as not to cause suspension of operation by reason of any embargoes by the railroad company on account of accumulation of coal in cars beyond the proper allowance to the party of the second part.

The party of the first part shall be responsible to the party of the second part for the payment of the agreed price at which all coal shipped to his customers shall have been sold, less the freight thereon paid by the party of the first part, and he agrees to pay to the party of the second part on the 20th of each month the aggregate selling price on board cars at the washery of all coal delivered during the preceding month to customers upon sales made by him, except that from the proceeds of such sales the party of the first part is hereby authorized to deduct the reserve hereinafter referred to, and apply the same toward the payment of said advances, and a commission of ten (10¢) cents a ton on each ton of pea and smaller sizes and of twenty (20¢) cents a ton on each ton of sizes larger than pea shipped from said washery or culm bank. * * *

The moneys to be so advanced by the party of the first part shall be repaid, with interest thereon at the rate of six (6%) per cent. per annum, as follows: Out of the proceeds of coal sold by the party of the first part under the terms of this agreement, or out of the price to be paid by the party of the first part for coal purchased by him in case any of the coal from said washery shall be purchased by him during the term of this agreement, the sum of twelve and one-half (12½¢) cents per ton upon each and every gross ton of coal of the size of pea or smaller sizes and the sum of twenty-five (25¢) cents a ton for each and every gross ton of sizes larger than pea shipped from said washery or culm bank may be retained by the party of the first part to apply at intervals, as the respective notes to be given by the party of the second part for the amounts to be advanced hereunder or any renewals thereof may mature, to payment pro tanto of such loans and interest thereon. The notes which are to be given by the party of the second part for the amounts advanced hereunder by the party of the first part from time to time are to be for such amounts and are to be made to mature on such dates that at least one note shall mature in each month, and, as such note or notes mature, such reserve shall be applied to the payment thereof; the intention being that this application shall be made monthly so as to save the party of the second part from loss of interest upon the amount of the reserve, except to the extent necessarily involved in applying the reserve only once a month.

At least ten thousand ($10,000) dollars, with interest upon the balance of such advances remaining at the time unpaid, shall be repaid by the party of the second part either by the application of said twelve and one-half (12½¢) cents and twenty-five (25¢) cents a ton as aforesaid or otherwise during each of the years subsequent to the date of this agreement until the entire amount due shall have been repaid. * * *

In case the party of the second part shall fail to promptly keep, observe and perform, without default, each and every of the stipulations of this agreement or of its lease or leases with Isaac B. Felts, with the Hoysradt Estate and with the Delaware Lackawanna & Western Railroad Company, if a lease is obtained from said company, or in case of its failure to pay taxes or the wages of its laborers, miners or other workmen when due, and such default in either of the preceding cases shall continue for thirty days after notice thereof from the party of the first part, or in case the party of the second part shall default in the payment of principal or interest or any portion thereof when due, or shall make an assignment for the benefit of creditors, or become bankrupt, or in case of levies upon its property by creditors which, in the judgment of the party of the first part, shall jeopardize his security, or in case of its failure to pay royalties when due, then and in either of such cases all terms of credit hereby stipulated for shall forthwith cease and terminate and the notes of the party of the second part hereinafter mentioned and so much of said loans and advances, with interest, as shall not

then have been repaid, and all other sums for which the party of the second part, shall then be liable hereunder shall thereupon at once become and be due and payable immediately, anything herein or in any connected or other instrument or writing to the contrary notwithstanding.

Repayment of the moneys to be advanced hereunder, with interest thereon, and due performance of the terms and stipulations of this agreement and of the leases aforesaid shall be secured in manner following, due performance of each being expressly understood to be of the essence of this contract and a material part of the security of the party of the first part:

First. At least one week prior to the date upon which the party of the second part shall require an advance to be made by the party of the first part, it shall give to the party of the first part its promissory note or notes, bearing interest at six (6%) per cent., aggregating the amount of such advance or advances, said note or notes to mature in not to exceed six months from the date of such advance and to be payable at such bank as the party of the first part may designate, and said notes as they mature shall be renewed by the party of the first part to the extent of any balance remaining unpaid until the time of repayment as herein fixed shall be reached. In case, by reason of such renewals, the time of payment of the installments of principal shall be ostensibly extended beyond the end of the first or any other year above mentioned the amounts which are to be paid by the party of the second part pursuant to the terms of this agreement at the times above stated shall nevertheless fall due as above stated, anything in said notes to the contrary notwithstanding.

Second. As security for the repayment of said notes or any renewals thereof, and for the due performance of this agreement, the party of the second part agrees to execute and deliver to Franklin D. Peale, trustee, its certain mortgage in the sum of thirty-five thousand ($35,000) dollars upon its leasehold interests in said Holden Bank under the aforesaid leases and also upon all its machinery, tools, buildings and improvements of every kind upon, over, in or about the premises embraced in the aforesaid leases, including the washery and culm pile aforesaid and all such property as is now or shall hereafter become a part of or be used in the plant of said company in and about its said operation and upon all its rights, franchises, property, goods and chattels of every kind and description, together with all easements, licenses, permits, rights of way, buildings, pipes, engines, boilers and machinery, tools and fixtures and other property of every kind forming a part of said plant or used in connection therewith. * * *

Seventh. In case of any alleged default hereunder or under the leases above referred to, the party of the first part shall give to the party of the second part notice in writing of such alleged default, and in case said party of the second part does not remove said cause of default within thirty days thereafter, then and not until then, the party of the first part may cause any attorney of the court of common pleas of Lackawanna county or any other proper county to enter in said court an amicable action of ejectment against the party of the second part for the premises embraced in said leases and the party of the second part hereby authorizes any attorney of said court to confess judgment in said amicable action of ejectment upon filing an affidavit setting forth the facts of such default claimed and that the notice required as aforesaid has been given to the party of the second part, and thereupon a writ of habere facias possessionem may issue upon said judgment; provided, however, that if the party of the first part shall, under the terms hereof, take possession of the premises under such judgment and writ of possession, if the party of the second part shall, within sixty days thereafter (time being of the essence of this agreement) make good said default and repay and fully reimburse to the party of the first part all his proper expenses, outlays and payments, including an attorney fee not to exceed two (2%) per cent. of amount then owing to party of first part, then the party of the first part shall restore the party of the second part to possession of the property and the party of the first part shall account to the party of the second part for all net profits earned meantime; provided that the entry of such judgment shall not prevent the party of the first part from proceeding

to recover by any process or proceeding any amount that may be owing for moneys so advanced as aforesaid, whether the same shall be represented by notes or otherwise; and provided also that the remedies hereby provided shall be deemed to be concurrent with and not exclusive of the remedies above provided in paragraph "fourth." * * *

It is further agreed that in case the party of the second part shall be offered, for any portion of the output of said washery, the delivery of which has not already been contracted for by the party of the first part with the approval of the board of directors of the party of the second part, higher prices than the party of the first part is able to obtain for the same, then and in that case the party of the second part may submit said offer to the party of the first part and require him to make delivery thereupon. If the party of the first part shall fail without proper reason, to make said delivery, the party of the second part may make said delivery for its own account, paying to the party of the first part one-half instead of the whole of the commission per ton herein provided for. * * *

It is further agreed that in spite of the provisions of this contract providing for the delivery of the output of said Marian Washery f. o. b. cars at the washery, the party of the first part shall be deemed a commission merchant selling the output of the washery of the party of the second part under a del credere commission.

That pursuant to the terms of said contract the complainant advanced, by way of loan, to the defendant a large sum of money, to wit, $37,364.27, exclusive of interest. That upon the amount so advanced there has been repaid the sum of $12,781.77, leaving due and unpaid on said account, January 28, 1909, the sum of $24,582.50.

That the defendant is engaged in the business of carrying on a coal washery operation in the borough of Taylor, county of Lackawanna, Pa., where it prepares for market coal from the Holden Culm Dump, located along the Delaware, Lackawanna & Western Railroad. That, pursuant of the contract between the complainant and the defendant, the latter proceeded to ship coal to the former on the 17th day of May, 1907, and from that time until the 13th day of October, 1908, it did ship coal to the complainant and receive from him payment therefor in accordance with said contract. That on the day last mentioned the defendant ceased to ship its coal to the complainant, as it had undertaken to do by virtue of its contract, and until henceforth had utterly failed to ship to the complainant the product of its washery, or any part thereof, without excuse or just cause, although having often been requested to do so, resulting in great damage to the complainant.

That the defendant has since been operating said washery and preparing and shipping coal to market from the said culm dump through other agents or parties than the plaintiff, and that such culm bank is not exhausted. That there are yet remaining many thousand tons of coal in said dump, and that large quantities are being added thereto daily by deposits from the Delaware, Lackawanna & Western Railroad Company in connection with the operation of the said Holden Colliery. That it is impossible to anticipate the length of time which will be required to exhaust the said dump, or the amount of coal which may be ultimately taken therefrom, for the reason that the length of time will largely depend upon the extent of the operations which may be conducted at the said washery and the amount of the output, and because it is altogether conjectural and uncertain what amount of materials may be deposited in the future upon the said dump by the Delaware, Lacka-

wanna & Western Company in connection with the operation of the Holden Colliery. That the complainant has already suffered large damages, and will continue in the future to suffer to an extent which it is impossible now to determine. Wherefore he is remediless in the premises at law and prays for relief in this court, to wit:

(a) For damages for the coal diverted, and for discovery of the amount as the basis for determining them.

(b) For a decree requiring the defendant to repay the balance of the sum advanced by the plaintiff to the complainant.

(c) For specific performance of said contract.

(d) For an injunction restraining the defendant from shipping coal to other persons than the complainant.

(e) For general relief.

The defendant admits the execution of the contract in suit and the loan of $35,000 by the plaintiff to it on account of which it insists the plaintiff has received a credit of the sum of $17,000, and that it (the defendant) is entitled to a further credit of $1,988.21 for 24,647 tons of coal delivered to the plaintiff and sold by him without defendant's consent at various prices below the minimum stipulated in said contract.

The answer furthermore sets forth that by reason of the plaintiff's violations of the terms of said contract he has prevented the defendant from further attempting to comply with the same. The violations referred to and the reasons assigned by the defendant for not attempting further to comply with such contract may be gathered from its answer and summoned up substantially as follows:

(1) That the plaintiff deducted from funds, realized from the sale of coal, without authority and under protest of the defendant, certain amounts for alleged overpayment on condemned coal, for alleged services of plaintiff's attorney, and the sum of $3,600 for reason not specially set forth.

(2) That the treasurer of the plaintiff failed to make reports of his accounts and funds when requested so to do by the defendant, and failed to pay bills when presented and approved by the defendant.

(3) That the plaintiff sold certain coal below the minimum price stipulated in the contract, and refused, on request, to render accounts of his sales of coal and to inform the defendant at what price and to whom the coal was sold, and also refused to allow the defendant to examine his books for the purpose of learning these facts.

(4) That plaintiff has refused to deliver to defendant possession of a certain lease procured by it from the Delaware, Lackawanna & Western Company granting the defendant the right to reclaim from the Holden Dump that part of the coal claimed and owned by said company on terms similar to other leases held by it.

These are briefly the alleged grounds upon which the defendant refused to deliver any of its coal to the plaintiff after the 13th day of October, 1908. Is its conduct to be justified on examination in the light of the evidence and the provisions of the contract?

[1] This therefore requires a partial analysis of the contract to determine its nature, and the duties and obligations of the several parties thereunder. Incidentally it is said that the relations of the plaintiff to

the contract is that of an agent with a del credere commission. A careful examination, however, of its terms and conditions, will show very clearly that it is much more, so far as the rights, duties, and obligations of the parties are concerned, than would be involved in such a contract.

Under its provisions the plaintiff agrees to advance to the defendant moneys to the amount of $35,000 for its benefit, to release its obligations, and to enlarge and improve its plant so as to operate it to better advantage. In consideration of such advance, the defendant agreed "to deliver to the party of the first part (the plaintiff) or his assigns the entire output of the culm bank and washery above referred to, not only until the payment of the moneys to be advanced, with interest, but also until the entire exhaustion of said culm bank, including materials hereafter deposited thereon by the Delaware, Lackawanna & Western Railway Company, or its successors or assigns, in connection with the operation of the Holden Colliery."

It is further agreed "to prepare all the coal to be delivered to the party of the first part (the plaintiff) as to the sizes, the percentage of impurities, and the merchantability and appearance, according to the standard of the Delaware, Lackawanna & Western Railroad, prevailing in the region where the said washery is situated," and that the respective sizes of the coal shipped from said washery should conform to the standard, and be made over meshes corresponding in size to the meshes used by the said railway company in the Lackawanna region.

It is not expressly stated in terms in the contract that the plaintiff shall sell the coal so delivered "for account of the defendant," but that it shall be disposed of by the plaintiff "for the best price that can be obtained for the same," saving, however, in respect of coal which is "up to said standard," that it shall not be sold for less than the average tide water price paid by the railroad coal companies under the so-called 65 per cent. contracts. From the proceeds of all sales so made, the plaintiff is expressly authorized to deduct the freight paid thereon, a reserve or sinking fund "of twelve and one-half (12½) cents per ton upon each and every gross ton of coal of the size pea, or smaller sizes, and the sum of twenty-five (25) cents a ton for each and every gross ton of sizes larger than pea," and to apply the same at intervals, toward the payment of his advances. He is further authorized to deduct a commission of "ten (10) cents a ton on each ton of pea and smaller sizes, and of twenty (20) cents a ton on each ton of sizes larger than pea, shipped from said washery or culm bank," to cover expenses of marketing and his services in making sales, and after deducting these amounts the balance is to be paid to the defendant.

In marketing the coal there is no restriction upon the plaintiff, as to price, except to coal which is "up to the standard"; but this restriction implies, under all the rules of construction, independently of the express agreement evidenced by letters of December, 1907, and January, 1908, the right to sell all coal which was not "up to the standard," for the best price that could be obtained therefor. Besides, he was not limited, in respect of sales, to any market. He could sell to whomsoever he pleased, and through any agencies, and in any manner which

in his judgment would produce the best results. In other words, he had a free hand, except in the selling price of coal which was "up to the standard."

The plaintiff is further required, by the contract, to pay to the defendant "on the 20th of each month the aggregate selling price on board cars at the washery of all coal delivered during the preceding month to (his) customers upon sales made by him," and is expressly responsible for the payment to the defendant of such aggregate price whether the coal was "up to the standard" or not.

There are numerous other provisions in the contract, as to the duties and obligations of the parties, to which it is not necessary now to refer, as it seems entirely clear, from the entire contract in the light of what has been made to appear, that the relations of the parties are and were intended to be substantially that of vendor and vendee. It specifically provides for a delivery to the plaintiff of all coal produced, and the payment by him, not conditionally but absolutely, on the 20th of each month, for all coal sold and delivered during the preceding month. In other words, it contains all the elements necessary to constitute a sale of all the coal produced to the plaintiff.

There is no restriction upon such sales, except as already stated, nor is there any provision for reports to the defendant of prices, names of purchasers, or other details, nor as to the manner of keeping the accounts. The keeping of accounts is, of course, necessarily implied, presumably as they had theretofore been kept in previous dealings between the parties. All the plaintiff was required to do was to exercise diligence in securing the best price possible in making sales of the defendant's coal, in which he was to an extent bound by the contract, and to pay to the defendant, on the 20th of each month, after making the deductions provided for, the *aggregate selling price* on board cars at the washery, for all coal sold and delivered during the preceding month. When this was done, the defendant had received all that it was entitled to receive, until the plaintiff's advances were repaid with interest.

It seems therefore that the plaintiff should not be treated simply as the agent or factor of the defendant under a del credere commission. It is true that under such a contract the vendor would become liable, in the same manner as if he himself were the purchaser of the coal; but such a relation does not imply any interest whatever in the goods themselves. The agent, in such case, in consideration of a special commission, simply engages to pay for the goods if the purchaser fails to do so. In other words, he guarantees such payment, and this is an essential feature, which distinguishes a del credere commission from an ordinary agency. Even if the contract does involve an agency with a del credere commission, it has been expressly held that in such case the factor "becomes liable to his principal when the purchase money is due, as between him and his purchaser he then in effect becomes the purchaser, and is substituted for the purchaser, and is bound to pay not conditionally, but absolutely in first instance." Cartwright v. Greene, 47 Barb. (N. Y.) 9.

As argued by counsel for defendant, whether, therefore, the plain-

tiff is to be considered an agent with a del credere commission, or a factor for the sale of coal, it is obvious, from the contract itself, that he has a vested, and indeed a very important, interest in the subject-matter of the contract, and had such interest at the time it was repudiated by the defendant. He had at that time advanced at least $35,000 for the use and benefit of the defendant. For the repayment of these advances he relied upon the sale of the coal which might be produced at the washery, holding at the same time as security a mortgage upon an interest in the culm dump. A diversion of the coal therefrom, to any other agency, will in effect destroy his security, to the extent that a continued operation of the washery will reduce the coal in such dump. The plaintiff, it will be admitted, had therefore from the very inception of the operations of the defendant, under this contract, a large vested interest in the subject-matter of such contract, so that it could not be terminated by the defendant but for the strongest possible grounds, amounting to actual fraud, or conduct equivalent thereto.

[2] Before entering upon examination of the conduct of the plaintiff, assigned by the defendant for his repudiation of the contract, it is of importance to note the status of the parties and their business relations prior to the contract in suit.

The Marian Coal Company was organized and existed for the sole purpose of reclaiming marketable coal from the Holden Dump. The improvements erected on the ground near the dump for this purpose were practically the only assets of the company, excepting, of course, certain leasehold rights to reclaim such coal. The coal in this dump was claimed by Isaac B. Felts, the estate of Jacob Hoysradt, and the Delaware, Lackawanna & Western Railroad Company, to whose joint credit royalties were deposited in bank for the coal taken. It appears that the Boland brothers then owned all of the capital stock of the defendant, being also creditors of the company for upwards of $20,000. For more than a year before entering into the contract of April 11, 1907, the plaintiff, as general manager of Peale, Peacock & Kerr of New York, had sold the output of the washery of the defendant company. While so doing, he had accounted to defendant by statement showing in detail the price received for each boat load of coal sold to customers at tide, omitting the name, and the price and name of each customer to whom delivery was made by rail. It appears, therefore, that the parties were not strangers to each other, and that their business methods were well known and intended to be carried on in their new relations.

Now, as to the first assignment of defendant, it might be sufficient to say that, even if the plaintiff caused to be improperly deducted the items specified from the defendant's account, it would not be justified in breaking the entire contract. The items are trifling, with one exception, as compared with the import of the contract. In any aspect, it appears to involve a mere matter of bookkeeping. If any such payments were erroneously made, it could easily have been adjusted and corrected between the parties in future settlement without the risk of loss, bearing in mind that the defendant was at all times the debtor

of the plaintiff. It, however, now appears from all the evidence in the case that the deductions were proper, with the possible exceptions of the item ($145) claimed by plaintiff for traveling expenses, and item ($125) paid for legal services, which do not appear authorized by the contract, and cannot in the light of the evidence be justified otherwise; nevertheless these deductions were made honestly but mistakenly and not with the intent to defraud, and will not be made to serve the defendant.

As to the second complaint, suffice to say that continuance of the contract as contemplated by the parties cannot be predicated upon the conduct of the defendant's treasurer though nominated by the plaintiff. If, however, the treasurer's failure to perform his duties could be charged to the plaintiff, the defendant would not be prejudiced thereby. The record is convincing of the honesty and efficiency of this officer. His accounts were faithfully kept and his duties performed in a manner to his credit, which we have a right to presume the defendant had in mind when they declined to displace him until long after this suit. The books, kept by him, were supervised by a reputable firm of certified accountants who audited them and found them correct, and there is no evidence to the contrary. The books having always been open for inspection, and if the system employed appeared complicated and confusing to the manager and secretary of the defendant company, and they had good reason to doubt the accuracy of the state of the accounts, good business policy should have suggested to them the propriety of an examination and audit of them by expert accountants as a remedy. This would have served a better purpose than the mass of reports willingly furnished by the treasurer on request, and the flood of correspondence that passed between the parties to which this suit no doubt must be attributed.

The third ground upon which the defendant seeks to justify its action seems to be regarded by it as the most flagrant of plaintiff's alleged offenses. The allegation does not charge fraud, or that the plaintiff wrongfully sold coal at prices below the minimum price stipulated in the contract, but that he refused to render an account of sales generally and inform the defendant at what price and to whom the coal was sold, and further that he refused to allow the defendant to examine the books to ascertain these facts.

It is to be noted that the plaintiff had for about a year been selling all of the output of defendant's washery, that part of it was sold on a commission and guaranty basis, as provided in this contract, that reports were rendered monthly of the same character as to information therein contained similar to those furnished after date of the contract, and that in spite of this practice the defendant did not stipulate for reports with names of customers. The practice thus established, in this regard, they are presumed to have had in mind when they entered into this contract and should govern even though a general custom to the contrary had been proven. It is to be remembered that the plaintiff, after making certain deductions, was required by the contract to pay to the defendant on the 20th of each month *"the aggregate selling price* on board cars at the washery" of all coal delivered during the preceding month,

whether paid for or not. The names and addresses of the plaintiff's customers would have served no legitimate purpose to the defendant. It is easily understood how they might have been used to the detriment of the plaintiff, and being his private property, he was not bound to disclose them. All that the defendant could require or demand was a report of such facts as would enable its officers to determine whether the plaintiff had accounted for all coal sold and delivered, and the aggregate of such sales. Such reports the plaintiff regularly furnished. Any further necessary information required could have been readily obtained from the records provided for the purpose.

Did the plaintiff sell coal below the minimum prices provided by the contract? The coal shall be prepared as to sizes, impurities, appearance and merchantability according to the Delaware, Lackawanna & Western Railroad Company's standard prevailing in the region of the washery, and shall not be sold when "up to standard" for less than the average tide water price paid by the railroad coal companies, under the so-called 65 per cent. contract.

Now the average tide water price of coal is the average of prices obtained by the coal companies at tide water, known to the trade as the Ruley price, ascertained in the Bureau of Coal Statistics at the head of which was a Mr. Ruley; hence the name. The defendant claims for its coal Delaware, Lackawanna & Western Railroad circular prices at tide. This is admitted to be the maximum price at which coal sells at tide. It is true that the Marian Company agreed to prepare its coal in accordance with the Delaware, Lackawanna & Western Company's standard. The contract, however, does not require the plaintiff to obtain the company's circular prices. It requires him to obtain for this coal of standard preparation the best prices he could procure above the average or Ruley prices. The evidence submitted is strong and convincing that such prices the plaintiff obtained for all of the coal sold "up to standard."

During a period of 18 months including two summers when prices are usually low, the plaintiff sold 72,487.08 tons of coal, good, bad, and indifferent, for which defendant received an actual credit (deducting commissions) of $37,296.67. This is but $1,767.35 less than Delaware, Lackawanna & Western Railroad Company's circular prices and within $356.31 of the Ruley prices. Bearing in mind that all of this coal was culm or dump coal, and that many thousand tons of it was actually condemned by the defendant's inspectors, and much of it sold by special agreement, the showing is to the credit of the agent.

It is further complained that the plaintiff's personal attorney refused on demand to turn over to the officers of the defendant a certain lease from the Delaware, Lackawanna & Western Railroad Company to it of an undivided interest in the culm bank in question. How this lease came into his possession is fully explained is the testimony, which shows ample justification for his retention. The defendant, however, did enjoy its fruits without hindrance. If the plaintiff should be personally held responsible for this act of his attorney, it is not made to appear that it operated to the injury of the defendant.

In considering the reasons assigned by the defendant for his refusal

further to comply with its contract, it will be observed that no fraud is alleged or proven, nor is it anywhere shown that the defendant has suffered any specific loss by reason of the alleged derelictions of the plaintiff. It will not suffice it to make general charges of loss. To justify its action it was incumbent upon it to show what loss or damage, if any, it had suffered, and how its alleged embarrassment operated to its injury. In view of these conclusions, it must follow that the defendant was not justified in repudiating the contract between the parties, or in refusing on its part to deliver the coal produced from the culm bank and washery in question to the plaintiff under the terms of such contract. Hence, the court having jurisdiction, the plaintiff is entitled to some remedy.

[3] The defendant demurs and contends that the plaintiff can by a recovery of damages have a complete or adequate remedy at law, and is therefore not entitled to relief here. The admission of this doctrine and its application to such cases as the one under consideration would practically divest courts of equity of all jurisdiction to compel specific performance of real contracts.

As a matter of fact it appears impossible to anticipate the length of time required to exhaust the dump, or to estimate the amount of coal that may ultimately be taken therefrom, because it will largely depend upon the extent of the operation which may be conducted at the washery and the amount of the output, and because it is altogether conjectural and uncertain what amount of materials may be deposited in the future upon the dump of the Delaware, Lackawanna & Western Railroad Company in connection with the operation of the Holden Colliery, and therefore the plaintiff's damages are not susceptible of liquidation.

"That the plaintiff could maintain an action at law for damages, for breach of the contract, there is no doubt; but it is a well-settled rule that, although the action at law will lie, yet if there is an utter uncertainty in any calculation of damages for the breach of the covenants, and the measure of the damages is largely conjectural, equity will intervene because of the inadequacy of the remedy, and enforce performance of it by injunction. Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476; Wilkinson v. Colley, 164 Pa. 43 [30 Atl. 286, 26 L. R. A. 114]."

It is evident, furthermore, that in order to recover damages by remedy at law it would be necessary to resort to a multiplicity of suits. The plaintiff might bring suit monthly to recover damages for loss of profits for the preceding month, or he might resort to annual suits. He could not recover in any one suit for all of the damages, because it would be impossible to ascertain or to show what the damages would amount to in any one suit, for reasons which are clearly obvious. He could not wait until the entire dump should have become exhausted, because it might be that by that time a substantial part of his claim might be barred by the statute of limitations. Furthermore, no plaintiff is required to wait after a breach of contract has occurred, and unless one action can be brought in which adequate relief could be obtained equity will always take jurisdiction. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; 16 Cyc. 60, 63.

Many authorities upon this general proposition might be cited;

but the court is satisfied, as argued by counsel for plaintiff, that this question was settled by this court, Judge Archbald presiding, in the initial stage of the case upon demurrer. In his opinion he said:

"As to the further ground of demurrer, that the plaintiff has a complete remedy at law by action for damages, it is sufficient to say that the bill seeks the specific performance of the defendant's agreement, to deliver coal from their washery at the Holden Culm Dump, which they undertook to do in return for the money advanced by the plaintiff to make the necessary developments. For this it is evident that damages for a breach of the contract would not be at all adequate. Nor is this disturbed because the plaintiff, in the same connection, asks damages for the coal so far diverted, and calls for a discovery of the amount as the basis for determining them. Equity, having taken jurisdiction, will dispose, if possible, of the whole of the controversy, and the plaintiff is entitled to be made good for the commissions which he has lost as a part of it."

[4] Moreover, it is now, in any event, too late to take objection to the jurisdiction of the court. As stated by Justice Brewer in Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021), adopting the language in earlier cases:

"* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that, 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"

Attention is also called to the language of the same learned justice in Hollins v. Brierfield Coal & Coke Co., 160 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113.

Regarding the remedy provided for in the contract, it is sufficient to note that, while it might afford redress for the failure to repay the plaintiff's loan, it gives none for the loss of his commissions. Furthermore, this court, having obtained jurisdiction, will retain such for the purpose of administering complete relief and doing justice with respect to the subject-matter.

It is therefore adjudged and decreed:

First. That the defendant be ordered and directed to specifically perform its contract with the plaintiff by delivering to the plaintiff from the date of this decree the output of its washery.

Second. That the defendant be enjoined by perpetual injunction from delivering any of the output of the washery and the Holden Dump to any one other than the plaintiff.

Third. That the defendant be and it is hereby required to account to the plaintiff for all moneys advanced by the plaintiff to it under the contract, which has not already been repaid, together with interest thereon, and that the defendant be required to account to the plaintiff for all damages sustained by the plaintiff by reason of the defendant's breach of contract.

Fourth. That J. Fred Schaffer, Esq., be appointed a special examiner to state an account between the parties and report the same to the court.

In re HILL.

(District Court, D. Vermont. September 30, 1911.)

1. HUSBAND AND WIFE (§ 113*)—PROPERTY OF WIFE—STATUTES.
P. S. Vt. 3040, provides that all personal property and rights of action acquired by a woman before or during coverture, except by gift from her husband, shall be held to her sole and separate use, and neither the wife's separate property nor the income therefrom shall be liable to the disposition of her husband or liable for his debts, but that nothing contained therein shall authorize a claim by either husband or wife against the other for personal services. *Held* that, under such act, so long as the wife keeps her property separate from that of her husband, it is her separate property.
[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 113.*]

2. HUSBAND AND WIFE (§ 205*)—CONTRACTS INTER SE—LOAN BY WIFE TO HUSBAND.
P. S. Vt. 3037, provides that a married woman may contract with any person other than her husband, and bind herself and her separate property in the same manner as if she were unmarried, and may sue and be sued as to all such contracts made by her, either before or during coverture, without her husband being joined in the action as plaintiff or defendant. *Held*, that such section does not recognize contractual relations between husband and wife, and hence a wife cannot maintain a suit at law against her husband for money loaned to him; a contract between them being void at law.
[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744, 748–755; Dec. Dig. § 205.*]

3. HUSBAND AND WIFE (§ 13*)—PROPERTY OF WIFE—RIGHTS OF HUSBAND—CREDITORS' RIGHTS.
The rights of a husband to the property of his wife are purely marital, and, unless voluntarily exercised by the husband, cannot be enforced against his will by his creditor.
[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 68–70; Dec. Dig. § 13.*]

4. HUSBAND AND WIFE (§ 39*)—CONTRACTS INTER SE—ENFORCEMENT IN EQUITY.
Where a trustee could act for the wife in maintaining her sole and separate estate, courts of equity will enforce her contracts with every one, including her husband.
[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 220, 221; Dec. Dig. § 39.*]

5. BANKRUPTCY (§ 314*)—MONEY LOANED BY WIFE—CLAIM IN BANKRUPTCY.
Where a wife having a separate estate obtained by inheritance furnished money to her husband with which to pay a pressing matured obligation, and for the amount so advanced took the husband's note which came into the hands of her administrator, such note was properly allowed against the husband's estate in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

In the matter of bankruptcy proceedings of Newell J. Hill. On petition of the Town of Bristol, a creditor, to review the decision of the referee allowing a claim of the estate of the bankrupt's wife for money alleged to have been loaned to the bankrupt. Affirmed.

Murray Bourne, for Town of Bristol, petitioning creditor.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MARTIN, District Judge. Petition of the town of Bristol, a creditor, for a review of the decision of the referee allowing claim of the estate of the bankrupt's wife.

The parties waive hearing and submit no briefs. The facts found by the referee are not controverted, and are as follows:

"Ada M. Hill was the wife of the said Newell J. Hill, bankrupt, and died during the winter of 1909–10. In the course of her married life she had received gifts of property from her father and grandfather, and inherited from them at their decease. This property consisted in large part of money which she deposited in her own name in a local bank. During a large part of her married life she had thus maintained an account at said bank, and had been accustomed to draw upon it by check signed by herself. On the 19th day of May, A. D. 1909, her husband, the said bankrupt, had an indebtedness of $500 to one E. W. Varney, mature, and was unable to meet the obligation. The wife drew her check for that amount in favor of said Varney, and on the same date the said bankrupt gave his note for $500 to her. The administrator of the estate of Ada M. Hill—W. N. Hill by name and a brother of the bankrupt—now presents this claim for $500 of borrowed money and interest thereon, and offers the aforesaid note in proof of the debt."

This claim was allowed by the referee on the ground that in Vermont a married woman may possess a sole and separate estate.

[1] Section 3040, Pub. St. Vt., provides:

"All personal property and rights of action acquired by a woman before coverture or during coverture, except by gift from her husband, shall be held to her sole and separate use, and neither the wife's separate property nor the rents, issues, income and products of the same shall be liable to the disposition of her husband or liable for his debts; but nothing herein contained shall authorize a claim by either husband or wife against the other for personal services."

Under this statute, so long as the wife keeps her property separate from that of her husband, it shall be held to be hers.

[2] Section 3037 of the Vermont Statutes provides:

"A married woman may make contracts with any person other than her husband, and bind herself and her separate property, in the same manner as if she were unmarried, and may sue and be sued as to all such contracts made by her, either before or during coverture, without her husband being joined in the action as plaintiff or defendant, and execution may issue against her, and be levied on her sole and separate goods, chattels and estate."

It will be readily observed that this statute does not recognize contractual relations between husband and wife. Therefore the wife cannot maintain a suit at law against her husband for money loaned to him, as a contract between them would be void in law. In some states it has been held that, where such contracts are void in law, they should of right be void in equity, notably Massachusetts. In Re Blandin, Fed. Cas. No. 1,527, Judge John Lowell held that a claim like the one at bar could be proved in bankruptcy. He contended that equitable debts are within the scope of the bankruptcy act. This case has been cited with approval by the Supreme Court of the United States. Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276. It has been frequently cited by district and circuit judges in the federal courts. But in Re Talbot (D. C.) 7 Am. Bankr. Rep. 29, 110 Fed. 924, Judge Francis C. Lowell disallowed in bankruptcy the claim of a wife against

her husband for a loan of money to him on the ground that the state courts of Massachusetts have held by a series of decisions that where money is loaned by a wife to her husband, or, conversely, there is no remedy either in law or in equity, that in Massachusetts contracts between husband and wife are void, and that a contract invalid in law has no foundation for equitable relief. "When contracts are themselves not authorized, validity cannot be imparted to them by affording a remedy for a breach of them through the medium of a court of equity." In re Talbot, supra.

The national bankruptcy court is a court of equity as well as of law. As to this the citation of authorities is unnecessary. Claims like this rest upon the state statute and the construction given it by the state courts. In many states, including Vermont, the courts hold, under statutes similar to the statutes of Vermont above quoted, that a loan of money or of chattels by a wife to her husband, not intended as a gift, may be enforced against the husband in courts of equity. In Barron v. Barron, 24 Vt. 375, Judge Isham, for the Supreme Court, carefully discusses this question. He recognized at common law the right of a husband to reduce the wife's property to his possession, that he may transfer or dispose of it, and upon his bankruptcy or insolvency it would vest in his assignees for the benefit of his creditors, and the wife, whatever may have been her fortune, may be left destitute of means of subsistence, but he says:

"To remedy this deficiency in the common law, courts of equity from the earliest period have exercised their power by giving to the wife a right to a provision out of her own property which has become termed the equity of the wife."

And, since the case of Lady Elibank v. Montoliere, 5 Ves. 737, the wife has been permitted to assert her claim in equity.

[3] Courts of equity have repeatedly held that the rights of a husband to the property of the wife are purely marital, and, unless those rights are voluntarily exercised by the husband, a creditor cannot enforce them for him or against his will. The husband at common law has only a qualified right to the property of the wife, and that right must be asserted by the husband, otherwise the court of equity, in cases of insolvency of the husband, will preserve the wife's estate for and in her behalf and in behalf of her heirs. Courts of chancery have for ages admitted in evidence agreements between husband and wife relating to the husband's acts of possession, and in some instances they have construed such acts as having created a trusteeship on his part. See Porter v. Bank of Rutland, 19 Vt. 410; 2 Kent, 146. In Clinton v. Hooper, 1 Ves. 186, the court held that it appearing from the evidence that the wife had claimed that her husband was debtor, and he having recognized himself as such by proposing to pay her, she was, on the death of her husband, a creditor.

There are many cases in which injunctions have been granted restraining the husband from enforcing his legal remedies to obtain the wife's property or to reduce the same to his possession, and this was regarded, under the common law, as a salutary rule in cases of insolvency of the husband. Where the wife has retained her equity in her

own estate by not permitting it to be appropriated by her husband, courts of equity will enforce those rights against the heirs of the husband and courts of bankruptcy against the creditors. Even if the husband appropriated the property of his wife, but under circumstances showing that it was to be repaid to her, then she will stand in equity as a creditor of the husband, and her claim will be enforced as against his executors. This principle of the common law that the legal existence of the wife is merged in that of the husband, and therefore they can make no contracts between themselves, gave rise to the interposition of trustees to act for and in behalf of a married woman in the preservation of her separate estate, and courts of equity for more than a hundred years have disregarded the old rule, and have treated the husband and wife as distinct persons, capable of contracting with each other, and of having separate estates. Story's Equity, § 1368. The statute of Vermont provides for separate estates, and the courts will look into the understanding and agreements between husband and wife as to the preservation of the separate estate of the wife.

[4] It is now practically settled in most states of the Union that, where a trustee could act for the wife in maintaining her sole and separate estate, courts of equity will enforce her agreements and contracts with anybody and everybody, including the husband. Justice Story (2 Story's Equity, § 1372) states:

"That if the husband should, for good reasons, after marriage, contract with his wife that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in equity."

Chancellor Kent, in 2 Kent, 147, 154, states:

"That a wife may contract with her husband, even by parol, after marriage, for a transfer of property from him, to her, or to trustees for her, provided it be for a bona fide and valuable consideration."

In Pinney et al. v. Fellows, 15 Vt. 536, the court held that upon the receipt of property by the husband from the wife, even after marriage, if for suitable reasons he entered into an agreement with the wife that she should possess and enjoy it separately from him, equity will uphold such postnuptial agreement in cases in which the claims of creditors will not be prejudiced by so doing.

In the case at bar the rights of the creditors are not prejudiced at all. The loan that the wife made to the husband was used in paying another debt, which other debt would have been provable against this estate had she not furnished the money to pay it.

[5] When it is clearly established that the wife possesses an estate acquired by gift, grant, or inheritance, and that it was understood between her and her husband that it should be kept as her separate and sole estate, though she may loan it to her husband, if the proof of the contract of the loan is untainted with fraud and clearly established, it is a provable claim against the bankrupt's estate.

In the case at bar it clearly appears that both the husband and wife recognized her estate as sole and separate from that of her husband. When she paid a debt for him and took his note therefor, the note is evidence of the fact that there was no intent on the part of either the husband or wife that that sum of money should be reduced to his pos-

session, or be separated from her estate and become a part of his estate. Under the equity powers of the state courts she could have enforced this claim against her husband had he been solvent. When his estate passed into the hands of a trustee in bankruptcy, she could enforce it against that trustee. Her administrator has the same power, acting for and in behalf of her heirs, whoever they may be. In re Foss (C. C.) 17 Am. Bankr. Rep. 439, 147 Fed. 790; Jackson v. Jackson, 91 U. S. 122, 23 L. Ed. 258; Smithsonian Institution v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

The order of the referee is affirmed.

VAN BRIMMER v. TEXAS & P. RY. CO.

(Circuit Court. E. D. Texas, Jefferson Division. October 2, 1911.)

1. COMMERCE (§ 27*)—INJURIES TO SERVANT—RAILROAD EMPLOYÉ—EMPLOYER'S LIABILITY ACT.

Where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of the train carrying both interstate and intrastate freight, his injury did not occur while he was engaged in interstate commerce, and therefore was not within Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), under the rule that, if the employé when injured is engaged wholly in the performance of service in furtherance of intrastate business, the act does not apply.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*

What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. v. Jones, 48 C. C. A. 232.]

2. REMOVAL OF CAUSES (§ 19*)—GROUNDS—EMPLOYER'S LIABILITY ACT—AMENDMENT.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), as amended by Act April 5, 1910, c. 143, 36 Stat. 291, providing that no case arising under the act and brought in the state court of competent jurisdiction shall be removed to any court of the United States, only provides that, where a cause of action arises under the employer's liability act, the suit may not, for that reason, be removed, and hence does not affect the right of removal in cases where the right exists by some other law.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 19.*]

At Law. Action by T. Van Brimmer against the Texas & Pacific Railway Company. Motion to remand to state court. Overruled.

S. P. Jones, for plaintiff.

F. H. Prendergast, for defendant.

RUSSELL, District Judge. This cause is before me on a motion to remand to the state court. The plaintiff sues for damages on account of personal injuries alleged to have been received by him while in the service of the defendant as an employé, in December, 1910. He filed suit against the defendant in the district court of Harrison county,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Tex., in February, 1911. The defendant in due time filed its petition and bond for removal upon the ground that it had the right of removal because it is a corporation chartered by an act of Congress. Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319.

The state court accepted the bond for removal and ordered the suit removed to the Circuit Court of the United States for the Eastern District of Texas. The plaintiff has filed a motion to remand the cause, alleging that he was engaged in interstate commerce when he was injured, and that he has brought his suit for those injuries under the act of Congress of April 22, 1908, and the amendment of April 5, 1910, known as the "Employer's Liability Act."

It is not disputed that the defendant has the right to remove the case to the United States court unless that right of removal was taken away by the sixth section of the act of April 5, 1910.

It is agreed that the injuries of which the plaintiff complains were received under the following circumstances: Plaintiff was a brakeman in the employ of the defendant company. On the occasion of his injuries he was engaged in the discharge of his duties as such brakeman on a freight train which was going from Big Springs, Tex., to El Paso, Tex. The train contained many cars, which were filled with merchandise from other states and were being so used to transport interstate shipments of freight. In the train was also a car filled with merchandise loaded at Dallas, Tex., and destined for Etholine, Tex.; the shipment being wholly intrastate in its character—that is, the shipment in the case of this car began and was to end within the state of Texas. When the train reached Etholine, the employés of the defendant, including the plaintiff, undertook to "set out" the said car destined for that place. In performing this work the engine and several cars, including the one destined for Etholine, were cut loose from the train, which was left standing on the main line, and the plaintiff and his coemployés proceeded to put the Etholine car on a side track. The conductor of the train ordered the train crew to make a "flying switch" and in this way send the car on the side track at Etholine. The part of this service which the plaintiff was to perform was to ride on the car, which was to be side-tracked at Etholine, and while the train was in rapid motion to cut loose that car from the others. Immediately after this car was cut loose by the plaintiff, the engine and remaining cars were to be suddenly decreased in speed so as to produce the effect of sending the Etholine car upon one track at rapid speed, and then before the engine and balance of the cars could reach the switch it would be thrown by the switchman so as to send the engine and other cars upon another track. In attempting to perform the work in this manner, the engineer suddenly stopped his engine before the Etholine car was cut loose, and the plaintiff was thereby jerked off of that car, thrown to the ground, and injured.

The negligence relied upon by the plaintiff was the act of the conductor in ordering the "flying switch" and of the engineer in stopping the engine too suddenly.

The decision of the motion to remand rests upon two propositions: Was the plaintiff at the time of the injury engaged in an act of furtherance of interstate commerce; and, second, does the act of April 5, 1910, *deprive every* defendant of the right to remove a suit which has been filed against him in the state court where the suit by the plaintiff is based upon the employer's liability act. I will take up these two propositions in the order in which I have stated them.

[1] The original employer's liability act was the Act of June 11, 1906, c. 3073, 34 Stat. 232 (U. S. Comp. St. Supp. 1909, p. 1148). That act by its terms embraced "every common carrier engaged in traffic or commerce in the District of Columbia, or in any territory of the United States or between the several states," etc. The validity of the act was called in question upon the ground, among others, that it attempted to extend the regulating power of Congress to every one engaged in interstate commerce, even though a portion of his business might relate to intrastate commerce exclusively. The question reached the Supreme Court, and the act was held by that court to be unconstitutional. Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The present Chief Justice delivered the opinion of the court, and, while other objections to the law are discussed, it was held that the act was addressed to all common carriers engaged in interstate commerce without limitation or restriction as to the nature of the business at the time of the injury, and so, necessarily, includes subjects wholly outside of the power of Congress under the commerce clause of the Constitution. The court said:

"From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states,' etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which persons may do; that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce."

This opinion was delivered on June 6, 1908. Thereupon Congress cured the defects in the former law, suggested by the opinion, by passing the act of April 22, 1908. This latter act applies by its terms to "every common carrier by railroad *while engaging* in commerce between any of the several states," etc. The force of the logic in the opinion in the Employer's Liability Cases was recognized by the legis-

lative branch of the government when the present law, the act of 1908, was passed. That a railroad company may be engaged both in interstate commerce and in intrastate commerce is self-evident. As to whether a cause of action for an injury to an employé arises under the employer's liability act depends upon the circumstances existing at the time of the injury. If at the time of the injury, the employé was performing some service for the company in furtherance of its interstate commerce business, then the rules of law declared in the act of 1908, and its amendment, will apply. Upon the other hand, if the employé, when injured, is engaged wholly in the performance of a service in furtherance of the intrastate business of the railroad company, then the act of Congress does not apply, because to give it application in such case would be extending the power of the federal government over matters exclusively within the state jurisdiction and control.

Turning to the facts in the case at bar: The plaintiff was a brakeman on a train of the defendant which contained cars being used for interstate shipments of freight. In the train was a car which was filled with merchandise destined for a point within the state. The shipment of this car originated in Texas, and was to end in that state. When the plaintiff was injured, he was engaged in the work of completing the transportation of that intrastate car. He, with others, was doing the final work of landing that car at its destination and was doing no act towards furthering the interstate business of the railroad company. Neither the railroad company nor the plaintiff nor any of his fellow employés were, at that time, "*engaging* in commerce between any of the several states"; but they were "engaging" in an act in furtherance of the purely domestic and intrastate commerce of the defendant. That being so, the provisions of the act of Congress, known as the "employer's liability act" do not apply, and section 6 of that act, as amended, does not prohibit the removal of this case.

[2] Upon the other point, it is contended by the plaintiff that the amendment to the employer's liability act of date April 5, 1910, prohibits the removal of any suit arising under the act, which has been instituted in a state court of competent jurisdiction. It is not denied that the defendant in this case would have the right to remove the cause to the United States court if the amendment referred to had not been passed, but it is contended that that amendment took away from every defendant the right of removal where the cause of action arises under the employer's liability act.

The language of the amendment relied upon by the plaintiff is as follows:

> "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Was it the purpose of Congress by this statute to deprive a litigant, who had a clear right to take his cause to the United States court, of such right, because the cause of action arose under the employer's liability act? Or was it the purpose of Congress to provide that the enactment of that statute, the employer's liability act, should not be

made the occasion for extending the federal judicial power over a field which it could not previously enter?

The Constitution declares that the judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States. The passage of the act of April 22, 1908, created a right of action, where it did not exist before, in favor of injured employés of common carriers by railroad. The right of action depending upon an act of Congress was, for that reason, a case arising under a law of the United States and of which the federal courts can take jurisdiction. The plaintiff in this class of cases could bring his suit in the United States court. If the plaintiff brought suit in the state court, the defendant could remove the suit to the federal court because it was a case arising under a law of the United States.

The result was that the act tremendously increased the business of the United States courts. Complaints came up to Congress from all over the country that the employer's liability act was being made the excuse for taking to the federal courts a large volume of litigation which ought to be left in the state courts, and that it was greatly extending the power of Congress and diminishing the legislative authority of the states. These suggestions are mentioned in the opinion of the court in the Employer's Liability Cases (see page 491 of 207 U. S., 28 Sup. Ct. 141, 52 L. Ed. 297), but are dismissed by the court as having to do only with the policy or expediency of the law, and not with its constitutionality, and therefore should be addressed to the legislative and not to the judicial department of the government. Finally Congress did act and passed the amendment which I have quoted to section 6 of the act.

I am unable to bring myself to the conclusion that the amendment deprives a litigant of the right to remove his case to the federal court who had that right independent of the employer's liability act. I hold that the amendment in question does no more than to provide that, where a cause of action arises under the employer's liability act, the suit should not, for that reason, be removed, but that it does not affect the right of removal in cases where the right exists by virtue of some other law. Cases of federal jurisdiction are divided into two classes: (1) Where the jurisdiction is dependent on the character of the parties, as, for instance, citizens of different states, corporations with federal charters, citizens who on account of prejudice or local influence cannot obtain justice in the state courts, etc. (2) Where the jurisdiction is dependent on the subject-matter or character of the suit, as where the federal Constitution or laws are involved. Cases under the employer's liability act fell within the second class, and that constituted the reason why they might be removed to the federal court until the passage of the amendment of April 5, 1910. But can it be supposed that, in a case where a defendant could not obtain justice in the state courts on account of prejudice or local influence, Congress intended to deprive such defendant of the right to take the case to the United States court simply because the cause of action arose under the employer's liability act? The purpose of the provisions of the law allowing removals in cases of prejudice and local influence was

to insure justice and fair trials in court to all citizens of the United States, and these objects would be defeated in every case of prejudice or local influence, where the cause of action arose under the act of April 22, 1908, as amended, if the amendment in question is given the effect contended for by the plaintiff.

The law provides that the courts of the United States shall have jurisdiction over controversies between citizens of different states, and that in this class of cases the right of removal exists where the suit has been instituted in the state court. The purposes intended to be accomplished by this legislation are too patent to need mention, and yet, if the amendment of April 5, 1910, be given the construction urged in argument by the plaintiff, even in this class of cases, the right of removal would be taken away where the cause of action arose under the employer's liability act. It is not conceivable that Congress intended to confer any such exceptional privilege upon the one class of citizens mentioned in that act, to the exclusion of all other citizens.

I think the more rational conclusion is that Congress, having created a liability by the act of April 22, 1908, which did not exist before, and seeing that the volume of litigation growing out of that act which reached the federal courts was very large, intended only to say that the act alone should not give a defendant the right of removal of a cause of action brought originally in the state court; and that there was no intention on the part of Congress to destroy the right of removal which a defendant might have by virtue of some other provision of law.

I overrule the motion to remand.

CROWE v. BAUMANN.

(District Court, N. D. New York. October 15, 1911.)

1. BANKRUPTCY (§ 139*)—RIGHTS OF TRUSTEE—INTEREST IN LEASE.

A bankrupt's interest in a lease of real property passed to the trustee as of the date of adjudication as provided by Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 139.*]

2. BANKRUPTCY (§ 302*)—WITHHOLDING REAL ESTATE—ACTION BY TRUSTEE—COMPLAINT.

New York Real Property Law (Consol. Laws 1909, c. 50) § 242, provides that an estate or interest in real property cannot be created, granted, or assigned except by an instrument in writing. *Held*, that where a complaint by a lessee's trustee in bankruptcy alleged that the bankrupt during the term assigned his lease, which then had several years to run, the bankrupt reserving however the right of occupancy, but that, on bankruptcy intervening, defendant wrongfully took possession and refused to surrender same on being tendered the rent due, for which plaintiff sought to recover detention damages, the complaint was not demurrable for failure to allege that the assignment and reservation were in writing, since, if they were not, they would be void and the bankrupt would be still entitled to possession.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. BANKRUPTCY (§ 284*)—REAL ESTATE—POSSESSION—RIGHT OF TRUSTEE—TENDER.

Where defendant wrongfully retained possession of certain real estate to which the bankrupt's trustee was entitled on demand, under a reservation in an assignment of a lease to defendant, the bankrupt's trustee was not bound to pay back rent as a condition of demanding and receiving possession, nor was he bound to pay rent except on receiving possession, and hence, having tendered the rent due on demanding possession and being refused, was not bound to keep the tender good or pay the money into court as a condition to his right to maintain a suit for damages for wrongful detention.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 284.*]

Action by George J. H. Crowe, as trustee in bankruptcy of Pappas & Karahall, against Frederick J. Baumann. On demurrer to complaint. Overruled.

H. J. Hennessey, for plaintiff.
Olmsted & Ashley, for defendant.

RAY, District Judge. On or about January 20, 1910, Pappas & Karahall, as copartners and as individuals, filed their petition in voluntary bankruptcy and were adjudicated bankrupts accordingly. February 3, 1910, the plaintiff, Crowe, was duly appointed trustee of the estates of said bankrupts and duly qualified. January 4, 1906, James P. McNamara leased the store and certain premises at No. 65 Court street, Binghamton, N. Y., to Pappas & Karahall for a term of years ending December 31, 1920. This lease was in writing, and Pappas & Karahall entered into possession under it and remained in actual possession of the premises until January 20, 1910. In the meantime and on the 2d day of July, 1909, Pappas & Karahall, says the complaint, "did sell, assign, and convey to the defendant, Frederick J. Baumann, said lease, reserving however to the said firm of Pappas & Karahall the use and occupancy of the premises covered by said lease for the entire term of said lease, to wit, until December 31, 1920; that, as a part of the transaction of assignment of said lease and of reserving the use and occupancy of said premises, said firm of Pappas & Karahall agreed to pay to the landlord until January 1, 1910, the rent reserved in and by said lease, and that commencing January 1, 1910, and continuing thereafter during the term of said lease, they, the said firm of Pappas & Karahall, would pay to the said Baumann the monthly rent for the said premises covered by the said lease of $225."

The complaint does not allege that this assignment of the lease and agreement was in writing. After the assignment of the lease, Pappas & Karahall continued to occupy the premises until January 20, 1910, on which day they filed said petition in bankruptcy. They also paid the rent to the landlord down to January 1, 1910. The complaint then alleges that on or about January 20, 1910, which is the same day the petition in bankruptcy was filed, "the said defendant herein, without any legal process therefor, did take possession of the said premises covered by said lease and has ever since occupied said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

premises." The complaint then alleges that the said right reserved by Pappas & Karahall to occupy the said premises was an asset of the bankrupt estate and passed to the trustee and to which he became entitled as of the date of adjudication, and that April 1, 1910, he tendered the rent for the month of January, 1910, $225, and elected to hold and occupy the premises until the expiration of said lease and notified the defendant of such election and demanded possession of the premises, which was refused by the defendant. He also alleges that the value of the use and occupation of such premises is $291.66 per month, or $7,500 down to December 31, 1920; also, that the defendant is indebted to plaintiff by lease of the premises in the sum of $7,500, etc., for which sum he demands judgment.

The defendant demurs to the complaint on the grounds it appears on the face of the complaint that this court has no jurisdiction of the alleged cause of action, and that the facts stated, conceded to be true for the purpose of the demurrer, are insufficient to constitute a cause of action. The defendant contends that the complaint fails to state that the assignment of the lease and reservation of the use and occupation of the premises were in writing, and therefore no valid assignment is shown. But, if no valid assignment to Baumann is shown, the bankrupt firm owned the lease and the right to possession under it on paying the rent to the lessor, McNamara, and Baumann had no right to take possession, and he is an interloper and a trespasser.

If the assignment was in writing and the reservation was a part of this paper, then Baumann had no right to take possession if his rent was paid. There is no direct allegation that he did not have the consent of Pappas & Karahall to take possession, or that he took the possession forcibly or unlawfully. There is no allegation the defendant did have consent to take possession of the premises. The theory of the complaint is that the right to the possession and use of these premises belonged to Pappas & Karahall, the bankrupt firm, and passed to and vested in the trustee in bankruptcy and is being unlawfully and wrongfully withheld by defendant and that he is liable for the value thereof.

[1] By section 70a of the bankruptcy act the trustee became vested with whatever right under this lease and agreement Pappas & Karahall had on the day of the adjudication. By section 18g adjudication in cases of voluntary bankruptcy is to be concurrent with the filing of the petition and must operate as of that day. Hence if the petition was filed January 20, 1910, the adjudication must in legal effect date the same day, and the title of the trustee relates back to that day. The defendant says it does not appear that the petition was filed on that day before the defendant took possession, and hence possession is not in legal effect shown to have been taken from the trustee, and that the defendant is in the position of an adverse claimant, and this court has no jurisdiction. The plaintiff says it does not appear that the plaintiff is an adverse claimant of title, and if he is he must make the claim by answer, and that in any event this court may determine whether or not defendant occupies that position; also, that the law knows no parts of days, and that it is immaterial whether the

defendant unlawfully went into the possession of these premises on the day the petition was filed two hours prior or two hours subsequent to the filing of the petition. The contention is that if a person, A., owns a horse and files a petition in voluntary bankruptcy, and on the same day B., without authority of law, takes possession of the horse, the title of the trustee relates back to and includes that day, and the taking of the horse by B. is to be regarded as a taking from the trustee. The defendant also says that in order to recover for the use, etc., of such premises, the plaintiff must have tendered to the defendant the rent and must have kept his tender good and must have paid same into court, and that a mere allegation of tender is not sufficient; also, that there must have been a tender of rent down to the time the action was commenced, notwithstanding the fact that the defendant has had the possession, use, and occupation from and since January 20, 1910.

The idea sought to be conveyed by the complaint is that the defendant took possession of this property without a consideration, and not by virtue of any arrangement with the bankrupt, and not before but after the petition was filed and the adjudication in contemplation of law made, and that he took such possession from the trustee. This is the theory of the complaint.

The question may be involved whether a person holding a lease for a term of years can assign same in writing and reserve the possession, use, and occupation for the entire term by mere parol agreement. The question may be in the case, but is not presented by this complaint. The allegation is that the lease was assigned, and that, as a part of the same agreement, the use, etc., of the premises, on payment of certain rents, was reserved to the assignor.

If the allegation of assignment is sufficient, then the allegation as to the reservation is sufficient. If the assignment of a lease must be in writing, and a reservation to the assignor of use and occupation under it for a larger period than one year must be in writing, and the allegation of the complaint averring such assignment must state that the assignment was in writing, then this complaint is insufficient to show any assignment, and the lease, and consequently the right to the use, etc., of the premises, passed to the trustee.

[2] By section 242 of real property law (section 242, c. 52, Laws N. Y. 1909; 4 Consol. Laws, p. 3417) it is provided that:

"An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power over or concerning real property or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

As the complaint alleges that the real property was leased in writing to the bankrupt for a term of years, if we construe the complaint as insufficient to allege a valid assignment of the lease to the defendant, we must construe it as insufficient to allege any transfer of any interest in the property to him, and the result is that the complaint alleges that on the day the petition in bankruptcy was filed the bank-

rupt owned, by virtue of the lease, the right to the use and occupation of these premises for the term of years mentioned, and the complaint is good so far as that aspect of the case is concerned. And, if we construe the complaint as sufficient to allege a valid transfer of the lease to the defendant, then it is sufficient to allege a valid reservation of the use, etc., in the bankrupt on compliance with the terms of the reservation.

We then come to the question whether the trustee was liable for the whole rent; that is, rent after the defendant took possession. I hold that it was not necessary under the facts alleged for the trustee to tender rent for any time subsequent to the month of January, 1910, if at all. The defendant could not take possession without the consent of the trustee, hold possession, and ask or collect rent for the time he held such possession. He has never offered or expressed a willingness to surrender on any terms whatever. The trustee sues for the value of what the defendant wrongfully took, withheld, and still retains from him.

Is the allegation of tender sufficient? There is no allegation the tender has been kept good or paid into court. The rent for January was offered, tendered, and rejected. It was a debt owing by the bankrupt to the defendant, assuming there had been a valid assignment of the lease to him.

[3] The trustee was entitled to the possession of these premises and was liable for the rent if he had and retained possession, but under the allegations of the complaint was under no obligation to pay any back rent as a condition of demanding and receiving possession. On receiving possession the trustee was bound to pay, but he was not bound to pay as a condition of receiving the possession. When a person is bound to pay only on receiving a conveyance, and he tenders payment and demands his conveyance, and the conveyance is refused, he need not pay into court to keep his tender good and stop the running of interest. Wood v. Rabe, 52 N. Y. Super. Ct. 479; Baylies, Code Pleading, 249. A tender may be made for the purpose of extinguishing the lien of a mortgage. An offer to pay the amount due on a mortgage either at the law day or at any time thereafter before foreclosure will extinguish the security, even though the tender is not kept good and the money is not brought into court. And a tender of the amount due on a mortgage before suit extinguishes the equitable cause of action of the mortgagee and leaves him only a remedy at law upon the bond or covenant to pay. The same principle applies as to the tender to a sheriff of the full amount due on an execution. In these and in all similar cases where the effect of a tender is to destroy the lien it is not necessary to keep the tender good or to pay the money into court. Tiffany v. St. John, 65 N. Y. 314, 22 Am. Rep. 612; Cass v. Higenbotham, 100 N. Y. 248, 3 N. E. 189; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Frost v. Yonkers Savings Bank, 70 N. Y. 553, 558, 26 Am. Rep. 627; Breunich v. Weselman, 100 N. Y. 609, 2 N. E. 385; Halpin v. Phenix Ins. Co., 118 N. Y. 165, 175–178, 23 N. E. 482; Werner et al. v. Tuch, 127 N. Y. 217, 222, 27 N. E. 845, 24 Am. St. Rep. 443.

Here, under the allegations of the complaint, the defendant wrongfully took possession of premises, the possession of which by operation of law then belonged to and was in the trustee in bankruptcy, an officer of this court or of the bankruptcy court. The only excuse of the defendant for such act was that the bankrupt owed him the rent for the month of January, 1910. This the trustee tendered, and this the defendant refused. The rental value of the premises was and is much more than the bankrupt was to pay. The plaintiff, an officer of the court deprived of the possession of the premises by the unlawful act of the defendant, was under no legal obligation to do anything except take steps to regain such possession or sue for the damages sustained. He evidenced his good faith and purpose to assume the obligation of the bankrupt by offering to pay all the back rent.

It must be understood that I am now assuming the allegations of the complaint to be true, and that either there never was a valid transfer of the lease to the defendant—that is, a written one—or that there was one and a reservation as stated in the complaint made in writing as a part of such assignment, a limitation thereon. If it turns out on the trial that there was an assignment of the lease in writing and no written reservation in the assignment or by a paper outside, as now advised I do not see how the plaintiff can recover. If the entire term was assigned or conveyed to the defendant, how could he by a mere verbal agreement convey back to the bankrupt an interest in the premises, the right to the use and occupation thereof, for more than one year? This is not an action to set aside what was done by way of assigning the lease as a fraud on creditors. It is well to say, in answer to certain suggestions made by the defendant in his reply brief to the effect that there can be no vesting of title to property in the trustee, except as of the day of adjudication, that this is true, but there may be a wide difference between voluntary and involuntary cases. In voluntary cases adjudication is based on and contemporaneous with the filing of a valid petition, while in involuntary cases there can be no adjudication until default in answer or the determination of the issues if any are framed. In voluntary cases the judge must make the adjudication on the filing of the petition, and hence in voluntary cases the title of the trustee always relates back to that day. If there is any question whether the assignment of the lease was in writing and whether the reservation referred to was in writing, the defendant can have the complaint made more specific in these respects. There is no necessity for the delay and expense of a trial if the whole matter can be disposed of on a demurrer to the complaint made more specific.

Demurrer overruled, with leave to answer in 20 days or to move for more specific allegations in the complaint.

UNITED STATES v. EXPLORATION CO., Limited, et al.

(Circuit Court, D. Colorado. October 13, 1911.)

No. 5,663.

PUBLIC LANDS (§ 120*)—SUITS TO CANCEL PATENTS—LIMITATION—CONSTRUCTION OF STATUTE.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), providing that suits by the United States to annul patents to lands thereafter issued shall only be brought within six years after the date of the issuance of such patents, affects not only the remedy, but the rights of parties, by making a patent conclusive as a transfer of title after the expiration of six years, although it may have been voidable, or even void, and its effect cannot be avoided by allegations of fraud in the bill, and that the fraud was concealed until after the lapse of six years.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

In Equity. Suit by the United States against the Exploration Company, Limited, and others. On demurrer to bill. Demurrer sustained.

B. D. Townsend, Spl. Asst. to Atty. Gen., for the United States.
Vaile, McAllister & Vaile, for defendants.

LEWIS, District Judge. The bill was filed on March 3rd, 1911. Its single purpose is to obtain a decree vacating and annulling nine patents issued by complainants to nine different persons, conveying in the aggregate eleven hundred and twenty (1,120) acres of coal lands theretofore belonging to the United States. Six of these patents, as shown by the bill, bear date October 16th, 1902, and three of them September 6th, 1902.

The bill charges that the Exploration Company, an English corporation, employed persons having statutory qualifications to make entries, to enter the lands in question for its use and benefit; that it paid all expenses and furnished said persons with moneys to pay the government purchase price for the lands; that the lands were selected by the Exploration Company; that the persons so employed acted solely for it, and when they received patents for the lands turned the same over to the company; that there was an agreement between the company and the persons so employed to fraudulently conceal, and in keeping with said agreement they have concealed, the fact that said persons were acting, and did act, in making their respective entries, solely for the use and benefit of the company; that by said agreement said facts were to be, and were, fraudulently concealed until the time within which suit might be brought by complainants to cancel said entries and set aside said patents, as fixed by statute, had expired, and that deeds which said entrymen agreed to execute, and did execute, conveying the lands so entered by them to said company, or to some one else at its direction, for its use and benefit, were to be, and were, fraudulently withheld from record.

It is charged that the several entrymen each conveyed the lands entered by him to defendant Alexander Burrell for the use and benefit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Exploration Company, that Burrell then conveyed the lands to Albert Smith for the company's use and benefit and Smith to defendant Philip L. Foster, who now holds the title in trust for the Exploration Company, and that all of these conveyances were so made at the direction of the Exploration Company in furtherance of the original fraudulent and unlawful agreement and conspiracy between the company and said entrymen by which it was to acquire complainants' said coal lands.

It is then alleged that the defendants and said entrymen successfully covered up and concealed their said fraudulent purposes and practices, and that knowledge thereof could not be obtained by complainants and no information in that regard came to them until in April, 1909.

It alleges that the defendants ought to be and are estopped and precluded from pleading or setting up lapse of time as a bar against the right of the complainants in the premises to have the relief here sought.

The prayer is for a cancellation of said patents and mesne conveyances.

It being obvious from the face of the bill that the suit was not brought within six years after the date of the issuance of each of the patents, its sufficiency is challenged by demurrers in behalf of the Exploration Company, Philip L. Foster, and Alexander Burrell, defendants; and this is the issue for present consideration.

The demurrers rest upon the claim that the act of March 3rd, 1891 (26 Stat. 1095, Sec. 8 at 1099; s. c. U. S. Compiled Stats. 1901, p. 1521), protects the defendants against the maintenance of this suit. That section, in part, reads thus:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

Oral arguments and written briefs went far and learnedly into the inquiry as to what is the binding force and effect of statutes of limitation when invoked in equity as a protection against fraud and its hiding. The different wording of the different statutes of limitation under consideration in the authorities cited was closely considered and discussed,—some of these statutes providing that the limitation period begins from the time the cause of action accrues, others, as in the instant case, fixing the time as starting from a named date. It is conceded by the defendants that under the first kind of statute the period of limitation does not begin until the fraud was, or should have been, discovered, that being the time when the cause of action accrues, which is a conclusion reached by construction of such statutes; but they insist that there is no room for construction of the statute under consideration,—because of its clear, positive and fixed terms, as well also as of the manifest purpose which it is intended to serve. To this they cite In re Brown, 4 Fed. Cases No. 1,983; Pickett v. McGavick, 19 Fed. Cases No. 11,126; U. S. v. Maillard, 26 Fed. Cases No. 15,709, and others; and also the debates and proceedings in Congress on the enactment of this statute.

I do not find it necessary to determine whether the authorities establish that statutes of the first kind cannot be availed of to protect against fraud for the reason above given, or whether, as contended by complainants, the true reason in equity is that such statutes cannot be made an instrument of fraud,—and thus, with the latter reason in hand, strike down every such claim regardless of the terms or phrasing of the statute. And this because, this statute has been dealt with and fully considered, in cases which control the action of this court, wherein its purpose and effect, applicable here, is unmistakably declared. Those cases are United States v. Winona, etc., R. R., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789; United States v. Chandler-Dunbar W. P. Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881; Louisiana v. Garfield, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92.

In the Winona case Mr. Justice Brewer, speaking for the court, said of this statute:

"Thus, in the act of 1891, it (the government) provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

In the Chandler-Dunbar case the court, through Mr. Justice Holmes, said:

"The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599 [17 L. Ed. 261].

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605 [17 L. Ed. 261]; Sharon v. Tucker, 144 U. S. 533 [12 Sup. Ct. 720, 36 L. Ed. 532]; Davis v. Mills, 194 U. S. 451, 457 [24 Sup. Ct. 692, 48 L. Ed. 1067]. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476 [17 Sup. Ct. 368, 41 L. Ed. 989]."

In the Garfield case the Supreme Court had under consideration the effect of an act of Congress purporting to grant swamp lands to the state of Louisiana. The act did not provide for the issuance of a patent but provided that the fee to the lands should pass to Louisiana on approval of a list by the Secretary of the Treasury. The court did not determine the question as to whether the limitation statute here being considered could be invoked to protect the asserted title of the

state under the provisions of that act and the approval of the Secretary. Speaking to this point, through Mr. Justice Holmes, it said:

"The only doubt is raised by the statute limiting suits by the United States to vacate patents to five years. Act of March 3rd, 1891, c. 561, § 8, 26 Stat. 1099. It may be that this act applies to approvals when they are given the effect of patents as well as to patents, which alone are named. In United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447 [28 Sup. Ct. 579, 52 L. Ed. 881], it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy but validated the patent."

There was no active fraud involved in any of these cases, though Mr. Justice Brewer considered the statute in question in that aspect. Each of these cases holds that the statute is to be applied not only against the remedy but that it affects the rights of the parties, that on the expiration of the time limited the patent becomes conclusive as a transfer of the title, notwithstanding it may have been voidable; indeed, though it may have been void, nevertheless the statute must be taken to mean that the patent becomes validated on the expiration of six years after its date and passes the title to the patentee as effectively as though it had been valid in the first instance. Thus the statute is made an inflexible rule of property; as much so as statutes which pass title through open, notorious, adverse and continuous possession maintained for a fixed period.

Additional authority to the same effect, by which we feel bound, is the opinion of the Court of Appeals for the Sixth Circuit in the Chandler-Dunbar case found in 152 Fed. 25, 29, 81 C. C. A. 221, 225, where it is said:

"But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitations vests the title in him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assuming it to have had any, was complete at the date of the passage of the act, and the lapse of five years without action to annul the grant resulted in the confirmation of it."

In United States v. Smith (C. C.) 181 Fed. 545, District Judge Bean had under consideration the effect of this statute in a case involving actual fraud, and in that respect he expresses his views thus on page 554:

"As to them (eight patents) the suit is barred, for in my judgment the statute begins to run from the date of the issuance of the patent, and not from the discovery of the fraud. The language of the statute is plain and leaves no room for construction. It says suits of the United States to vacate or annul patents shall only be brought within six years after the issuance of patent. * * * The object of this statute is to extinguish any right the government may have in the land and vest a perfect title in the adverse holder after six years from date of the patent, regardless of any mistake or error in the Land Department, or the fraud or imposition of the patentee."

See also United States v. American Lumber Co., 85 Fed. 827, 832, 29 C. C. A. 431, 436:

"In the present case no doubt is suggested by the language of the statute, and there is no room for construction. It is clear that Congress has said

that all suits by the United States to vacate patents shall be brought within the period limited by the act."

It therefore appearing from the bill itself that this suit was not brought within six years after the date of the issuance of each and all of the patents sought to be vacated and annulled, the bill is insufficient and the demurrers, and each of them, are well taken. They are sustained and it is so ordered.

PORT JOHNSTON TOWING CO. v. PENNSYLVANIA R. CO.

(District Court, S. D. New York. May 8, 1911.)

SHIPPING (§ 39*)—CHARTER—CONSTRUCTION—INSURANCE.

A time charter party for a tug, which provided that the charterer should save the owners harmless from all claims for injuries done by the tug to other vessels, persons, or property through the negligence of the officers or crew, contained a further provision that, "in case of any liability on the part of the charterer to the owners for any damage covered by insurance effected by or for the benefit of said owners, the charterer shall have the benefit of said insurance." *Held*, that such provision did not impose any obligation on the owners to maintain insurance in force for the benefit of the charterer.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 39.*]

In Admiralty. Suit by the Port Johnston Towing Company against the Pennsylvania Railroad Company. Decree for libelant.

James J. Macklin, for libelant.

Burlingham, Montgomery & Beecher (G. H. Robinson and William S. Montgomery, of counsel), for respondent.

HOLT, District Judge. This action is brought to recover from the respondent the amount of a judgment which the libelant was obliged to pay because of the alleged negligence of the respondent. The libelant owns the steamtug Wilkesbarre, and on June 18, 1907, chartered her to the respondent for a period of not less than 30 days, with the option to either party to terminate the charter on 2 days notice. The charter provided that the respondent was to save the libelant at all times harmless from all claims for injuries done by the tug to other vessels, persons, or property through any negligence of the officers or crew of the tug. On September 13, 1907, the tug Wilkesbarre was towing the coal boat Flagler, and ran the Flagler upon certain rocks, doing damage to the boat. A libel was subsequently filed by the owner of the Flagler against the Wilkesbarre. The libelant gave notice to the respondent to come in and defend. The case was tried, and a judgment rendered against the Wilkesbarre for $760.57. That judgment has been satisfied by the libelant, and this suit is brought to recover the amount.

The respondent's answer substantially admits the allegations of the libel, but sets up as a defense that the charter party represented that the tug was insured; that the charterer, in case of any liability,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

should have the benefit of the insurance; and that the libelant did not keep the insurance in force. The provision of the charter party upon this subject was as follows:

"It is further agreed that, in case of any liability on the part of the charterer to the owners for any damage covered by the insurance effected by or for the benefit of said owners the charterer shall have the benefit of said insurance," etc.

There was insurance on the tug, at the time of the charter, which had been effected by the libelant for its own benefit, in the sum of $4,750, covering damages to tows of the tug occasioned by stranding. The policy contained the following provision:

"The interest of the insured in this policy or any part thereof is not assignable except with the consent of this company in writing, and in case of any transfer or termination, or of any change in the nature of the insurable interest of the insured, either by sale or otherwise without such consent, this policy shall thereupon at once be void and of no effect."

As I understand the argument for the respondent, it is claimed that under this provision in the policy the execution of the charter party effected such a change in the nature of the interest of the insured as to make the policy void, and that it was the duty of the libelant either to procure the assent of the insurance company to having the policy attach in favor of the charterer, or to notify the charterer that the policy had lapsed. The injury to the Flagler occurred on September 13, 1907. On September 18, 1907, the respondent served a notice releasing the Wilkesbarre from the charter, and on the same day the libelant gave notice to the agents of the insurers cancelling the tower's liability policy covering the vessel. Upon these facts, I do not see why the libelant, as owner of the tug, did not retain an insurable interest in her after the charter party was executed. The tug was liable to be proceeded against in rem at any time for the negligence of the charterer in navigating the tug. All parties seem to have assumed that until the formal cancellation of the policy on September 18th the policy remained in full force. If the execution of the charter party terminated the insurance, either party could take out new insurance, and probably the insurance company, upon proper application, would have continued the policy in force. Assuming, however, that the policy had ceased to be operative before the accident, the question is whether the libelant was under any liability for that fact. The respondent's counsel argues that it was the duty of the respondent either to have obtained the consent of the insurance company to have the policy attach in favor of the charterer, or to have notified the charterer that the policy had ceased to attach. In the first place, all the parties seem to have assumed that the policy was still in force. In the next place, I cannot see that it was the duty of the libelant, after the charter party was executed, and the tug taken into the possession of the respondent, to take any steps to protect the rights of the respondent under the policy of insurance. If the consent of the insurance company was necessary to have the policy continue in force, I think that it was the duty of the charterer to see to it that that consent was obtained. If that consent could

not be obtained, then it was the duty of the charterer to take out insurance for its own protection. I cannot see that it was the duty of the libelant, under this charter party, to continue the existing insurance or to obtain new insurance for the protection of the charterer. The language of the provision in the charter relied on simply amounted to an agreement by the libelant that whatever rights against the insurance company it should have, if any, in case of injury to a tow would inure to the benefit of the charterer. I do not consider the provision as imposing an obligation on the libelant to keep insurance in force for the benefit of the charterer.

My conclusion, therefore, is that the libelant is entitled to recover the amount demanded in the libel, with costs.

In re CHAMBERSBURG SILK MFG. CO.

(District Court, M. D. Pennsylvania. June, 1911.)

BANKRUPTCY (§ 267*)—SALE OF PROPERTY FREE OF MORTGAGE LIENS—PAYMENT OF FEES AND EXPENSES FROM PROCEEDS.

Where a mortgage given by a bankrupt corporation to secure bonds was by its terms subject to control by the holders of a majority in amount of the bonds outstanding, and such majority joined in a petition by the trustee in bankruptcy for a sale of the property free from the lien of the mortgage, such action bound all the bondholders, and the fund realized may properly be charged with payment of the reasonable expenses, costs, and fees incident to the sale and care of the property and the disbursement of the fund by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 267.*]

In the matter of the Chambersburg Silk Manufacturing Company, bankrupt. On certificate of referee concerning payment of fees, etc., in preference to lien creditors. Order affirmed.

J. A. Strite, for exceptants.
Ralph W. Rymer, for trustee.

WITMER, District Judge. This is a proceeding, at the instance of the Chambersburg Trust Company, holding two bonds, of $500 each, and Harriet J. Dickson, holding one of such bonds, of the bankrupt corporation, for a review of an order made by the referee in bankruptcy directing the fees of the referee, trustee, attorneys for the trustee and for the bankrupt, pay of watchman protecting the property pending the proceeding, and other expenses incident to the proceedings in bankruptcy, to be paid out of the proceeds of the sale of real estate to the exclusion of the holders of bonds secured by mortgage constituting a second lien on the premises sold.

It appears that on petition of the trustee, representing that it was to the interest of the estate and the second mortgage bondholders that the real estate bound by such mortgage be sold discharged of such lien, to which a majority in amount of such bondholders assented, joining in the prayer of such petition, an order was entered by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

referee authorizing such sale, which, notwithstanding the objections of the parties who have brought this review, was approved by the court. The order under which the sale took place contained the following:

"Sale to be made without prejudice to the right of lien creditors, whose liens may be diverted thereby, to claim from the fund derived from the said sale the sum of their respective claims."

Also:

"The costs of the sale to be paid from the fund realized."

The trustee, having been encouraged by the bondholders, excepting, of course, the exceptants, either by acquiescing or joining in the application to the court, to sell the property and franchises of the bankrupt divested of the lien of their security, believing it to be to the interest of the estate as well as the holders of said bonds, is in my opinion, under these conditions, entitled to a deduction from the amount, $7,600, realized, for payment of the reasonable expenses, fees, and costs incident thereto. The several sums paid for day and night watchmen for looking after the estate mortgaged to date of sale, insurance, and other reasonable and necessary expenses calculated to conserve the property while in his control, should also be paid out of the fund realized, as directed by the referee.

This conclusion is justified, however, to the extent in this case, only by reason of the attitude of the lien creditors, who invoked the aid of the court to make sale of the aliened property and realize on their security, without the expense and delay of foreclosure proceedings. In re Barber et al. (D. C., Minn.) 3 Am. Bankr. Rep. 306, 97 Fed. 547; In re Meis (D. C., Ky.) 18 Am. Bankr. Rep. 104.

The exceptants reply that they should not be obliged to contribute of their security, since they have steadfastly protested to its discharge by sale. While the bankruptcy court had the authority to discharge the lien without their consent, and order certain costs incident to the same paid out of the fund, notwithstanding this is a power which is exercised with great care and caution, and any defalcation for costs and fees is jealously guarded. But for other considerations beyond the action of the exceptants entering into this decision we might, to some extent, affirm their contention. The claims here proven are founded on bonds, the individual property of the holders, it is true; but the security fastening such by lien upon the franchise and property of the bankrupt is the mortgage divested, which binds the holders of said bonds by its several terms and conditions. In regard to enforcing this lien, the mortgage throughout bears evidence of an intent that the lien thereof should be at all times subject to the control of the majority in amount of the holders of the bonds issued and outstanding, and the bonds were issued and held under and subject to all the provisions of the mortgage, which is, by recital, made part of the same. I doubt not but that, by the general policy of the law and the conditions recited, the majority in amount of the bondholders petitioning court to discharge the lien of the mortgage by the assent obtained, effected such

discharge and bound all bondholders alike with the consequences resulting from the action of the majority as stipulated.

Referring to the contention of the exceptants claiming that the distribution of the fund realized should be made through the trustee for the mortgage bondholders, the Chambersburg Trust Company, suffice it to say that the sale of the property was in no sense a foreclosure of the mortgage, but an absolute sale of certain rights in the property, reaching as far as the lien of the mortgage in question, under the equity power of the court, on motion of interested parties, with a view of subserving their interests and for a division of its proceeds amongst the creditors. The sale rested entirely on the order of the bankruptcy court, whose officers executed and carried it into effect, receipting likewise for the proceeds. The court's officer will also be permitted to pay the avails of the security directly to the bondholders, entirely disregarding the trustee named in the mortgage.

The exceptions are overruled, and the report of the referee, with its findings, conclusions, and orders, are affirmed.

In re ASHOKAN DAM.

(Circuit Court, S. D. New York. October 4, 1911.)

EMINENT DOMAIN (§ 134*)—CONDEMNATION PROCEEDINGS—DAMAGES—RESERVOIR SITE.

Where farm lands condemned by a city for reservoir purposes were valuable as a reservoir site, not only to such city but to others, such availability may properly be considered in awarding damages for their taking.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.*]

In the matter of application to condemn land in Ulster County, New York, for Ashokan Dam and Reservoir; William Sage, Jr., claimant. On motion to confirm report of commissioners. Confirmed.

Edward A. Alexander, for claimant.

William McM. Speer and Walter C. Sheppard, for City of New York.

LACOMBE, Circuit Judge. The proceeding affecting property of this claimant was removed to this court by reason of diversity of citizenship.

The commissioners made an award of $7,624.45 for the land and buildings of claimant's parcel and the further sum of $4,024.45 for reservoir availability and adaptability. The city of New York moves to confirm the report as to the $7,624.45 only, contending that there should be no award for reservoir availability. The claimant moves to send the case back on the ground that the amount awarded for reservoir availability is wholly inadequate.

So far as the latter motion is concerned, it appears that the evidence is of such a character that the court is not disposed to disturb

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the conclusion reached by the commissioners any more than it would an award of a like amount by a jury predicated on such testimony. This motion is therefore denied.

The evidence shows that the land in question, together with that of claimant's neighbors, was available as a reservoir site, and that such availability was not confined to the uses of New York City. Apparently the award is not made on the basis of the value of the reservoir lands to the city of New York alone; had such been the basis, the valuation would have been very much higher. But the commissioners have taken into consideration as an element of value the circumstance that, had New York City never gone to this watershed, some other political community or some water company created by statute might have been willing to pay more than their value as farming land for the parcels which would enable it to impound water there. Under Boom Company v. Patterson, 98 U. S. 403, 25 L. Ed. 206, this was a proper method of determining value.

An interesting point is raised, viz., whether since the decisions of the state courts are not in accord with those of the federal courts on that subject (In re Ashokan Reservoir, 130 App. Div. 350, 352, 357, 114 N. Y. Supp. 571, 575, of which the McGovern claim was affirmed by the New York Court of Appeals without opinion) comity should not require the latter courts to follow state decisions. This question is about to be presented to the United States Supreme Court in the McGovern Case (229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1228), which has been taken to that tribunal. In view of this circumstance it is unnecessary to discuss that question here. The principle laid down here in Boom Company v. Patterson, supra, will be followed and the entire report of the commissioners confirmed. Presumably before this decision comes up for review at the next term of the United States Circuit Court of Appeals a decision of the United States Supreme Court (in the McGovern Case) will dispose of the question.

Report as to claimant's parcel is confirmed.

UNITED STATES v. LYMAN.

(District Court, D. Oregon. October 16, 1911.)

No. 5,414.

1. CRIMINAL LAW (§ 242*)—VENUE—REMOVAL OF ACCUSED.

On an application to remove a federal prisoner from one district to another, the court to which the application is made, while bound to examine the indictment when an objection is made thereto to ascertain whether a crime is charged, will not consider mere technical objections or objections that go only to matters of form.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510; Dec. Dig. § 242.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONSPIRACY (§ 25*)—ELEMENTS OF OFFENSE.

To constitute conspiracy against the United States, the object of the unlawful agreement must be the commission of some offense against the United States in the sense only that it must be some act made an offense by the laws of the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 35; Dec. Dig. § 25.*]

3. CONSPIRACY (§ 43*)—OFFENSE AGAINST UNITED STATES—CONSPIRACY TO AID IN ESCAPE.

Since it is made an offense by federal statute for any person directly or indirectly to aid, abet, or assist another person to escape, and conspiracy to commit such an offense is a separate crime, an indictment, alleging that accused, together with other named persons, conspired to commit an offense against the United States, to wit, to aid, abet, and assist himself to escape from an officer, was not fatally defective on the theory that, inasmuch as there was no law making it an offense for a prisoner to escape or attempt to escape, he could not be guilty of aiding, abetting, or assisting himself to do so.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*]

John Grant Lyman was indicted for conspiracy to aid, abet, and assist himself to escape from an officer. On petition for a warrant for removal as authorized by Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716). Granted.

Walter H. Evans and Everett A. Johnson, Asst. U. S. Attys., for the Government.

Lionel R. Webster, for defendant.

BEAN, District Judge (orally). I am now prepared to pass upon the application heretofore made for an order for the removal of defendant, Lyman, from this jurisdiction to the Northern district of California, for trial under an indictment returned against him in that jurisdiction.

[1] In a matter of this kind, I understand it is the duty of the court to examine the indictment when objection is made to it, to ascertain whether a crime is charged therein. Mere technical objections, or objections that go to matters of form, will not be considered; nor do I think the court should examine an indictment as critically as it would if it were the court of primary jurisdiction. If there is a reasonable controversy about the question as to whether the facts stated constitute a crime, I take it that it is the duty of the court to which the indictment was returned to determine that question, and not the court in which the application is made for an order of removal.

Now, from this general viewpoint, we come to the question in this case. Under the federal statutes, conspiracy is a substantive offense. For the purpose of this case, it is an unlawful agreement of two or more persons to commit an offense against the United States. The defendant is charged in the indictment before me with a violation of this law. It is alleged that he, together with other named persons, conspired and confederated together to commit an offense against the United States, to wit, to aid, abet, and assist himself to escape from an officer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] To constitute the crime of conspiracy, the object of the unlawful agreement must be the commission of some offense against the United States in the sense only that it must be some act made an offense by the laws of the United States.

[3] Now, it is made an offense by the statute for any person to directly or indirectly aid, abet, or assist another person to escape, so that, if two or more persons conspire and confederate together to commit such offense, they bring themselves within the provisions of the conspiracy statute. It is argued, however, that, because there is no law making it an offense for a prisoner to escape or attempt to escape, he could not be guilty of aiding, abetting, or assisting himself to do so, and therefore could not be a party to a conspiracy to accomplish that purpose. This argument is ingenious and plausible, but in my judgment it overlooks the substantial crime charged in the indictment. The defendant is not accused of aiding and abetting himself to escape, but with a conspiracy to accomplish that purpose, which of itself is an offense, and, although he could not be guilty of aiding and abetting himself to escape, he could be guilty of entering into an unlawful conspiracy with other persons to commit that offense. To aid and assist one to escape is made a crime by statute. Conspiracy to commit such an offense is a separate crime. Therefore, although a person to a conspiracy might not himself be able, either physically or legally, to commit the offense which it is charged the conspiracy was entered into to accomplish, yet he still might be guilty of the conspiracy itself, and that is what is charged in this case.

These are my views of this indictment and the law as I understand it at this time. The indictment is sufficient, so far as the objection urged is concerned, and order of removal should issue.

WEISER VALLEY LAND & WATER CO. v. RYAN et al. †

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,942.

1. EVIDENCE (§ 524*)—OPINION EVIDENCE—EXPERTS—VALUE OF LAND.
In a proceeding to condemn land for a dam site in connection with an irrigation project, opinions of expert engineers as to the value of the land, taking into consideration the cost of the land to be utilized, the cost of construction and maintenance of the works, the feasibility of utilizing the water, the prospective amount available, the lands available for irrigation, their value, the value of the water furnished, etc., were admissible under the rule that in determining the value of land to be condemned it must be viewed, not merely with reference to the uses to which it is at the time applied, but with reference also to such uses to which it is manifestly adapted, considering its capability as well as its availability, disregarding, however, its value for any specific purpose as an independent fact.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 524.*]

2. EMINENT DOMAIN (§ 131*)—CONDEMNATION OF LAND—"VALUE."
The value of land sought to be condemned, which the petitioner is required to pay, is not what any one person would give for the land for his own particular use, but what could probably be obtained for it if a sale was desirable and a purchaser sought, applying the ordinary business methods to find him and to dispose of the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.*

For other definitions, see Words and Phrases, vol. 8, pp. 7275–7280; vol. 8, p. 7826.]

3. EMINENT DOMAIN (§ 241*)—PROCEEDINGS—PERSONAL JUDGMENT.
Under Rev. Codes Idaho, § 5224, providing that, if the damages for land taken in eminent domain proceedings are not paid or deposited, the defendants may have execution as in civil cases, and, if the money cannot be made on execution, the court must annul the entire proceedings and restore possession to the defendant if possession has been taken by the plaintiff, construed in connection with other sections relating to the procedure in an eminent domain proceeding, a personal judgment may be properly rendered against the petitioner for the damages ascertained.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 241.*]

4. EMINENT DOMAIN (§ 148*)—DAMAGES—INTEREST.
Under Rev. Codes Idaho, § 5221, providing that, for the purpose of assessing compensation and damages for land taken or damaged in condemnation proceedings, the right shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, the owner is entitled to interest on the damages awarded for land taken from the date of the summons.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 397–399½; Dec. Dig. § 148.*]

In Error to the Circuit Court of the United States for the District of Idaho.

Condemnation proceedings by the Weiser Valley Land & Water Company against Colonel W. Ryan and another. From a judgment assessing damages, plaintiff brings error. Affirmed.

See, also, 190 Fed. 425.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 6, 1911.

Richards & Haga, for plaintiff in error.
Lot L. Feltham and Frank D. Ryan, for defendants in error.

Before MORROW, Circuit Judge, and HANFORD and WOLVERTON, District Judges.

WOLVERTON, District Judge. The plaintiff in error, which was the plaintiff below, is a corporation engaged in the construction and maintenance of an irrigation project. For the purpose of obtaining a site for a dam and reservoir, plaintiff instituted a suit to condemn the lands of the defendants, consisting of 320 acres, each of them owning 160 acres. The proposed site is situated in Lost Valley, Washington county, Idaho, at an altitude of from 4,000 to 6,000 feet above sea level. Lost river flows through the valley, and passes out through a narrow canyon. The purpose is to construct a dam 80 feet in height across the stream in the canyon, with a view to impounding the surplus waters produced by the melting snowfall within the watershed around about. The valley contains an area of some 500 to 700 acres of meadow land, including the lands of the defendants. This meadow land rises gradually towards the surrounding hills, but an 80-foot dam would cause the water to flow back to such an extent that it would cover, not only the meadow land, with all the land of defendants, except, possibly, 8 acres, but a large area besides, comprising in all about 1,200 acres. It was estimated that such a reservoir would have a capacity of 60,000 acre-feet, that the water from melting snows would be sufficient to fill it, which would provide irrigation for 20,000 acres of land, and that it is feasible to get the water from the reservoir upon a larger area than that. The defile through which the water passes beyond Lost Valley is of such a nature, with rock walls, that the dam construction could be had at minimum expense, and would be so situated as to be largely free from wave action and erosion.

[1] At the trial G. R. Baker, a civil engineer with large experience in the construction of reservoir and irrigation projects, was called as a witness for the defendants, and testified to the feasibility of constructing the dam and the irrigation canals and ditches contemplated by the plaintiff, and of their practical utility when constructed. Then as follows:

"Assuming that there are lands in Washington county sufficient in area to consume the capacity of this Lost River Basin up to the 52,000 acre-feet, which lands may be irrigated from said water supply at a reasonable amount of expense for the quantity of water furnished, taking into consideration and assuming the natural features of the reservoir as to altitude, topographical features, precipitation as shown by the witnesses in this case, and location for dam facilities, and opportunities of impounding such water, and assuming that there is in said community no established market value for said lands for all purposes for which they are naturally adapted, including reservoir site, assuming that no change has taken place in the topographical features or conditions of said reservoir site since September 4, 1909, I would know the actual value of the lands of the defendants on September 4, 1909, for and in view of all the purposes to which such lands were actually adapted. In my experience I have known of sales made of similar lands like this for reservoir sites. The ones I refer to are located in Colo-

rado. I know of the actual value of another reservoir of similar proportions, similarly situated, of a similar character, and similarly situated in relation to an arid land district. * * * I know of other reservoir sites, the actual value of which I am familiar with, what we call the 'Marshall Reservoir.' I know of the actual value of other reservoir sites than those I have mentioned. I know of some sites that have been sold. I think I would know the actual value of those reservoir sites, those several reservoirs. I think I would know the actual value of this reservoir referred to as the Lost Basin Reservoir, September 4, 1909, in view of all the facts I have learned concerning it by my own investigation, and in view of the testimony of the witnesses produced in the trial of this case. And, assuming the facts that have been presented to me in former questions as to the precipitation and the presumed conditions, that there are lands in Washington county susceptible of irrigation from this reservoir which as yet have no water placed upon them sufficient to consume all the water in the reservoir up to the quantity figured by me as 56,000 acre-feet, in view of all the purposes to which these lands are naturally adapted."

At this time the question was asked: "Now, what in your opinion was the value of those lands at that time?" (September 4, 1909). Whereupon witness further testified, on cross-examination as to his competency:

"When I speak of the value of a reservoir site, I take into consideration the value of the land upon which the water would be distributed, and that the land would be made productive, or I might take into consideration other features of the reservoir sites, as they might be. It might be that the question of domestic purposes should enter into it to a certain extent, and also there might be power purposes that would enter into it. Of course, the price at which those lands will buy water would enter into it. The cost of the distributing canal to take the water from the reservoir to this land would have to be taken into consideration, and the cost of constructing the reservoir would have to be considered; also, the profits that would be made upon the handling of the proposition. The elements that would enter into the profits would, of course, be the amount of money expended in construction and so on—the total cost and the management and operation."

Objection being interposed, the court further interrogated, and witness answered:

"I have stated that I could give the market value of this land now; that is, what it would sell for upon the market last September, under the conditions that question was asked. In reaching the conclusion, I consider the reputed price at which they are selling, and the value of the lands, that is, by irrigating, by being irrigated, the value of irrigated and nonirrigated lands, the value of water that is necessary to make the lands productive. Of course, I base it to a great extent upon the price at which water is sold per acre. I base it upon the price at which water is sold with the schemes with which I am familiar. I have an idea what I would pay for those lands last fall, considering the circumstances and the physical conditions that there are there, with reference to the surroundings. From my observations I feel intelligent enough with regard to the situation, to say what I would be willing to pay. I think I would be willing now to make a bona fide offer for those lands. I feel intelligent enough in regard to it to do that, considering conditions there."

Here the objection was overruled, and witness was permitted to answer:

"I should value those lands last fall at $20,000 a claim; that is, $40,000 for 320 acres."

On cross-examination he further testified:

"I don't know anything about what it would cost to carry water to these lands. I think I could build the dam at the reservoir site for $200,000. I included that in my estimate of the value of these lands. I also included the distribution of the water. I would place it at half a million, that is an arbitrary figure that I have put on it. It wouldn't be just as safe to assume arbitrarily a million as half a million, because I don't think it would cost a million based on my general experience with reference to getting water onto such projects. I don't know anything about the amount of rock work I would have to do, or the earthwork, or the bridges, or the flumes, or the pipe lines or headgates. I don't know anything about those things. I fixed $500,000 as the cost of those canals, because I have never distributed that much water that has cost anywhere that much. That is the only reason I can give. I took into consideration the cost of the dam, at $200,000, and the cost of the distributing works at $500,000, and the sale of the water at $50 per acre, and upon that I base my estimate of $40,000. I also took into consideration the cost of the land in the reservoir; that is, about 1,200 acres of land. I would place the value of that land at $150,000, the value of all the land in the reservoir, so I have $150,000, $200,000, and $500,000—that makes $850,000. I would figure that 60,000 acre-feet of water would irrigate 20,000 acres of land, and 52,000 acre-feet would irrigate in the neighborhood of 17,000 acres, and I am assuming that there is 17,000 acres of land available at that price—at $50 an acre. It would amount to $850.000. I would now have a plant that cost $850,000, and the selling price would be $850,000. When I said I took into consideration the profits, I didn't make my basis upon 17,000 acres. Taking it on a basis of 52,000 acre-feet and 3 acre-feet to the acre, then my cost and selling price are absolutely equal. There wouldn't be any profit in that that I could see."

Robert J. Wood, another witness called for defendants, after being qualified as an expert civil engineer with large acquaintance with the construction of irrigation projects, was interrogated as follows:

"In view of all the facts and the information that you have acquired by your own investigation, and the further testimony of witnesses in this trial, and assuming as a fact that there is a quantity of rainfall sufficient to place in that reservoir annually 52,000 acre-feet, taking into consideration a reasonable per cent. of loss for evaporation and otherwise, and in view of the fact that no market price has been established for lands in that vicinity for all purposes, do you know, or did you know, the actual value of those lands of the defendants on or about September 4, 1909, in view of all the purposes and uses to which said lands are naturally adapted?

"The Court: That is, the value for which this land would sell in cash.

"Witness: That, based on an opinion, I suppose?

"The Court: That is, what would it sell for in cash.

"A. Yes."

After lengthy cross-examination by plaintiff's counsel, the court further explained the question as follows:

"The question is whether or not, in your judgment, whether or not you or any man with money would buy this land in question upon the information which you have. In other words, whether the information which you have is sufficient to enable you intelligently to make an investment, and, if so, what would the business man who has the information which you have, or any man, pay in cash for that land. Now, if you think any business man would buy it on the information which you have, you may so state, you may state what in your judgment it would sell for; that is, if you have any judgment about it. If you haven't, you may so state. You understand, Mr. Wood, we are trying to reach an intelligent estimate of the value of this land, not a mere guess, not a mere speculation, but you should remember that we are here under the solemnity of an oath, and want your best judg-

ment, if you have any, as to what this property is worth. Of course, in forming that judgment, you can form it upon the information which you have, not what might possibly be developed, but what you have at present."

And witness answered:.

"Well, I should say, your honor, that I have information enough to satisfy myself as to a value, and that value is what in my judgment a business man who knew the conditions as I know them would pay without further investigation."

Whereupon the court overruled the objection to the question, and witness answered further:

"I should say that defendants' land in the reservoir site, the two claims, were worth $30,000 on September 4, 1909."

Other witnesses were permitted over objection to testify in the same line, but the foregoing is sufficiently illustrative for an understanding and appreciation of the questions involved.

The question for determination is whether this evidence was proper to be admitted to establish the value of the lands sought to be condemned, and thereby to determine the measure of the defendants' damages. The plaintiff's proofs tended to show the value of the lands to range from $8 to $15 per acre, and it is contended that the evidence thus offered by the defendants, and admitted over objection, was speculative, somewhat visionary, and does not afford a certain and substantial basis upon which to determine the market value of the lands in question. The proper basis of inquiry is, What were the lands worth in the market? And this establishes the measure of damages. In ascertaining such value, the property should be viewed, not merely with reference to the uses to which it is at the time applied, but with reference also to the uses to which it is manifestly adapted, taking into account its capability as well as its availability. "As a general thing," says the Supreme Court in Boom Co. v. Patterson, 98 U. S. 403, 408 (25 L. Ed. 206), "we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The scope of inquiry as to value is cogently stated in Alloway v. Nashville, 88 Tenn. 510, 514, 13 S. W. 123 (8 L. R. A. 123):

"It includes [says the court] every element of usefulness and advantage in the property. If it be useful for agriculture or for residence purposes, if it has adaptability for a reservoir site or for the operation of machinery, if it contains a quarry of stone or a mine of precious metals, if it possesses advantage of location or availability for any useful purpose whatever, all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate. This does not mean that all the capabilities are to be priced separately and the aggregate put down as the true value, for they do not exist independently of each other, and cannot all be realized at the same time; nor will it do to restrict the estimate to any one of them because in one view that would exclude the other elements altogether, and in another view it would tend to make the degree of benefit to the party appropriating and

condemning for a particular purpose the real measure of value, which is never allowable."

"In the same line," says the court in Conan v. City of Ely, 91 Minn. 127, 131, 97 N. W. 737, 739, after quoting from Boom Co. v. Patterson, supra, "this court has held that a person is entitled to the fair value of his property for any use to which it is adapted and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be one to which it is presently applied, or some other to which it is adapted. Any evidence is competent, and any fact proper to be considered, which legitimately bears upon the market value of the property."

After a careful review of the decisions of the Supreme Court of California on the subject, Mr. Justice Henshaw, in Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 412, 104 Pac. 979, 981, thus concludes:

"It is seen, therefore, that this court by its latest utterances has definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it was taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that, therefore, while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose, is not admissible as an element in determining that market value, for such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use."

The rule is quoted as authoritative by the Supreme Court of Idaho in Portneuf-Marsh Valley Irr. Co. v. Portneuf Irr. Co., 114 Pac. 19, 20, from the Supreme Court of Iowa (Ranck v. Cedar Rapids, 134 Iowa, 563, 111 N. W. 1027), as follows:

"Generally speaking, the true rule seems to be to permit the proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he is negotiating a sale, and all other facts which would naturally influence a person of ordinary prudence desiring to purchase. In this estimation the owner is entitled to have the jury informed of all the capabilities of the property, as to the business or use, if any, to which it has been devoted, and of any and every use to which it may reasonably be adapted or applied. And this rule includes the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use."

A like holding has been recently made by the Supreme Court of Washington. In re City of Seattle, 47 Wash. 603, 92 Pac. 423.

It is unnecessary to cite other authorities upon the subject, but it should be remarked that the rule in its broadest sense is especially applicable in a case where the property is so situated or conditioned as to have no current market value.

[2] It would seem that the testimony admitted, accompanied as it was by the careful admonition of the witnesses by the court respecting the exact question to be answered, was not objectionable under the rule. Many things were taken into consideration by the witnesses pertaining to the irrigation project of the plaintiff—the cost of the land to be utilized, cost of construction and maintenance, the feasibility of utilizing the water, the prospective amount available, the lands available for irrigation, the value of those lands, and the value of the water furnished, and perhaps anticipated profits, all entering into account as forming the basis for judgment as to the value of the land sought to be appropriated. In forming their estimates of value, the defendants were entitled to have the witnesses take into consideration the land "for the most advantageous use to which it may be applied." But it was not competent for them to place a value upon the land for any specific purpose as an independent fact. All the uses to which the property is available, the more advantageous as well as the less advantageous, should be taken into view, and the general estimate of the market value should be deduced; not what any one person would give for it for his particular use, but what could probably be obtained for it if a sale was desirable and a purchaser sought, applying the ordinary business methods for finding a purchaser and disposing of the property. That the witnesses were confined to an estimate of this sort is apparent from what the court said to the witness Wood:

"The question is, * * * in other words, whether the information which you have is sufficient to enable you intelligently to make an investment, and, if so, what would the business man who has the information which you have, or any man, pay in cash for that land. * * * We are trying to reach an intelligent estimate of the value of this land, not a mere guess, not a mere speculation, but * * * your best judgment, if you have any, as to what this property is worth."

This, together with the very careful and clear instructions given to the jury upon the subject of market value as the proper measure of damages, impels us to the firm conclusion that the jury could not have been misled as to the proper basis for forming their judgment as to market value, and that no error was committed in admitting the testimony complained of. It should be remarked that specific estimates of value pertaining to acquirement and construction of different parts of the irrigation project were brought out mainly by the cross-examination of the witnesses, but in the end the basis for estimate of the market value of the land was properly restricted.

[3] The next question presented is whether it was regular and proper to enter judgment in personam for the amount of the damages awarded. A condemnation proceeding is so largely statutory that it is of but little assistance to look beyond the state statute by which it is authorized. The statute of Idaho regulating the exercise of eminent domain (2 Idaho Revised Codes, pp. 326, 329–333) provides for instituting the proceeding to condemn by filing a complaint and issuing a summons. Section 5215. It prescribes what the complaint shall contain. Section 5216. The manner of issuing the summons and the form thereof. Section 5217. Also the manner of ascertaining and assess-

ing the value of the property by the court, jury, or referee. Section 5220. And then specifically that:

"For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken." Section 5221.

"The plaintiff must, within thirty days after final judgment, pay the sum of money assessed." Section 5223.

"Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff." Section 5224.

It would seem from a reading of these statutes in pari materia that, a jury trial having been had and assessment of compensation made, it is within the intendment thereof that the court should enter a personal judgment against the condemner. Payment of the sum of money assessed is required to be made within 30 days after the final judgment. If not so paid, the defendant is entitled to execution as in a civil action. He could have no execution without a judgment. Then, if the money cannot be made, the court may restore possession of the property. So the statute, not only speaks of the judgment, but treats of the subject with the especial thought that a judgment is essential. A reading of the entire statute on the subject of eminent domain gives assurance that the constitutional guaranty against the taking of private property without just compensation first ascertained and tendered has been reasonably safeguarded. Indeed, the Supreme Court of Idaho has so determined the question. Portneuf Irrigating Co. v. Budge, 16 Idaho, 116, 100 Pac. 1046. So that, the property owner being protected, it is not an insuperable objection that the condemner is not permitted to exercise his volition as to whether he will pay the assessment of compensation or abandon his project. The procedure is one for the Legislature, and, unless inimical to the fundamental law, it cannot be further questioned. We think the judgment in that particular was properly entered.

[4] The next contention is that the court erred in adding interest to the amount of the assessment from the date of the summons. Under the statute, the right to the compensation shall be deemed to have accrued at the date of the summons. Having such right to compensation at a given time, it would seem that the owner ought to have interest upon the amount ascertained until paid. In the meanwhile he can claim nothing for added improvements, nor is he entitled to any advance that might affect the value of the property. For authorities of some application, see Reed v. Chicago, M. & St. P. Ry. Co. (C. C.) 25 Fed. 886; St. Louis, E. R. & W. Ry. Co. v. Oliver, 17 Okl. 589, 87 Pac. 423; Warren v. St. Paul & Pacific Railroad Co., 21 Minn. 424.

These considerations lead to an affirmance of the judgment of the Circuit Court, and it is so ordered.

WEISER VALLEY LAND & WATER CO. v. RYAN.†

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,960.

1. EMINENT DOMAIN (§ 274*)—TRESPASS—INJUNCTION—ESTOPPEL.

Under Rev. Codes, Idaho, § 5226, providing that a condemner of land is not entitled to enter and take possession prior to the ascertainment of damages by a jury and the payment of such damages or a deposit with the clerk, unless the damages are assessed by commissioners appointed by the court for that purpose, and such damages when so assessed are paid to the owner, or, if refused by him, deposited with the clerk to abide the result of the action, the fact that a landowner, after stipulating that the condemner might submerge the land to be taken until final judgment in condemnation proceedings on giving bond, did not take any steps to prevent the condemner's construction of its works until after the latter refused to pay the judgment rendered in condemnation proceedings, did not estop the landowner to then sue to enjoin the maintenance of the improvement.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 274.*]

2. EMINENT DOMAIN (§ 241*)—CONDEMNATION—JUDGMENT.

Under Rev. Codes, Idaho, §§ 5223, 5224, 5225, relating to condemnation proceedings, it is improper to render judgment of condemnation until the award of compensation has been paid; proper judgment being a personal judgment against the condemner for the amount of the award.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 241.*]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Suit by Colonel W. Ryan against the Weiser Valley Land & Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 190 Fed. 417.

Richards & Haga, for appellant.

Lot L. Feltham and Frank D. Ryan, for appellee.

Before MORROW, Circuit Judge, and HANFORD and WOLVERTON, District Judges.

WOLVERTON, District Judge. This is a suit instituted by the appellee against appellant to enjoin the latter from maintaining a dam across Lost Creek, Washington county, Idaho, and thereby forcing the water of the stream back upon the land of complainant. The appellant, being the defendant below, is engaged in the construction, maintenance, and operation of an irrigation project, and is required, within the scope of its undertaking, to construct a reservoir, which, when completed, will inundate the land of the complainant, or practically all of it. It is the attempt to construct the dam, designed with the basin above it to form the reservoir, that complainant complains of, by reason of its effect to force the water back upon him. It appears from the bill of complaint, which was filed January 7, 1911, that the defendant, in the exercise of the right of eminent domain, on September 4, 1909, commenced a proceeding in the District Court of the state of Idaho, the summons having been served on that date, to condemn the land of plaintiff to its use. On September 15, 1909,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 6, 1911.

without further proceeding being had, defendant began its construction of the dam, and thenceforth became a trespasser upon plaintiff's land.

The defense interposed to the injunction is that the plaintiff stood by and permitted the improvement to go on without interposing objection thereto, and, further, that the plaintiff on March 8, 1910, entered into a stipulation with defendant, which stipulation was filed in the action to condemn, whereby it was agreed that the defendant (plaintiff in that action) should have the right to overflow and submerge the land of plaintiff until final judgment in that court, upon giving a bond in the sum of $2,500 for compensating plaintiff for all damages that he might sustain by reason of such overflow. The bond was executed March 12, 1910, and the proceeding to condemn postponed for further hearing until June 10, 1910. For these reasons, it is urged that plaintiff is estopped from interfering with the further construction of the dam. The bill for injunction shows, furthermore, that the action to condemn, after the cause was removed to the federal court, was brought on for trial, and determined June 24, 1910, resulting in a judgment in favor of the plaintiff in the injunction for the sum of $8,000 as the value of his land; that execution had subsequently issued to enforce payment, but that no property of defendant could be found with which to satisfy the execution; and that defendant refused to pay such judgment. The federal Circuit Court, to which this suit also was removed, decreed the injunction prayed for. This appeal is from that decree.

[1] The first question to be considered is whether the plaintiff has been estopped by remaining inactive and without raising objection to the defendant's construction of the dam. The answer to this objection is plain. The defendant was at the time it entered upon the construction of the dam and virtually began its trespass upon plaintiff's land proceeding in invitum to condemn the land, and this under the procedure prescribed by the Idaho statute. Under that procedure, the condemner is not entitled to possession prior to the ascertainment of damages by a jury and the payment of such damages, or a deposit with the clerk, except the damages be assessed by commissioners appointed by the court for that purpose, and such damages, when so assessed, are paid to the owner, or, if refused by him, deposited with the clerk of the court to abide the result of the action. Thereupon the condemner may enter and take possession, but not until then. Section 5226, Idaho Revised Codes. Portneuf Irrigating Co. v. Budge, 16 Idaho, 116, 100 Pac. 1046; Pyle v. Woods, 18 Idaho, 674, 111 Pac. 746. It is hardly conceivable how the condemner can, while proceeding in invitum to condemn, the owner resisting the proceeding, estop the owner by reason of the latter having made no objection on the ground to prosecution of the work, when at the same time the condemner is ignoring the very statute under which it is proceeding. Equitable estoppel is not based upon any such principle, and the defendant could not have so acquired an unimpeachable right to proceed with its construction, and thus impair the holdings of the complainant. It is to be observed that at the time this suit was begun for injunction the defendant had prosecuted its action to condemn to judg-

ment; and, while refusing to pay the award of compensation, or even to deposit the same with the clerk, it is insisting upon a virtual appropriation of plaintiff's land, and this, of course, without compensation to the owner.

[2] The judgment entered in the action to condemn is probably irregular, in that it purports to condemn the land to the uses of the defendant company. Under the Idaho statute (sections 5223, 5224, 5225, Idaho Revised Codes), it was manifestly not intended that such a judgment should be entered until the award of compensation had been paid, but it was proper to enter a personal judgment for the amount of the award rendered by the jury. See Weiser Valley Land & Water Co. v. Ryan and Ryan, 190 Fed. 417, just decided.

As it pertains to the stipulation, that had served its purpose in the action in which it was filed when this suit was begun. It was to continue effective until final judgment in the action. The defendant, however, insists upon remaining in possession despite the judgment, and without responding for the compensation awarded, for which there is no warrant of law or equity.

The decree of the court below should be affirmed, to continue in force until the judgment in the action to condemn is satisfied. When the judgment is satisfied, the injunction should be discharged; and such will be the order of the court.

WILSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. August 20, 1911.)

No. 295.

1. POST OFFICE (§ 48*)—WRONGFUL USE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT—STATUTES.

Where an indictment for the use of the mails in furtherance of a scheme to defraud, in describing the offense, charged that defendant devised and intended to devise a scheme and artifice to defraud divers persons of their money and property, in and by inducing by false and fraudulent representations and pretenses, and by fraudulent artifices and devices, such persons to part with their money and property, did not, by the use of the words "by false and fraudulent representations and pretenses," state an offense solely within Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1909, p. 1455]) § 215, in which the words "by means of false or fraudulent pretenses, representations or promises" are added to the language of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), prohibiting the use of the post office in furtherance of a scheme to defraud, in force at the time the offenses were committed, and the indictment, notwithstanding such words, sufficiently stated an offense under section 5480.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66–80; Dec. Dig. § 48.*]

2. INDICTMENT AND INFORMATION (§ 109*)—STATUTORY OFFENSES.

Where an indictment properly states an offense under a statute in force when the offense was committed, the validity of the indictment is in no way affected by the fact that it may also be sufficient to state an offense under a later statute carrying a heavier penalty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 286–288; Dec. Dig. § 109.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. INDICTMENT AND INFORMATION (§ 70*)—FORM—POSITIVENESS—RECITALS.
An indictment, alleging that at a particular time defendants had devised a fraudulent scheme, sufficiently charges that defendants theretofore "did" devise such scheme, and was therefore not defective as pleading the scheme or artifice by way of recital only.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.*]

4. POST OFFICE (§ 48*)—WRONGFUL USE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.
Where an indictment for devising a scheme to defraud, to be effected through the post office department, charged defendants with devising a scheme or artifice to defraud, the fact that it also added the words "in and by inducing by false and fraudulent representations and pretenses" persons to part with their money, did not limit the government to the common-law offense of obtaining money by false pretenses.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66–80; Dec. Dig. § 48.*]

5. POST OFFICE (§ 35*)—WRONGFUL USE OF MAILS—"SCHEME TO DEFRAUD."
A scheme to induce persons to purchase stock in a corporation by false and fraudulent representations that the money paid would go into the corporation's treasury for development purposes, that the officers would not sell their shares and believed that they would become of enormous value, that stock held by officers was nontransferable, that only treasury stock was on the market, and that all increases on the selling of the stock was justified by the development of the business, was a "scheme and device to defraud" within Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), prohibiting the use of the mails in furtherance of a scheme or artifice to defraud, etc.; the statute being intended broadly to prevent the use of the mails to despoil the public, whether such result was intended to be accomplished by plain falsehoods, or by the most alluring and complicated contrivances.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

6. POST OFFICE (§ 35*)—WRONGFUL USE OF MAILS—SCHEME TO DEFRAUD.
In a prosecution for wrongful use of the mails, in furtherance of a scheme to defraud by the sale of corporate stock by false representations, it was not essential that the government allege or prove that the stock sold was worth less than the price paid for it and that the purchasers were, in fact, damaged thereby.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

7. POST OFFICE (§ 35*)—WRONGFUL USE OF MAILS—SCHEME TO DEFRAUD.
Use of the mails in furtherance of a scheme to defraud, by inducing the sale of stock in a corporation by false representations, that only treasury stock was to be sold, was not rendered innocuous by defendants placing an amount equal to the amount of the treasury stock in the corporation's treasury as a loan.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

8. CONSPIRACY (§ 43*)—TO COMMIT OFFENSE—WRONGFUL USE OF MAILS—SCHEME TO DEFRAUD.
Where an indictment charged a conspiracy to devise a scheme to defraud in the sale of corporate stock and to have furthered such scheme by opening correspondence through the mail, it sufficiently charged a conspiracy to commit an offense against the United States.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. POST OFFICE (§ 35*)—SCHEME TO DEFRAUD—UNLAWFUL USE OF MAILS.
A scheme to defraud the public, by inducing them to send money to a corporation as the purchase price for its stock, which money the defendants, as officers of the company, could then embezzle, was none the less a public offense and a violation of the laws of the United States because it was also a private tort against the corporation.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

10. CRIMINAL LAW (§ 150*)—LIMITATIONS—CONTINUING OFFENSES.
Where defendants devised a scheme to defraud, consisting of plans for the sale of corporate stock by false representations to be carried out by means of correspondence through the post office, the conspiracy was a continuing offense, and a prosecution therefor was not barred until three years from the last overt act.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*
Commencement of period of limitations against prosecutions for continuing offenses, see note to 84 C. C. A. 519.]

11. INDICTMENT AND INFORMATION (§ 124*)—PARTIES—JOINDER.
When certain persons combine to perform certain acts, and some of them combine with others engaged in totally different acts, though all may have a similar general purpose in view, it is improper to join them in an indictment for conspiracy.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 327–333; Dec. Dig. § 124.*]

12. INDICTMENT AND INFORMATION (§ 124*)—JOINDER—COMMUNITY OF INTEREST.
Where there was evidence of the original formation of a single joint conspiracy among the defendants to sell the stock of a corporation by false and fraudulent representations and of an original community of interests and general plan in which all the defendants participated, to a greater or less degree, they were not improperly joined in an indictment because they later formed agencies to sell the stock in different parts of the country, though some of the defendants profited from one agency, some from another, and one from both.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 327–333; Dec. Dig. § 124.*]

13. CRIMINAL LAW (§ 444*)—EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF CORPORATION.
In a prosecution for wrongful use of the mails in furtherance of the scheme to defraud in the sale of corporate stock by false representations, the books of the corporation, regularly kept in due course of business, are admissible on the issue of the financial condition of the corporation, without verification of the entries by employés, in the absence of any contention that the books were not accurately kept.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.*]

14. CRIMINAL LAW (§ 396*)—EVIDENCE—BOOKS OF CORPORATION.
A person who makes statements concerning the affairs of a corporation cannot object when the regular books of the corporation are used against him.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 396.*]

15. POST OFFICE (§ 49*)—WRONGFUL USE OF MAILS—SCHEME TO DEFRAUD—EVIDENCE.
In a prosecution for using the post office in furtherance of a scheme to defraud in the sale of corporate stock by false and fraudulent representations, evidence *held* sufficient to sustain the conviction of all the defendants.
[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 49.*
Nonmailable matter, see note to 30 C. C. A. 79.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Southern District of New York.

Christopher C. Wilson and others were convicted of using the mails to effect a scheme to defraud, and they bring error. Affirmed.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, taken by the defendants, Christopher C. Wilson, William W. Tompkins and Francis X. Butler.

Said defendants, together with William A. Diboll and George H. Parker, were convicted under an indictment charging them, in the first three counts, with using the mails to effect a scheme previously devised by them to defraud, in violation of section 5480 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696),[1] and, in the fourth count, with conspiring to commit an offense against the United States in violation of section 5440 of the Revised Statutes (page 3676); said offense against the United States forming the basis of the conspiracy count being the misuse of the mails in violation of section 5480.

The defendants other than Diboll were sentenced to terms of imprisonment. A fine was imposed upon the defendant Diboll, which was paid. The defendant Parker has withdrawn from the present writ of error so that it is prosecuted—as already stated—by the defendants Wilson, Tompkins and Butler alone.

Arthur M. King, for plaintiff in error Wilson.

John B. Stanchfield, for plaintiff in error Tompkins.

W. Bourke Cochran, for plaintiff in error Butler.

H. A. Wise, U. S. Atty., and G. H. Dorr, Asst. U. S. Atty. (Robert Stephenson, of counsel), for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The most material questions presented by the assignments of error are these:

(1) Whether the first three counts of the indictment are based upon a statute in force when the alleged offenses were committed;

(2) Whether the first three counts set forth the scheme or artifice in question otherwise than by way of recital;

(3) Whether the averments in these counts limit the charge to using the mails to obtain money by false pretenses;

(4) Whether it was necessary for the government to show damage to persons buying the stocks;

(5) Whether the selling of the personal stock was fraudulent;

(6) Whether the fourth count charges a conspiracy to commit an offense against the United States;

(7) Whether the conspiracy count is barred by the statute of limitations;

(8) Whether there was a single or two separate conspiracies;

(9) Whether error was committed in the admission of documentary evidence;

[1] The contention that the first three counts are based upon section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1909, p. 1455]), and not upon Rev. Stats. § 5480, is considered in the opinion.

(10) Whether the evidence was sufficient to warrant the conviction of all the defendants.[2]

[1] The contention of the defendants regarding the first question is that the counts charging the misuse of the mails are based upon section 215 of the Criminal Code which went into effect January 1, 1910, and not upon section 5480 of the Revised Statutes which was in force at the time of the commission of the alleged offenses, and that the Criminal Code in relation to such offenses is ex post facto.

The relevant portions of the statutes in question are printed in the footnote[3] and from a comparison of them it appears that the Criminal Code adds the words, "by means of false or fraudulent pretenses, representations or promises" to the language of section 5480.

The indictment, in the general description of the offense, charges that the defendants "devised and intended to devise a scheme and artifice to defraud divers persons of their money and property in and by inducing by false and fraudulent representations and pretenses, and by fraudulent artifices and devices, said persons to part with such money and property."

It is urged that this use by the pleader of certain phrases appearing in the Criminal Code and not expressly appearing in the prior statute, necessarily establishes that the indictment is based upon the former and not upon the latter, and that as the Code increases the penalty and was not in force when the offense was committed the indictment based upon it is void.

In our opinion, however, the facts stated in the indictment, as distinguished from the general description, clearly disclose a scheme or artifice to defraud within section 5480, and this would undoubtedly be

[2] While the questions stated in the text are regarded as the most important in the case and the opinion is, for that reason, confined to an examination of them, it must be understood that the court has examined and considered all the other assignments of error which have been urged or relied upon by any of the defendants. It is thought to be sufficient to say, in respect of them, that, in the opinion of the court, they disclose no reversible error.

[3] R. S. § 5480 as amended: "If any person having devised or intending to devise any scheme or artifice to defraud, * * * to be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post office establishment of the United States, * * * shall, in and for executing such scheme or artifice, or attempting to do so, place any letter or packet in any post office of the United States, or take or receive any therefrom, such person, so misusing the post office establishment, shall be punishable by a fine of not more than five thousand dollars, and by imprisonment for not more than eighteen months, or by both such punishments. * * *"

Criminal Code, § 215: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or letter box of the United States, * * * shall be fined not more than one thousand dollars, or imprisoned not more than five years or both."

sufficient even if the characterization of the offense were inappropriate. But, in our opinion, the general description in the indictment is not an inappropriate description of a "scheme or artifice to defraud" under section 5480. We think that a person who induces others by "false and fraudulent representations and pretenses" to part with their property is guilty of devising "a scheme or artifice to defraud" within the meaning of the statute.

[2] If then the indictment properly state an offense under the statute in force when it was committed, its validity is in no way affected by the fact that it may also be sufficient to state an offense under the later statute carrying a heavier penalty. So the indictment being sufficient under the statute it is immaterial whether the pleader had it or the Code in mind when he drew the indictment. Indeed, he may very well have had the language of the Code in mind as preserving the provisions of the statute with the interpretation placed upon them by the courts.

[3] With respect to the second question which we are to consider, the defendants contend that the first three counts of the indictment are bad because the scheme or artifice is pleaded by way of recital and not by direct averment.

The point of this contention is that the counts in question charge that the defendants on a given day had devised a scheme to defraud, and it is said that these allegations do not constitute positive averments of the commission of the offense of which the fraudulent scheme was a necessary part. In our opinion, however, the charge that at a particular time the defendants had devised a fraudulent scheme, sufficiently charges that the defendants theretofore did devise such scheme.

[4] The defendants' contention with respect to the third question stated is that the indictment by adding the words "in and by inducing by false and fraudulent representations and pretenses" to the express language of the statute, limits the charge to the offense of scheming to obtain money by false pretenses and of using the mails to that end. Based upon this proposition these further contentions are made:

(1) That the offense of obtaining money by false pretenses is not a "scheme and device" within the statute.

(2) That if such offense be within the statute, the trial court erred in receiving evidence of false pretenses and representations as to the future.

Here again we think that the defendants lay too much stress upon the general description of the offense contained in the indictment. The particulars of the scheme are stated at length and it appears clearly that the defendants are not charged merely with misrepresentations as to past facts but as to the future as well. But even confining ourselves to the general description, we think the government not tied down to the common law offense of obtaining money by false pretenses. The defendants are charged with devising a "scheme and artifice to defraud" not only by inducing persons to part with their money by false representations but "by fraudulent artifices and devices." Taking the averments together we think that a "scheme and artifice" within the meaning of the statute is averred.

[5] Notwithstanding the argument of the defendants we have no doubt that a scheme to induce persons to purchase stock in a corporation by false and fraudulent representations that the money paid for it would go into the treasury of the corporation for development purposes; that the officers of the corporation would not sell their shares and believed that they would become of enormous value; that stock held by officers was nontransferable; that only treasury stock was on the market, and that all increases in the selling price of the stock were justified by the development of the business, is a "scheme and device to defraud" within the meaning of the statute. We cannot accept the defendants' contention that the mails are open for the dissemination of "plain, blunt, customary misstatements." On the contrary, we think that the purpose of the statute was the broad one of preventing the use of the mails to despoil the public, whether such result was intended to be accomplished by means of plain falsehoods, or by the most glittering, alluring and complicated contrivances.

In Durland v. United States, 161 U. S. 313, 16 Sup. Ct. 511 (40 L. Ed. 709), the Supreme Court of the United States said:

"But beyond the letter of the statute is the evil sought to be remedied, which is also significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

"In the light of this the statute must be read, and so read it includes every thing designed to defraud by the representations as to the past or present, or suggestions and promises as to the future.

* * * * * * * * * * * * *

"It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise."

[6] The defendants' contention in respect of the fourth question stated is that it does not appear from the indictment or proof that the stock which the defendants sold was worth less than the price paid for it and consequently, that an essential element of the offense charged, i. e., damage, was not established.

It is not necessary to determine in this case whether actual injury is an essential element of a civil action for fraud. There are some cases which hold that even in such an action a party is entitled to the benefit of the terms of the fraudulent contract and that the measure of damage is the difference between the real value of the property purchased and the value which it is represented to have. On the other hand it is held in other cases—and much more logically—that an action of fraud is in disaffirmance of the fraudulent contract and that a party can only recover according to the extent of his injury, viz., the difference between the value of that which he paid and that which he received.

But whatever may be the rule in civil cases, we are satisfied that damage is not made an essential element of the federal statutory of-

fense of using the mails to execute a scheme or artifice to defraud. We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person's right of open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to induce persons to part with their property and to purchase stock which was not of the value represented, the government was not required to go further and prove either the existence or extent of damage to the purchasers.

Any other construction of the statute would deprive it of all force in dealing with fraudulent schemes in the guise of legitimate corporate enterprises and would place a premium on lies and deceit. It would only be necessary to deal in a stock of uncertain value, e. g., of a corporation owning patent rights, and all the false and fraudulent statements imaginable could be made with impunity and the mails be used to prey upon the public. Purchasers would not obtain that which they were promised; their money would be obtained by false and fraudulent representations, but in how many cases could the government show that they failed to get their money's worth? How could the real value of such shares be established?

In Kellogg v. United States, 126 Fed. 323, 326, 61 C. C. A. 229, 232, this court said of the statute now under consideration:

"Since Congress did not make the benefit of the wrongdoer an element, it would seem to be judicial legislation for the courts to require such benefit to be alleged and proved."

As a corollary to this conclusion we think it follows that damage to purchasers from which benefit to the wrongdoer would result, is likewise not necessary to be alleged and proved.

In Horn v. United States, 182 Fed. 727, 105 C. C. A. 169, the Circuit Court of Appeals for the Eighth Circuit stated the essential elements of an indictment under section 5480 without including damage, and with respect to the allegation of the indictment concerning the value of the stocks which the fraudulent scheme was devised to sell, said:

"It is sufficiently alleged that the stock of the mining company was not of the value that the defendants were to falsely represent it to be."

In so far as Miller v. United States, 174 Fed. 35, 98 C. C. A. 21, is in conflict with the conclusions stated, we are unable to follow it.

[7] With respect to the fifth question, it is contended that there was no fraud in the sale by the defendants Wilson and Tompkins of the stock belonging to them personally notwithstanding the representations that only treasury stock was to be sold provided they put the proceeds of such sale into the treasury of the corporation even if they did so by loans. In our opinion, however, there is a material difference, directly affecting purchasers of shares, between the financial condition of a corporation which has, for example, $100,000 in its treasury as the result of sales of its treasury stock and that of a corporation whose treasury stock is unsold but which has obtained $100,000 by borrowing from its officers.

[8] The gist of the contention of the defendants with respect to the

sixth question which we have stated is that the conspiracy count does not charge a conspiracy to commit any offense against the United States but only charges a conspiracy to devise a fraudulent scheme or artifice in contravention of state laws. It is urged that devising a scheme to defraud in and of itself is not forbidden by any statute of the United States and the fact that the conspirators may have intended to use the mails as a part of their scheme was merely an incident of the scheme and insufficient to bring the conspiracy within the federal statute.

[9] In our opinion, however, the count sufficiently charges a conspiracy to commit an offense against the United States when it charges a conspiracy to devise a scheme to defraud and to execute such scheme by opening correspondence through the mails. We think that persons conspire to commit an offense against the United States when they conspire to commit an offense which can be carried into effect only by violating the laws of the United States. We also think without foundation the contention of the defendants that the offense which the indictment alleges that they conspired to effectuate was not a crime or a fraud upon the public but a private tort against the United Wireless Company. Undoubtedly embezzlement from the corporation would not, in and of itself, constitute a scheme to defraud the public by the use of the mails. But a scheme to defraud the public by inducing them to send money to the corporation which the defendants could then embezzle would be rendered none the less a public offense by the intervention of the corporate entity.

[10] The defendants' contention with respect to the seventh question which we are to consider is that the conspiracy charge is barred by the statute of limitations.

The indictment fixes the date of the conspiracy as December 8, 1908, which was within three years of the filing of the indictment. It seems to be conceded, however, that the date of the original agreement, the meeting of the minds of defendants, was more than three years before the indictment and that if the date of such agreement can be treated as the date of the conspiracy, it was barred by the statute of limitations. It is also practically conceded, in view of the decision of the Supreme Court in United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, that if the conspiracy were a continuing one it was not barred by the statute because its operation continued at least up to the date specified in the indictment.

In our opinion the averments of the indictment with respect to the nature of the conspiracy as well as the proof itself show that it was necessarily a continuous one. In the language of Mr. Justice Holmes in the Kissel Case, "A conspiracy is a partnership in criminal purposes." Such a complex and far-reaching partnership as that described in the indictment requires continuance of operation to accomplish its object and continues until such purposes are accomplished or the partnership abandoned.

We are unable to appreciate the distinction between a conspiracy to close a factory so that it will not be a competitor of the conspirators —as in the Kissel Case—and a conspiracy to dispose of a large amount

of stock to whomever may be induced to buy, which necessarily contemplates a continuance of selling until the amount of stock controlled by the conspirators shall be sold. If in the one case the conspiracy continues "fresh every day" until the factory is permitted to open, it seems clear, in the other case, that it continues until the conspirators cease disposing of the stock or give up the scheme.

It is also urged that the Kissel decision is inapplicable because the present indictment does not contain in express terms a continuando. As just pointed out, however, we think that the averments of the indictment with respect of the nature of the conspiracy necessarily involved the allegation that the conspiracy was a continuous one and were equivalent to an express allegation that it had continuance in time.

With respect to the eighth question before us the defendant Butler especially urges that the proof offered to support the indictment establishes not one conspiracy but two, and that with one of them said defendant had no connection.

[11] We do not question the correctness of the proposition stated in behalf of said defendant that when certain persons combine to perform certain acts and some of them combine with others engaged in totally different acts, though all may have a similar general purpose in view, it is error to join them in an indictment. Applying this principle in the present case, if the proof failed to show cooperation or concerted action among the defendants prior to the formation of the New York Selling Agency and the Western Selling Agency, we think there would be much ground for contending that neither the presence of the defendant Wilson in both agencies nor the common object of selling the stock of the United Wireless Company was sufficient to show a single conspiracy. [12] But we think that there was evidence to warrant the jury in going back of the agency agreements in finding a single general conspiracy among the defendants to sell United Wireless stock; an original community of interest. And if there were an original general plan in which all the defendants participated—some in greater and some in less degree—it was not, in our opinion, split up into separate conspiracies by the later formation of the agencies to sell the stock in different parts of the country even though some of the defendants profited from one agency and some from the other, and the defendant Wilson from both.

[13] The next question is whether error was committed in the admission of documentary evidence.

For the purpose of showing the sales of personal stock by the defendants in the face of representations that no personal stock was being sold and that the only stock being sold was treasury stock of the United Wireless Company, the government was permitted to introduce the stock books of that corporation together with tabulations based thereon.[4]

[4] Certain other books and reports were also introduced in evidence, but we think their admission governed by the same general principles as the stock books and they are not separately considered.

The defendants contend that the admission of these books was a violation:

(1) Of their constitutional right granted by the sixth amendment to be confronted with the witnesses against them;

(2) Of the rule against hearsay testimony.

Without passing upon the question whether a strict adherence to the constitutional provision required all the persons who made the entries in the books to be called as witnesses or whether the testimony was of such nature as to constitute a recognized exception to the rule, it is sufficient to say that we think the defendants waived their constitutional privilege if it existed.

No point was made that the witnesses who made the entries were not called. The accuracy of the books was not questioned. The only ground of objection was that the defendants were not responsible for books which they did not keep; "in other words, that these people are not chargeable in a criminal litigation with entries in the books to the making of which they are not shown to have been parties."

The question then resolves itself into the inquiry whether the rule against hearsay testimony operates against the admission of the books or whether the trial court was right in overruling the objection made by the defendants as just stated. Manifestly the testimony was relevant and material. As the defendants themselves say, it went to the very heart of the case. Manifestly also the stock books would be considered to furnish the very best history of its shares in any business matter or transaction in commercial life. Regular entries, such as books of this nature contain, afford the basis of undertakings of the greatest magnitude and it would be a rare case where investor or man of business would call for the verification of entries by employés, which verification could ordinarily be obtained only with much difficulty.

In our opinion these considerations should have great weight in a court of law although we do not feel called upon in the present case to state any broader exception to the hearsay rule than the necessities of the case require. It is sufficient now to say that we think in any case, civil or criminal, where the question presented is whether statements made by a party relating to, or involving an inquiry into, the history or transfers of the shares of a corporation or representations concerning the financial condition of a corporation are true or false, and no contention is made that the books of the corporation have not been accurately kept, that such books—the stock books and other books—regularly kept in due course of business should be received in evidence in proof of the statements they contain. It would be practically impossible to establish the truth or falsity of the statements or representations in any other way. If possible it would involve—taking the stock books for example—a lamentable waste of time serving no useful purpose, to establish the actual signatures in hundreds of cases where no one suggests that any signature is a forgery. [14] Moreover, a person who makes statements concerning the condition or affairs of a corporation is not in a position to object when the regular books of tne corporation are used against him. If he be

an officer of the corporation and make such representations he should certainly be bound by the books and if he be a stranger and make statements without knowledge he cannot complain. We think that the rulings of the trial court upon the documentary evidence were correct.

[15] The final question to be considered is whether the evidence was sufficient to warrant the conviction of the different defendants.

It is apparent from an examination of the record that the defendant Wilson was the master mind in the scheme for the exploitation of the United Wireless Company and it is not seriously contended in his behalf that there was not sufficient evidence of his guilt upon all the counts to go to the jury.

The defendants Tompkins and Butler stand in a different position. They were undoubtedly under the domination of the defendant Wilson. They took comparatively minor parts in the general plan. If the government were required to establish the scheme to defraud or the existence of the conspiracy by testimony limited to the acts of these particular defendants, it would undoubtedly fail. But such would be the result in the case of any complex scheme participated in by a number of persons if it were sought to hold one of the less conspicuous participants by proof confined to its own acts. In every such case the existence of the conspiracy must necessarily be shown by general evidence and the vital question then is whether the particular defendant actually took part in it. And in view of the fact that the sentences imposed upon these defendants might have been imposed for conviction under the conspiracy count alone, it seems only necessary to consider that question here.

Moreover, in considering the testimony concerning these defendants, it must be borne in mind that combinations and conspiracies are seldom to be proved by formal agreements. All the facts and circumstances must be considered and the acts of the particular defendants must be looked at with reference to them. Moreover, the question is not what view this court would take of the testimony but what view the jury had the right to take of it. The judgment cannot be reversed unless the evidence were such that the trial court erred in submitting the question of the guilt of these defendants to the jury.

We have carefully considered the testimony concerning the defendant Tompkins, although we think that no useful purpose would be served by reviewing it in detail. It is sufficient to say that in view of the connection of this defendant with the prior De Forest Company and of his continuous connection with the United Wireless Company in various capacities as well as of his participation in the selling agency agreement and of his other acts as disclosed by the record, we think that there was evidence to warrant the jury in finding his guilty knowledge of, and participation in, the conspiracy and scheme to defraud.

So, we have carefully considered the testimony concerning the defendant Butler. We were impressed upon the argument with a doubt whether there was sufficient evidence to go to the jury connecting him with the conspiracy, but an examination of the record convinces us that the trial court was right in submitting to the jury the question

of his guilt. His long association with the old De Forest Company and the persons in charge of it, his subsequent connection with the Wireless Company, his participation in the selling agency contracts, his attendance at a stockholders' meeting, where questionable resolutions were passed, and the various matters which the testimony shows were brought to his notice, justified, in our opinion, the action of the court. We are satisfied that something more than the relation of attorney and client existed between this defendant and the Wireless Company and its promoters and that the evidence was such as to warrant the jury in finding his participation in the conspiracy.

With respect to both the defendants Tompkins and Butler, there was one item of evidence—the agency agreement in which they both participated—which, in and of itself, was most suspicious and furnished some ground at least for the jury to draw the inference of guilty knowledge. The commission of 50 per cent. for the sale of United Wireless stock was most remarkable. A court may almost take judicial notice of the fact that the stock of a corporation selling for twice its par value does not require the payment of such a commission to dispose of it. If it does, the selling price must be altogether artificial. The inference must be either that the company is fraudulent if the commission is not excessive or that the commission is fraudulent if the company is what it purports to be.

For these reasons, we reach the conclusion that no error was committed in the trial of the three defendants. Moreover, after an examination of the evidence, we think that their conviction was right: While their original purpose may have been legitimate, while they may have believed in the future of wireless telegraphy, we are satisfied that they deliberately entered into a scheme to take advantage of the public interest in a great and meritorious invention to sell to the public thousands of shares of stock which they knew to be practically worthless. They could accomplish their objects only through the use of the mails, and through the use of the mails has come their condemnation under a federal statute. But the judgment will not serve the purpose it ought to serve if it be regarded merely as inflicting punishment on these defendants. It should reach far beyond them and serve as a warning to that vast crowd of speculators, promoters, gamblers and adventurers who pose as men of business and affairs and carry on their operations in the borderland between legitimate undertakings and criminal schemes. It ought to bring home to their understanding that the misappropriation of other peoples' moneys is not distinguished from larceny by designating the process a great corporate enterprise; that inducing hundreds of men and women to part with hundreds of thousands of dollars for worthless securities calls for condemnation just as much as cheating in the sale of a single musical instrument or photograph album; that after all there is no merit in wholesale knavery over cheap tricks or in gilded devices over barefaced swindles, and, furthermore, that neither swindlers of high degree nor cheats of low station can employ with impunity the mails of the United States in aid of their fraudulent schemes.

The judgment of the Circuit Court is affirmed.

BELSEA et al. v. TINDALL et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1911.)

No. 1,849

1. TRIAL (§ 296*)—INSTRUCTIONS—BURDEN OF PROOF.

Where defendants, in addition to a denial of material allegations of the complaint, pleaded an estoppel, it was not error for the court to charge generally that the burden of proof rested on plaintiffs, and that, to entitle them to recover, they must establish every material allegation of the complaint by a preponderance of the evidence, where further along in the charge the jury were told that the burden rested on defendants to prove by a preponderance of the evidence the affirmative matter pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713; Dec. Dig. § 296.*]

2. MINES AND MINERALS (§ 68*)—LEASES.

In an action of ejectment by the owners of a placer mining claim against the lessees, evidence that, after the commencement of the action, defendants continued to work the claim for more than a year, from time to time washing the gold from the dumps of gravel hoisted therefrom, and that plaintiffs visited and inspected the workings during such time, and received and receipted for the share of the gold reserved by the lease as royalty without objection, was sufficient to warrant the submission to the jury of the defense of estoppel pleaded by defendants to a claim for damages for such working set up in an amended complaint.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 68.*]

3. MINES AND MINERALS (§ 68*)—LEASE—BREACH.

The question whether lessees of a placer mining claim worked it "mine-fashion" as required by the lease *held* properly submitted to the jury under the evidence in an action of ejectment by the lessors, based on an alleged failure to do the work in accordance with the terms of the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 68.*]

4. MINES AND MINERALS (§ 68*)—MINING LEASE—CONSTRUCTION—"PAY DIRT."

The term "pay dirt," as used in a placer mining lease, requiring the lessees to remove all "pay dirt as low as 2 cents per pan," *held* properly construed by the court in the light of all the surrounding circumstances and conditions pertaining to the working of the claim as not meaning all dirt in the mine averaging two cents per pan, but all such that it would pay to mine by the use of minerlike methods.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 68.*]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska.

Action at law by John Belsea and W. P. Beardsley against Edward Tindall and William C. Finn. Judgment for defendants, and plaintiffs bring error. Affirmed.

Action in ejectment to recover possession of a placer mining claim described as claim No. 2, above discovery on Ester creek, in the Fairbanks mining district, territory of Alaska, and for damages for the alleged wrongful withholding of such possession.

On July 7, 1906, the plaintiffs in error, John Belsea and W. P. Beardsley, who were then doing business in Alaska under the firm name and style of the Eagle Mining Company, leased to C. G. Finger and Edward Tindall the placer mining claim described as mining claim No. 2, above discovery on Ester

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creek, in the Fairbanks mining district in Alaska. The lease was for a term of a little more than three years, terminating at noon on the 1st day of September, 1909, unless sooner forfeited or determined by the violation of any of the covenants of the lease by the lessees.

The covenants of the lease material to the present controversy were, on the part of the lessees:

"(1) To enter upon said above-described mining property at once, to work the same mine-fashion starting and lower line working same with a straight face at least 100 ft. wide or more if required to get all pay dirt as low as 2 cts. per pan, in other words, to good and economical mining so as to take out the greatest amount of mineral with due regard to the development and preservation of the same as a workable mine and to the special covenants hereinafter reserved. * * *

"(3) To allow said parties of the first part or their agent from time to time to enter upon and into all parts of said mining premises for purposes of inspection. * * *

"(5) No clean-ups to be made without party or parties of the first part or their agent being personally present. All gold dust to be well cleaned.

"(6) To pay as royalty to the said parties of the first part forty per cent. (40%) of all gold and other precious mineral taken from said ground such payments to be evidenced by receipts at the office of the Eagle Mining Co. on claim No. 3, above Ester creek, Fairbanks mining district, district of Alaska. * * *

"(8) * * * That upon violation of any covenant or covenant or covenants hereinbefore reserved the term of this lease shall at the option of the parties of the first part expire and the same and said premises with the appurtenances shall become forfeited to said parties of the first part and said parties of the first part or their agent may thereupon after demand of possession in writing enter upon said premises and dispossess all persons occupying the same with or without process of law or at the option of said parties of the first part said parties of the second part and all persons found in occupation may be proceeded against as guilty of unlawful detainer."

In the summer of 1907 (the exact date is not stated) this lease was extended by the lessors one year, or until September 1, 1910. After this extension and after September 14, 1907, Finger sold all his interest in the lease to William C. Finn. Thereafter Edward Tindall and William C. Finn, the defendants in error, were the owners of the entire leasehold estate in the claim. On February 19, 1908, Beardsley and Belsea notified Tindall, Finn, and Finger of a forfeiture of the lease on the ground that the defendants had failed to work the claim in accordance with the terms of the lease. On February 24, 1908, Beardsley and Belsea commenced the present suit in ejectment against Tindall, Finn, and Finger for the recovery of the possession of the claim.

In the second amended and supplemental complaint filed October 8, 1909, it is charged that after the execution of the lease, and prior to the commencement of the action, the defendants had violated its conditions and covenants by failing and refusing to work the premises in mine fashion; that commencing from the lower line of the claim the defendants did not work the same with a straight face at least 100 feet wide; that they left pay dirt on each side of the portion of the ground mined by them of the value of more than two cents to the pan for an average thickness of not less than the thickness of the pay streak; that they left a portion of the pay streak unmined for the entire width of the same; that they did not carry on said mining in a good or minerlike manner; that they did not take out the largest amount of mineral with due or any regard to the development of the same as a workable mine; that they left a large pillar of pay dirt of the value of more than two cents to the pan running across the entire pay streak, of an average thickness up and down stream of not less than about 30 feet; that they left good and valuable pay dirt of a value of more than two cents to the pan on each side of that portion mined by them, although requested and required by plaintiffs to take out and mine all of said pay

dirt; and that said defendants and each of them, although required so to do by plaintiffs, refused to work up the claim with a straight face, and with a face not less than 100 feet in width, and as much wider as would be necessary to take out all pay dirt having a value of two cents to the pan, contrary to the express provisions of the lease, and contrary to the working of said mine in a good, minerlike fashion; that between the dates mentioned, and especially between the 1st day of October, 1907, and February 19, 1908, defendants had failed, neglected, and refused to work and mine the said property in an economical and minerlike way, and had failed, neglected, and refused to mine and work said mine with a straight face of a width of 100 feet, and had failed, neglected, and refused to mine and take out large portions of the pay dirt of a value of more than two cents to the pan, but had wrongfully and willfully worked and mined the property in a wasteful, extravagant, and destructive manner, gouging out the richest part of the pay streak, and butchering the claim in such manner that a large portion of the gold therein would be and was wasted and lost to the plaintiffs. It is alleged that plaintiffs dissolved their partnership on February 9, 1908, and thereupon Belsea conveyed to Beardsley the upper 75 feet of the claim, and Beardsley assigned to Belsea all of his right, title, and interest in the claim for damages against the defendants, and that Belsea had become the owner of such claim for damages. It is alleged that on February 19, 1908, plaintiffs declared a forfeiture of the lease, and that defendants Tindall and Finn were notified of such declaration.

A second cause of action is alleged in which it is charged, substantially as in the first cause of action, that since the commencement of the action and the service of summons defendants have continued to carry on mining operations upon said claim contrary to the rights of the plaintiffs; that since the commencement of the action such mining operations on the part of the defendants Tindall and Finn have been in violation of the terms of the lease; that large quantities of pay dirt or gravel had been left behind unmined; that on May 15, 1909, the defendants ceased mining said ground in the underground workings thereof, and thereupon turned large quantities of water into the underground workings of said claim, thus preventing said plaintiffs or either of them from entering the underground workings of said claim, and testing the value of the ground left by the defendants, and thereby preventing the plaintiffs from proving the damages sustained by them. Belsea demands judgment for the possession of the claim, except the upper 75 feet. Beardsley demands judgment for the possession of the latter portion of the mine. Belsea also demands judgment for damages in the sum of $1,000 for the withholding of the premises prior to the commencement of the action, and for $24,000 for the withholding of the premises since the commencement of the action.

To this complaint the defendants Tindall and Finn filed their answer on October 12, 1909, admitting the ownership of the claim by the plaintiffs and its lease to the defendants as alleged in the complaint, but denied the allegations of the complaint charging that the defendants had not worked the claim in accordance with the terms of the lease, and for an affirmative defense the answer alleged, in substance, that the defendants Tindall and Finn were the owners of the leasehold estate, and were in actual possession of the property and mining thereon with a large and expensive plant of machinery, and with a large force of men, and were then and had been at all times continuously actually engaged in mining the same in compliance with the terms of the lease, except when restrained therefrom by the order of the court made in the case on May 22, 1909; that on that date an order of injunction was made and signed by the court restraining the defendants and their employés from mining said ground pending the action, and that ever since that date the defendants have been restrained and enjoined from working and mining thereon; that, as soon as the court will permit, the defendants would immediately and in good faith continue to prospect and search for pay and gold-bearing gravels therein, and would dig, work, mine, hoist, and pile the said pay and gold-bearing gravels on the surface of the ground, and especially would and had at all times intended to dig, excavate, and hoist, pile, and clean up the partition or pillar between

the first old works or block No. 1 on the lower end of the claim and the next block above, and all other ground then unmined and so complained of by the plaintiff Belsea.

The defendants alleged that it was their intent and purpose, and they had the financial ability, to work said claim continuously until all the pay dirt therein of the value of two cents to the pan was worked out, and this they could do before the expiration of the lease on September 1, 1910. The defendants alleged the particulars concerning the working of the mine, the presence of the plaintiff Belsea, and his attorney in fact and agent, W. C. Harp, during defendants' mining operations, the acceptance by the plaintiff of his royalty of 40 per cent. Upon the proceeds of such continued opertions, the fact that plaintiffs stood by in silence and without objection during the winter of 1908–1909, and saw the defendants work and mine the ground and excavate from the underground workings thereof gold-bearing gravel, and deposit and pile up this gravel on the surface in two large and valuable dumps ready for washing and cleaning up, and the separation of the gold therefrom; that these two dumps contained on April 27, 1909, gold of the value of $100,000; that immediately after May 8, 1909, defendants began to sluice and wash up the same, and between the first day of sluicing and the 22d day of May the defendants washed up and cleaned out of these two dumps then on the surface of the claim gold and gold dust of the value of $39,445, and on the 13th, 16th, 19th, and 21st days of May, 1909, defendants paid to the plaintiff Belsea 40 per cent. of the gross amount thereof under the terms of the lease, to wit, the sum of $15,776.20; that said payments were in full and so received by Belsea; that thereafter and at the time of filing the answer on October 12, 1909, the remainder of the two dumps on the surface contained more than $50,000 in gold; that the defendants were the owners and entitled under the lease to 60 per cent. of that amount, or $30,000, which defendants alleged that plaintiff was seeking to convert to his own use.

Plaintiffs' reply denied in the main the affirmative matter alleged in defendants' answer. Plaintiffs' two causes of action were: First, a violation of the terms of the lease on the part of the defendants by reason of their alleged failure to work the ground in the manner provided for in the lease, and upon which alleged failure a notice of forfeiture was served upon the defendants on February 19, 1908. For this cause of action, plaintiffs demanded judgment for the possession of the property and damages for the wrongful withholding of the same in the sum of $1,000. The second amended and supplemental complaint filed on October 8, 1909, alleged an additional or second cause of action, upon which plaintiffs demanded judgment for $24,000 in damages for the wrongful withholding of the premises and for a continuing violation of the terms of the lease after notice of forfeiture and after the commencement of the action.

It appears from the evidence that the claim in question is a placer claim about 1,000 feet in length, extending along Ester creek. The width of the claim is about 900 feet. The bedrock under the claim is from 30 to 40 feet beneath the surface. On this bedrock is a deposit of gravel containing gold, extending lengthwise of the claim. The width of the deposit varies from 100 to 200 feet. Along its center or channel it is from 3¼ to 4 feet deep, but the depth gradually diminished in the direction of the sides until the gravel ceases altogether. To reach this gravel deposit the defendants sunk shafts from the surface to the bedrock, a distance, as before stated, of from 30 to 40 feet. The shafts were sunk to a convenient point on the bedrock for the convenient and economical removal of the gravel. This appears to have been somewhere near the center of the deposit crosswise. From the bottom of the shaft the defendants ran tunnels across the deposit through which the pay gravel was removed to the shaft and hoisted to the surface and placed in dumps for washing at the appropriate season. Not all the gravel was pay gravel. Generally the gold in the gravel diminished in value in the direction of the sides. It was accordingly provided in the lease that the "pay dirt" to be removed by the defendants was to pay at least two cents per pan. If the pay was below that amount, the defendants were not required to remove the gravel.

The defendants in this case sunk eight different shafts to the bedrock at convenient points along the length of the claim, and through these shafts hoisted the "pay dirt" or gravel to the surface. The ground worked through a shaft was designated as a block, with a number corresponding to the number of the shaft through which the block was worked. It appears that between blocks 1 and 2 the defendants did not remove all the pay gravel, but left a section extending across the block which they claim they left as a bulkhead to keep out the water of Ester creek, but which they proposed to remove before they left the mine. The plaintiffs claim that under the terms of the lease this deposit should have been removed while the work in that locality was in progress. This was the commencement of the controversy between the parties. It is claimed, further, by the plaintiffs that the defendants in working the mine left quantities of pay gravel around the shafts. These deposits were designated as pillars in the testimony. It is also claimed by the plaintiffs that the defendants left pay gravel on the sides, and that the leaving of these various deposits was a violation of the terms of the lease. The defendants claim that they would have worked out all the pay gravel in the mine during the term of their lease had they not been prevented by the injunction obtained by plaintiffs. The case was tried before a court and jury, and resulted in a verdict in favor of the defendants. From the judgment entered on this verdict, the case is brought here by the plaintiffs on a writ of error.

Stevens, Roth & Dignan, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for plaintiffs in error.

James Wickersham, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The question in the court below was whether the defendants had worked the claim in accordance with the terms of the lease. The lease provided certain specific directions for working the claim, and the question was whether these directions had been followed by the lessees. The lease required that the lessees should "work the claim mine fashion, starting and lower line working the same with a straight face, at least one hundred feet wide, or more if required, to get all pay dirt as low as two cents per pan." To make these instructions more certain and definite the lease stated them. "In other words," that is to say, the lessees were required "to good and economical mining so far as to take out the greatest amount of mineral with due regard to the development and preservation of the same as a workable mine."

[1] Whether the defendants worked the mine in accordance with these directions the evidence was conflicting. It was therefore a question of fact for the jury to determine upon the weight of evidence under appropriate instructions by the court. The errors assigned relate to these instructions. The court instructed the jury fully as to the issues involved in the case as set forth in the plaintiffs' complaint, the defendants' answer, and plaintiffs' reply, and in an orderly way gave the usual instruction that the burden of proof was upon the plaintiffs, and that it was incumbent upon them to establish all the material allegations of their complaint by the weight or preponderance of the evidence. The jury were instructed that, unless they found and believed from all the evidence in the case that the plaintiffs had sustained the material allegations of their complaint by the weight or preponderance of the evidence, it could not find in plaintiffs' favor,

and the verdict should be for the defendants; and if the jury should find and believe from the evidence that the evidence did not preponderate in favor of either of the parties, but was equally balanced, then it should find for the defendants.

It is objected to this instruction that it leaves out of consideration entirely the question of estoppel, affirmatively pleaded by the defendants, and upon which defendants relied, and the burden of proof of which was upon the defendants. The objection cannot be sustained for the reason that in the instruction complained of the court was referring to the evidence required to sustain plaintiffs' complaint. When the court reached an appropriate place in its instructions in referring to the defendants' affirmative defense, the court gave the required instruction, and gave it in a way so as to avoid confusion and mistake as to its proper relation to the issue involved. The court in this part of its instruction again referred to the fact that the burden of proof in the case as in all civil cases was upon the plaintiffs; that the plaintiffs must establish all the material allegations of their complaint by a fair preponderance of the evidence. "But," said the court, "when that is once done to your satisfaction, in order for the defendants to overcome the right of the plaintiffs to prevail by reason of any affirmative defensive matter set up in their answer, it then becomes necessary for the defendants to prove such affirmative matters by the weight or preponderance of the evidence." To this instruction there was no objection, as, indeed, there could be none. It is a clear statement of the rule relating to evidence given in support of an affirmative defense, and its omission from that part of the instruction relating to the plaintiffs' case as set forth in their complaint was not error. "In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole, as it must have been understood, both by the court and the jury, at the time when it was delivered." Magniac v. Thomson, 7 Pet. 348, 389, 8 L. Ed. 709; Evanston v. Gunn, 90 U. S. 660, 666, 668, 25 L. Ed. 306.

[2] The court instructed the jury that the defendants were held by law to a substantial compliance with all the terms and conditions of the lease, and, if the jury found by a preponderance of the evidence that it failed to comply substantially with any of the terms of the lease, plaintiffs would be entitled to recover the possession of the premises in controversy. To this instruction there was appended this qualification:

"Unless you further find that the plaintiffs have estopped themselves from claiming the possession of said premises by their own acts, as you will be hereafter instructed."

It is objected to this last part of the instruction, as well as to the instructions relating to estoppel thereafter given, that there was no evidence sufficient in law on which to base an instruction on the sub-

ject of estoppel, and which would give the jury the right to pass upon that issue in favor of the defendants. This objection is urged against all the instructions referring to the defense of estoppel as set up by the defendants. It is not based upon the objection that the law was incorrectly stated, but that the evidence was not sufficient to create an estoppel. If there was any evidence tending to establish the defense of estoppel, the question was for the jury. If there was no evidence in support of that defense, the objection should have been made by requesting the court to so instruct the jury and directing a finding on that issue in favor of the plaintiffs. This the court was not requested to do.

Was there any evidence tending to establish the defense of estoppel, and, if there was such evidence, did it relate to the first cause of action or to the second cause of action, or to both? The court instructed the jury that the defense of estoppel could not overcome the effect of the bringing or the maintenance of the suit by the plaintiffs; that is to say, if the jury found by a preponderance of the evidence that the defendants had violated the terms of their said lease prior to the 19th day of February, 1908, and prior to the service of the written notice of forfeiture upon them, that no conduct of the plaintiffs or their agents subsequent to the service of the summons could in any event estop the plaintiffs from bringing an action and recovering the possession of the premises for such a breach, and no act or word of the plaintiffs after the service of the summons in the case could estop them from proving the breach occurring, if the jury found from a preponderance of the evidence that such did occur, prior to the commencement of the action and service of summons upon them. In other words, the defense of estoppel to be effective against acts of forfeiture alleged in the complaint must be supported by evidence of conduct on the part of the plaintiffs or their agents occurring prior to the notice of forfeiture and the service of summons in the case.

It is admitted by the plaintiffs that this instruction was correct as applied to any alleged acts of defendants occurring subsequent to the commencement of the action, but it is contended that the defendants did not allege or attempt to prove estoppel by acts prior to the commencement of the action. Conceding this to be the fact, it follows that the evidence tending to establish the defense of estoppel was limited to the second cause of action, wherein there was a claim for damages in the sum of $24,000 for continuing acts in violation of the terms of the lease after notice of forfeiture and after the commencement of the action. What was this evidence? The lease was entered into on July 6, 1906, and immediately thereafter the lessees entered into the possession of the property. On February 19, 1908, the complainants notified the defendants that the forfeiture of the lease was claimed, and on February 24, 1908, the original suit in ejectment was filed in this case. But nothing appears to have been done under this original complaint. On May 1, 1908, defendants cleaned up from the workings of the claim gold dust amounting in value to $69,136, and thereupon defendants paid to the plaintiffs the 40 per cent. royalty to which they were entitled under the lease, namely, $27,554, the defendants

retaining the remaining 60 per cent., amounting to $41,582. In October, 1908, defendants cleaned up from the workings of the claim gold dust amounting in value to $24,019.20, and thereupon paid plaintiffs the 40 per cent. to which they were entitled, amounting to the sum of $9,607.68, the defendants retaining the balance. On May 22, 1909, defendants cleaned up gold dust amounting in value to $39,445, and thereupon paid to the plaintiffs the 40 per cent. due them under the lease, amounting to the sum of $15,776.20, the defendants retaining the remainder. The total production of the claim by the defendants from May 1, 1908, to May 22, 1909, amounted to $132,620.20, and of this amount the plaintiffs were paid the sum of $43,040.08. The several amounts making the latter total sum the plaintiffs received without protest of any kind and without any complaint that the defendants were not working the mine in accordance with the terms of the lease. During all this time—that is to say, during all the time subsequent to the bringing of the action of ejectment on February 24, 1908—the defendants prosecuted the work of sinking shafts, running tunnels up and down and across the deposit, and removing and hoisting gravel from the underground drifts to the surface where it was placed in dumps for washing at the proper season. During this time the evidence tends to show that either personally or by an agent the plaintiffs continued to inspect the work in the mine as it progressed; that from time to time they took samples of gravel from such parts of the mine as they wished without objection or interference on the part of the defendants; that the plaintiffs washed this gravel for the purpose of determining its value and whether the production of the mine as worked by the defendants was satisfactory or not. This procedure was maintained for more than a year, and the plaintiffs continued at each clean-up to receive the exact measure of royalty provided in the lease, and to receipt therefor without demanding more and without claiming that more was due.

During the winter of 1908–09 the defendants at considerable expense mined and hoisted and piled upon the surface two large dumps of gravel, and had washed a portion of it. The plaintiffs had been present, watching the progress of the work without protest or objection, but, notwithstanding this evidence of acquiescence, the plaintiffs on May 20, 1909, interposed by writ of injunction and stopped the work, demanding the defendants to desist from further mining operations upon said claim, and from sluicing and washing the dumps of gravel on said claim, and from separating the gold therefrom. There was evidence tending to show that the estimated value of the gravel remaining in these two dumps at the time the work was stopped by the injunction was $50,000. It is charged by the defendants that the purpose of the injunction was to deprive the defendants of their share of the product of what remained of these two dumps of gravel. We think this evidence tended to establish the defense of estoppel, and that it was proper to go to the jury in support of that defense upon the second cause of action. As said in Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. Ed. 618:

"The estoppel here relied upon is known as an equitable estoppel or estoppel in pais. The law upon the subject is well settled. The vital principle is

that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

To the same effect is Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79.

[3] It is next assigned as error that the court instructed the jury that the lease had been extended for the period of one year from and after the 1st day of September, 1909, and that the defendants had until that time within which to take out any pillars left behind and any bulkheads and pay dirt as low as two cents to the pan left on the limits of the claim already worked, providing the jury should find from the evidence that the defendants had at all times in good faith intended to work out such ground so left and separate the gold from the earth and gravel therein under the terms of the lease. An exception was taken to this instruction on the ground that it did not state that the extension was given prior to the commencement of the action and during the year 1907, and for that reason was misleading and had a tendency to prove an acquiescence after the commencement of the action. There does not appear to have been any controversy as to the time when this extension was made. In the course of the trial and in the presence of the jury it was admitted by counsel for the plaintiffs that the lease was extended for one year in the summer of 1907. With such an admission before the jury and without controversy as to its accuracy, we do not think the instruction of the court was misleading, particularly in view of the positive instruction of the court that, if the jury found by a preponderance of the evidence that the defendants had in any manner substantially violated the terms of their lease before the commencement of the action, their verdict must be for the plaintiffs for the possession of the claim, and that no conduct of the plaintiffs or their agents subsequent to the service of the summons on the defendants in the cause could in any event estop the plaintiffs from maintaining the action and recovering the possession of the premises for such a breach. This instruction, which appears to have been more favorable to the plaintiffs than they were entitled to have given to the jury, precluded any possibility of the jury being misled as to the fact or its tendency to prove an acquiescence on the part of the plaintiffs after the commencement of the action.

The remainder of the instruction is assigned as error, for the reason it is contended that the contract of lease did not authorize the leaving of any pay dirt behind with the intention of removing the same later, but did provide that all of the pay dirt as low as two cents to the pan should be removed as the same was worked from the lower end of the premises. The question for the jury to determine was whether the claim had been worked by the defendants in mine fashion. In the detail of working the claim it was required that the work should start at the lower line, working the same with a straight face at least 100 feet wide or more if required to get all pay dirt as low as two cents per pan. All this was again expressed by the lease. "In other words," that is to say, the defendants were required by the lease "to good and economical mining so as to take out the greatest amount of mineral with due regard to the development and preservation of the same as a workable mine." If, then, the leaving of pay dirt behind

by the defendants to be afterwards removed by them was required under the conditions of working the claim mine-fashion, and of working it economically so as to take out the greatest amount of mineral with due regard to the development and preservation of the same as a workable mine, the defendants had not violated the terms of the lease, but, on the contrary, they had strictly observed its terms. There was evidence introduced tending to show that the leaving of a bulkhead between blocks 1 and 2 for the purpose of keeping out the waters of Ester creek was working the claim mine-fashion, and that the leaving of pillars of unworked gravel to support the overhead earth as the work progressed was working the claim mine-fashion, providing these pillars were removed before the defendants left the claim; and there was evidence of the same character concerning the gravel on the side limits. There was also evidence tending to show that pay dirt was dirt that would pay the defendants to remove. With this evidence before the jury the question as to whether the defendants intended to remove the dirt left behind in the progress of working the mine was merely incidental to the main and controlling question whether they were working the claim mine-fashion and economically so as to take out the greatest amount of mineral with due regard to the development and preservation of the same as a workable mine. If the defendants were prosecuting the work in accordance with the terms of the lease with respect to these requirements, then the intention of the defendants to remove all the pay dirt during the term of the lease was as much in accordance with its terms as any other part of the work.

[4] The court instructed the jury, in substance, that "pay dirt," referred to in the lease, was such a stratum of gold-bearing earth and gravel that the defendants using the approved methods in the vicinity of the mine could remove at a profit over and above the necessary expense of extracting the same; that is to say, "pay dirt" as low as two cents per pan did not mean all dirt in the mine averaging two cents to the pan, but all dirt which it would pay to mine as low as two cents per pan through the employment of minerlike methods. It was objected to this instruction that what was "pay dirt" was a question of fact for the jury, and not a question of law for the court. In this connection the court had instructed the jury that the phrase, "pay dirt as low as two cents per pan," should be considered in connection with the circumstances and conditions surrounding the working of the mine and the physical conditions of the ground, both above and below the surface. After a careful examination of the testimony, we think this instruction was correct as a construction of the terms of the lease in the light of all the surrounding circumstances and conditions pertaining to the working of the claim.

The remaining objections to the instructions of the court have been substantially covered by the discussion of the objections to which specific reference has been made.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

THE TOKAI MARU.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1911.)

No. 1,969.

1. FISH (§ 16*)—STATUTE PROHIBITING ALIENS FROM FISHING IN ALASKA WATERS—CONSTRUCTION AND ENFORCEMENT.

Act June 14, 1906, c. 3299, 34 Stat. 263 (U. S. Comp. St. Supp. 1909, p. 1080), makes it unlawful for any nonresident alien or any "company corporation or association" not organized in the United States or authorized thereto to catch fish in the waters of Alaska, except with rod, spear, or gaff, and provides that every person, company, etc., violating such provision, shall be fined, which fine "shall be a lien against any vessel or other property of the offending party or which was used in the commission of such unlawful act"; also, that every vessel used or employed in the violation of the act shall be liable to a fine, "and may be seized and proceeded against by way of libel in any court having jurisdiction of the offense." *Held* that, where the crew of a vessel violated the act, the prosecution and conviction of its members was not an essential prerequisite to the enforcement of the government's right against the offending vessel, but that they could be tried, fines imposed against them and the vessel, and the lien therefor established in the same proceeding in a court of competent jurisdiction.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 31; Dec. Dig. § 16.*]

2. FISH (§ 13*)—STATUTE PROHIBITING ALIENS FROM FISHING IN ALASKA WATERS—CONSTRUCTION.

Act June 14, 1906, c. 3299, § 1, 34 Stat. 263 (U. S. Comp. St. Supp. 1909, p. 1080), which makes it unlawful for aliens "to catch or kill, or attempt to catch or kill, except with rod, spear or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States," cannot be construed as prohibiting only commercial fishing, and as permitting the alien crew of a foreign vessel to take fish in violation of its provisions for their own use.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 13.*]

3. FISH (§ 14*)—STATUTE PROHIBITING ALIENS FROM FISHING IN ALASKA WATERS—CONSTRUCTION—"COMPANY."

The officers and crew of a vessel composed entirely of aliens may be considered a "company" within the meaning of the statute, and a single fine imposed upon them for its violation and made a lien on the vessel.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 2, pp. 1347–1350.]

4. TREATIES (§ 11*)—OPERATION AS TO SUBSEQUENT LAWS.

The power of Congress to enact laws for subsequent observance is not restricted by prior treaties with foreign nations.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. § 11.*]

Morrow, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Third Division of the District of Alaska.

Suit by the United States by libel of information against the schooner Tokai Maru, Choemoh Ki Kuchi, claimant. Decree for libelant, and claimant appeals. Reversed.

The amended libel of information, on which the decree appealed from is based, contains the following averments:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(1) That F. J. Haake, an officer in the revenue cutter service of the United States in command of the United States revenue cutter Perry, heretofore, to wit, on the 28th day of June, 1910, at Kalekta Bay, an inlet of Bering Sea, and within the district of Alaska, and the waters thereof, seized on behalf of the United States the schooner Tokai Maru, a Japanese schooner of about 90 tons burden, in command of Capt. Matsutaro Numazaki, her boats, tackle, anchors, ropes, lines, sails, stores, apparel, equipment, furniture, and cargo.

"(2) That said schooner Tokai Maru, her tackle, apparel, furniture, and cargo, after being seized as aforesaid, was by the said F. J. Haake immediately brought into the port of Unalaska, in the district of Alaska, and there delivered into the custody of the United States marshal of the Third division of the district of Alaska, and that all of said property ever since said time has been, and now is, in the possession of and held by said United States marshal at Unalaska, within said district and division, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

"(3) That the said F. J. Haake was then and there duly commissioned and authorized by the Secretary of Commerce and Labor of the United States, acting through the Secretary of the Treasury and the Secretary of the Navy of the United States, to make said seizure, and that said seizure was made by the said F. J. Haake under and by virtue of said authority.

"(4) That all of said property was then and there seized for the following causes, which are hereby alleged to be the true facts: That the captain, officers, and crew of the said vessel did on the 28th day of June, 1910, and for some time immediately prior thereto, within the district of Alaska, and the waters thereof, and within the admiralty and maritime jurisdiction of the above-entitled court, willfully and unlawfully catch and kill, and attempt to catch and kill, fish by means other than with rod, spear, and gaff, the said captain, officers, and crew then and there not being citizens of the United States, nor persons who have declared their intention to become such, nor bona fide residents therein, and then and there not being a company, corporation, nor association, organized and authorized to transact business under the laws of the United States, or of any state, territory, or district thereof, and then and there not being employed by any person, firm, corporation, nor association, lawfully entitled to fish in the waters of Alaska, and then and there not being natives of Alaska, contrary to the form of the statutes in such cases made and provided, to wit, in violation of the act entitled, 'An act to prohibit aliens from fishing in the waters of Alaska,' approved June 14, 1906, and against the peace and dignity of the United States of America.

"(5) That the said vessel, her tackle, apparel, furniture, and cargo were used and employed by her captain, officers, and crew in unlawfully catching and killing fish within the waters of Alaska, as aforesaid.

"(6) That part of the tackle, apparel, furniture, and cargo of said vessel consisted of firearms, ammunition, and 117 fur sealskins. That said firearms, ammunition, and fur sealskins are the property of the captain, officers, and crew of said vessel."

The seventh and eighth paragraphs recite criminal proceedings and the conviction of the captain and crew of the vessel and the nonpayment of fines imposed by a commissioner acting as a justice of the peace of Alaska. The ninth and last paragraph contains formal averments of jurisdictional facts. The District Court received proof of the criminal proceedings and other evidence upon which findings were made sustaining all the averments of the amended libel of information, and thereupon rendered a decree subjecting the vessel to a fine of $500 and to a lien for fines against the captain and each member of the crew amounting to the additional sum of $19,000. The decree condemned, not only the vessel and her equipments, but also 117 fur sealskins found on board of her.

The law applicable to the case is the act of Congress approved June 14, 1906, entitled "An act to prohibit aliens from fishing in the waters of Alaska." Act June 14, 1906, c. 3299, 34 Stat. 263 (U. S. Comp. St. Supp. 1907, p. 828; Supp. 1909, p. 1080). The first section of the statute declares that it shall be unlawful for any alien person, company, corporation, or association

to catch or kill or attempt to catch or kill, except with rod, spear, or gaff, fish of any kind or species whatsoever in the waters of Alaska under the jurisdiction of the United States. The second section provides that every person, company, corporation, or association found guilty of a violation of any provision of this act shall for each offense be fined not less than $100 nor more than $500, which fine shall be a lien against any vessel or other property of the offending party, or which was used in the commission of such unlawful act, and that every vessel used or employed in violation of any provision of this act shall be liable to a fine of not less than $100 nor more than $500, and may be seized and proceeded against by way of libel in any court having jurisdiction of the offense. Section 4 of the act contains, among other provisions, the following: "If any foreign vessel shall be found within the waters to which this act applies, having on board fresh or cured fish and apparatus or implements suitable for killing or taking fish, it shall be presumed that the vessel and apparatus were used in violation of this act until it is otherwise sufficiently proved."

James Kiefer, for appellant.

Robt. T. Devlin, U. S. Atty., Earl H. Pier, Asst. U. S. Atty., George R. Walker, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HANFORD, District Judge.

HANFORD, District Judge (after stating the facts as above). [1] One of the chief contentions of the appellant is that the District Court could not rightfully subject the property seized to liability for the fines imposed upon the captain and crew, because the justice of the peace had no jurisdiction of the alleged offense. We hold, however, that the prosecution and conviction of the captain and members of the crew is not an essential prerequisite to the enforcement of the government's right against the offending vessel (The C. G. White, 64 Fed. 579, 12 C. C. A. 314), and we consider the present suit to be an original cause brought in a court of competent jurisdiction, and that it is not ancillary nor supplementary to the criminal proceedings before the justice of the peace. If a vessel should be captured in flagrante delicto and her captain and crew should be successful in avoiding prosecution by evading arrest, the statutory lien would not be discharged by such evasion, and it would require an unreasonable construction of the statute to place the government in the embarrassing situation of a holder of a seized vessel without right to proceed to a realization of the benefit contemplated by the creation of the lien.

It is to be observed that the judgment of the justice of the peace is not pleaded as a separate and distinct cause of action, the liability of the vessel, as a guilty thing for a fine and her liability under the lien clause of the statute are run together in the amended libel of information and the judgment is just thrown in as a makeweight; and as the answer contains no affirmative plea of payment, or satisfaction of the judgment, there is no issue raised by the pleadings respecting the criminal proceedings which is necessarily material to be considered. The case is here for a trial de novo. This court may direct the entry of a proper decree notwithstanding errors of the trial court in receiving incompetent evidence, or in its findings based thereon. Deeming it unnecessary to decide the question involved in the col-

lateral attack here made upon the judgment of the justice of the peace, all of the pleadings and evidence referring to that judgment will be treated in this opinion as surplusage and eliminated from the case.

The libel of information, after eliminating therefrom all of paragraphs 7 and 8, contains averments of all the jurisdictional facts necessary to sustain an original independent suit by the government to enforce the statute by collecting a fine and foreclosing a lien against the vessel and her equipments, and specifically charges violations of the statute for which the prescribed fine and lien attach to the vessel. These averments and charges are sustained by admissions and by uncontradicted evidence proving that the captain and crew are aliens, and not inhabitants of Alaska; that the vessel was seized by a revenue cutter of the United States while at anchor within Kalekta Bay, Alaska, less than three miles from the shore; that there was then found on board of her shoal water fish recently caught, some of them had been recently salted and others were alive, and fishing lines with sinkers and baited hooks recently used, and there was no fishing rod, spear, or gaff on board. These facts in connection with failure to prove that the fish found on the vessel were obtained elsewhere, independently of the statutory presumption, afford convincing evidence that the fish were taken from the waters of Alaska within the jurisdiction of the United States.

[2] It is contended, however, that only a few fish were found in the vessel, that the vessel was on a sealing cruise, and not engaged in commercial fishing, and that the statute should not be construed as prohibiting fishing by aliens to supply their personal need for food. This ground of defense cannot prevail. The statute is clear and unambiguous. It prohibits aliens from taking *any* fish in the waters of Alaska "except with rod, spear, or gaff," and the court is not authorized to add other exceptions.

[3] It is not probable that all of the persons composing the crew personally participated in the unlawful fishing, and there is some evidence to the contrary, and no evidence to single out one or more of the crew as individual offenders. Therefore this court holds that there is a failure of proof necessary to justify the imposition of a fine against either as an individual person. The captain and his crew, however, were an aggregation of persons constituting the ship's company, engaged in an adventure for their common benefit. The law prescribes:

"That every person, *company*, corporation, or association found guilty of a violation of any provision of this act * * * shall, for each offense, be fined not less than $100, nor more than $500. * * *"

This court holds that, whilst the evidence is insufficient to justify separate punishment of individual members of the crew, the law authorizes the imposition of a single fine against the ship's *company* in addition to the fine imposed against the vessel as a distinct entity, and, in view of all the circumstances alleged and proved, it is our opinion that fines for the aggregate amount of $1,000, in addition to the large amount of taxable costs, will be reasonable and amply sufficient to vindicate the law in this instance.

The 117 sealskins found on board the vessel were not used in any way in violation of law, and there is no distinct admission in the pleadings, nor satisfactory evidence proving, that they were owned by either or all of the persons engaged in taking fish unlawfully. Therefore there appears to be no legal ground for holding them subject to a lien for the fines.

The appellant objects to the taxation of costs including the expenses of keeping the property in custody, but without showing any legal ground for exemption from the general rule subjecting defeated litigants to liability for costs and necessary expenses incidental to the litigation; and the court has no authority to relieve him therefrom.

[4] The remaining defensive argument is that:

"By the first and second articles of the treaty between Japan and the United States, concluded November 24, 1894, proclaimed March, 1895 (29 Stat. 848), the officers and crew of this schooner are given the same rights in Alaskan waters, with reference to fishing, as are given to our own citizens. [And] that statutes which discriminate against aliens, in violation of their treaty rights, are void. In re Ah Chong [C. C.] 2 Fed. 733; In re Tiburcio Parrott [C. C.] 1 Fed. 481; Yick Wo v. Hopkins, 118 U. S. 356 [6 Sup. Ct. 1064] (30 L. Ed. 220)."

The authorities here cited do no more than affirm the fundamental principle that state laws and municipal ordinances may not override national treaties; and they give no sanction to an argument questioning the validity of a national law. The power of Congress to enact laws for subsequent observance is not restricted by prior treaties with foreign nations. The Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. Moreover, the articles of the treaty referred to contain no allusion to fishing privileges, and do not purport to grant any right to sea rovers to resort to American fishing grounds for the purpose of taking fish for their own consumption or for any purpose whatever.

The decision of the District Court is reversed, and the cause will be remanded, with directions to vacate the decree appealed from, to release the fur sealskins, and to enter a new decree for a fine of $500 against the vessel, a fine of $500 against her captain and crew as a company and for costs, and to enforce such decree by appropriate proceedings.

MORROW, Circuit Judge (dissenting). I am unable to agree with so much of the judgment of the majority of this court as imposes a fine of $500 against the "ship's company." No such cause of action was alleged in either the original or amended libel, and no such cause of action has been claimed or suggested in this court by either party to the action.

The Japanese sealing schooner Tokai Maru was found on June 28, 1910, in the waters of Alaska, near Kelekta Bay, Unalaska, by the officers of the United States revenue cutter Perry, with some 20 fish on board the schooner, some of which had been salted down. Fishing tackle was also found on board, such as lines, hooks, and sinkers, but no rods, spears, or gaffs. One fish line was wet when found, indicating that it had been recently in use. The captain of the revenue cutter

seized the schooner, and arrested the officers and crew, consisting of 38 men, all natives of the empire of Japan, for a violation of the act of June 14, 1906, entitled: "An act to prohibit aliens from fishing in the waters of Alaska." Act June 14, 1906, c. 3299, 34 Stat. 263 (U. S. Comp. St. Supp. 1909, p. 1080). The schooner, together with the officers and crew, were taken by the officers of the revenue cutter to Unalaska. The schooner was turned over to the United States marshal, and on July 8, 1910, a complaint was filed in the justice's court at Unalaska, charging each and every officer and member of the crew of the schooner by name with a violation of the said act of June 14, 1906. Upon a trial in the justice's court the officers and crew of the vessel were found guilty as charged in the complaint, and a judgment was thereupon entered, fining each officer and member of the crew the sum of $500; the fines amounting in the aggregate to the sum of $19,000. It was further adjudged that, in case any one of the defendants should fail or refuse to pay said fine of said $500, he should be confined in the United States jail at Valdez, Alaska, until such fine was paid, not to exceed one day for each $2 of said fine, and that the cost of the prosecution should be taxed proportionately to each of the defendants. This judgment was entered in the justice's court on July 10, 1910, and the defendants thereupon imprisoned under its terms. On July 11, 1910, a libel was filed in the United States District Court for the District of Alaska against the schooner, charging that her officers and men had been engaged in unlawfully fishing with line, leaden sinker, and hooks within three miles of Unalaska Island, in Alaska; that, on account thereof, said officers and men had been convicted and fined in the sum of $19,000 and costs; that the United States had a lien upon said schooner, her tackle, apparel, furniture, and cargo for said amount, and praying that the vessel be sold to pay said fines and in discharge of said liens.

Subsequently an amended libel was filed containing two causes of action: The first cause of action alleged the seizure of the vessel, her tackle, apparel, furniture, and cargo to recover a fine of not less than $100 and not more than $500 upon the charge, in substance, that the captain, officers, and crew of the vessel had unlawfully caught and killed fish in the waters of Alaska by means other than with spear, rod, or gaff, said officers and crew being aliens and not qualified under the act of June 14, 1906, to catch and kill fish in the waters of Alaska by such other means.

The second cause of action alleges that a complaint had been filed in the justice's court for the Aleutian Island precinct, district of Alaska, against the captain, officers, and crew of the vessel, numbering 38 in all, charging them with unlawfully fishing in the waters of Alaska in the manner and form before alleged. This complaint is set forth in full in the libel. It is further alleged that a warrant had been issued for the arrest of the defendants, and under and by virtue thereof they had been brought before the justice's court, and such proceeding had that the defendants had been duly tried in said court before a jury, and found guilty of the crime charged in the complaint. It is alleged that the court thereupon pronounced sentence and rendered

judgment against the defendants that they each to pay a fine of $500; that said fine amounted in the aggregate to the sum of $19,000. It is further alleged that it was the judgment of the court that each of the defendants stand committed until his fine be paid in the manner and form provided by law. It was alleged that the schooner was liable to a fine of not less than $100 or more than $500, and subject to condemnation and sale for the payment thereof, and also for the payment of the fines imposed against the captain, officers, and crew of the vessel, amounting to the sum of $19,000. It was alleged that these fines imposed upon the officers and crew of the vessel were liens against the vessel, her tackle, apparel, furniture, and cargo in favor of the United States, and that the said vessel, her tackle, apparel, furniture and cargo were subject to condemnation and sale for the satisfaction of said liens.

The prayer of the amended libel was that the court pronounce a fine against the vessel in the sum of $1,000; that the schooner, her tackle, apparel, furniture, and cargo be condemned by the said decree of the court, and sold to satisfy the fine against the vessel, and also the liens for the fines imposed against the captain, officers, and crew of the vessel in the justice's court in the sum of $19,000.

The answer of the claimant of the schooner denied the material allegations of the libel; and specifically that the proceedings before the justice of the peace were in accordance with law; denied that any valid complaint was filed in said court against the captain, officers, and crew of said schooner or any of them; denied that they were lawfully tried; denied that they, or any of them, were lawfully convicted of any offense, but alleged that all the purported legal proceedings before the said justice of the peace were without jurisdiction and void.

The court entered a decree in favor of the United States upon both causes of action, viz., a decree for $500 as a fine against the vessel, and a decree for $19,000 for the fines imposed upon the officers and crew of the vessel, and for costs.

The decree is as follows:

"That the fines, amounting to $500 each and aggregating the sum of $19,000, imposed against the captain, officers, and members of the crew of said vessel, 38 in all, by the judgment of the justice's court for the Aleutian Island precinct, Third division, district of Alaska, as set forth in the amended libel of information herein, be, and they are hereby declared to be, liens in favor of the United States against said vessel, her tackle, apparel, furniture, and cargo, and the said liens are declared to be, and they are hereby, foreclosed. That said schooner Tokai Maru, her tackle, apparel, furniture, and cargo, including the firearms, ammunition, and 117 fur sealskins, constituting a part of said cargo, be, and they are hereby, condemned and ordered sold to satisfy the said liens, amounting to $19,000, and said fine of $500 imposed against said vessel."

The decree then orders the vessel, her tackle, apparel, furniture, and cargo, including the firearms, ammunition, and 117 fur sealskins, constituting a part of said cargo, to be sold by the United States marshal, and the proceeds arising from the sale of said vessel, her tackle, apparel, furniture, and cargo be applied, first, to the payment of the fine imposed against the vessel; second, to the payment and satisfaction of the said fines imposed by the justice's court against the

captain, officers, and crew of said vessel. By the judgment of this court the decree of the District Court imposing a fine of $500 upon each of the officers and crew of the vessel, amounting in the aggregate to $19,000, is reversed; and, in lieu thereof, a decree is directed to be entered in the sum of $500, being the amount of a fine imposed upon the captain and crew of the vessel as a "company."

The first objection to this decree is that the evidence is not sufficient to sustain it. In my opinion the justice's court had no jurisdiction of the case against the officers and crew of the vessel under the act of June 14, 1906. The judgment of that court was therefore void, and, being void, it was not evidence against the vessel in the District Court. But it is said the case is here for a trial de novo, and this court may direct the entry of a proper decree notwithstanding errors of the trial court in receiving incompetent evidence. Conceding such to be the jurisdiction of this court, nevertheless there must be evidence to support such a decree. The evidence consists in the finding of some 20 fish on board the vessel, some of which had been salted down; the finding also of fishing tackle, such as lines, hooks, and sinkers, one fish line being wet when found, indicating that it had been recently used. No rods or gaffs were found on board. This evidence was sufficient to warrant the seizure of the vessel under section 4, Act June 14, 1906, c. 3299, 34 Stat. 263 (U. S. Comp. St. Supp. 1909, p. 1080), which provides that:

"If any foreign vessel shall be found within the waters to which this act applies, having on board fresh or cured fish, and apparatus or implements suitable for killing or taking fish, it shall be presumed that the vessel and apparatus were used in violation of this act until it is otherwise sufficiently proved."

But this presumption does not run against the officers and crew of the vessel, either individually as determined by the decree of the District Court, or collectively as "ship's company" as determined by this court; and without this presumption the evidence is clearly insufficient to support either decree.

The second objection to this decree is that it is not determined whether the justice's court at Unalaska had jurisdiction of prosecutions under the act of June 14, 1906. It is merely held that the prosecution and conviction of the captain and members of the crew is not an essential prerequisite of the enforcement of the government's right against the offending vessel. But the fact remains that the decree of the District Court against the officers and crew of the vessel was based upon the judgment entered in the justice's court at Unalaska. If the justice's court had no jurisdiction of the case, as I think it had not, then that part of the decree of the District Court was not only not supported by evidence, but the libel against the vessel charged no cause of action for which it was liable.

The third objection to the decree is that it is upon a trial de novo in this court without regard to the established rules of practice governing such a trial. A trial de novo is a trial anew, or a second trial. Ex parte Morales (Tex. Cr. App.) 53 S. W. 107, 108; 8 Am. & Eng. Encyc. 832, 13 Cyc. 786. "This is, in the same manner, with the same effect, and upon the same issues tried in the court below." Paul v.

Armstrong, 1 Nev. 96. See, also, People v. County of El Dorado, 10 Cal. 19; Adams v. Oakes, 20 Johns. (N. Y.) 282. But a rehearing in admiralty is regulated by established rules. The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316. The twenty-fourth admiralty rule (29 Sup. Ct. xli), as prescribed by the Supreme Court of the United States, provides:

"And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose."

With respect to proceedings in the appellate courts in admiralty cases, the practice has been changed from time to time by acts of Congress. 1 Enc. of U. S. Supreme Court Reports, 176, 194; Munson S. S. Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360. With respect to appeals from the District Court of Alaska, see In re Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232. In view of the uncertainty as to the practice in admiralty cases in the Circuit Court of Appeals under act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547) this court in 1900 adopted the rules previously adopted in the Circuit Court of Appeals in the Second Circuit (100 Fed. v). Rules 7 and 8 provide as follows:

"7. New Allegations, etc. Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief or interpose a new defense, or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days' notice to the adverse party or his attorney of record.

"8. New Pleadings—New Testimony. If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall within ten days thereafter, serve such new pleading, duly verified on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath."

In the present case no proceedings have been taken under these rules or otherwise to amend the libel by making new allegations or in stating a new cause of action, nor has there been any prayer for other or different relief than that contained in the amended libel, upon which the decree was entered in the District Court. I am therefore of the opinion that no new decree should be entered by this court without such proceedings and opportunity offered the claimant to appear and answer this new cause of action.

There is still another objection to the decree of this court. The judgment of the District Court was that the officers and crew of the vessel should be each fined the sum of $500, and that they should be confined in the United States jail at Valdez until such fine should be paid, not to exceed one day for each $2 of said fine. It appears from the record that the defendants were imprisoned on the 11th day of July, 1910. It appears, further, that on the 2d of February, 1911, these defendants were still in jail, and the presumption is that they continued in jail until the fine was fully paid. The penalty of the statute as determined by the judgment of the court has, therefore, been satisfied as against the individual defendants, and it seems to me that

this should be held as a satisfaction of the penalty against them as the "ship's company."

The decree also appears to me to be inconsistent. It discharges the fur sealskins found on board the vessel from the seizure and lien of the decree. The statute makes the fine a "lien against any vessel or other property of the offending party, or which was used in the commission of the unlawful act." The answer of the claimant admits that "part of the firearms, ammunition and fur sealskins are the property of the captain, officers and crew of said schooner." If a decree is to be entered against the captain, officers, and crew of the vessel as a company, to be enforced against the vessel as a lien, there does not appear any good reason why the fur sealskins should be released from the lien and liability.

In my opinion the decree should be reversed, with instructions to dismiss the libel as to the cause of action based upon the judgment entered in the justice's court on the ground that that court had no jurisdiction of the case, and a decree entered against the vessel in favor of the United States for $500 and for costs, this decree to be a lien upon the vessel alone.

JOHNSON et al. v. NORRIS et al.

(Circuit Court of Appeals, Fifth Circuit. October 2, 1911.)

No. 2,110.

1. BANKRUPTCY (§ 324*)—INTEREST.
   The rule in bankruptcy for the computation of interest on claims to the date of filing the petition has no application to a solvent estate.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 324.*]

2. BANKRUPTCY (§ 438*)—BANKRUPTCY ACT—DISTRIBUTION OF ESTATE.
   Bankr. Act July 1, 1898, c. 541, § 66, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3448), providing for distribution of the bankrupt's entire estate among his creditors, and authorizing only a return to the bankrupt of unclaimed dividends, has no application to a surplus remaining after payment of all claims and expenses in full.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 438.*]

3. BANKRUPTCY (§ 438*)—ADMINISTRATION—PAYMENT OF DEBTS IN FULL—SURPLUS.
   After paying all debts of the bankrupt in full, including interest due before and subsequent to the filing of the bankruptcy petition, any surplus then remaining was payable to the bankrupt without statutory authority.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 438.*]

4. BANKRUPTCY (§ 324*)—INTEREST ON CLAIMS.
   Where, in voluntary proceedings by a bankrupt partnership and the individual partners, there was a surplus arising from the individual estates of the partners after paying all debts and interest up to the filing of the petition, the creditors, having proved interest-bearing claims in the first instance, were entitled to a distribution, out of such surplus, of interest from the date of the filing of the petition until the debts were paid before any part of the surplus should be returned to the bankrupts.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 324.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. BANKRUPTCY (§ 324*)—DISCHARGE—EFFECT.

A discharge in bankruptcy, while relieving the bankrupt of further liability, did not relieve the funds in the hands of the trustees or affect the claim of creditors thereon to interest accruing subsequent to the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 324.*]

(Syllabus by the Court.)

6. VOLUNTARY BANKRUPTCY—SURPLUS.

When there is a surplus of a voluntary bankrupt's estate, after the payment of all proved claims and interest thereon to the date of the filing of the petition, such surplus should be applied first to the payment of the interest accruing on the claims subsequent to the filing of the petition, and the remainder only returned to the bankrupt.

Petition to Revise a Decree of the District Court of the United States for the Southern District of Texas.

In the matter of bankruptcy proceedings of Vineyard, Walker & Co. On petition to revise a decree of the United States denying the right of J. E. Johnson and others, petitioners, to be paid out of a surplus in the hands of F. O. Norris and others, trustees, interest accruing after adjudication on claims paid in full. Petition allowed, and decree reversed.

On November 6, 1907, in the court below, the firm of Vineyard, Walker & Co., and the individuals composing the firm, to wit, B. L. Vineyard, A. M. Waugh, Peter Hahn, Leo Hahn, and R. E. Walker, were, on their voluntary petition, adjudged bankrupts. F. O. Norris, J. J. Whatley, and L. R. McFarlane were appointed trustees. During the course of administration, dividends were paid to the partnership creditors and to the creditors of the individual partners amounting to 100 cents on the dollar, including interest to the date of the filing of the petition; but no interest which accrued subsequent to November 6, 1907, was paid.

On March 26, 1910, the trustees filed a report showing the following assets on hand:

B. L. Vineyard	$60,061 45
R. E. Walker	7,119 54
Peter Hahn	16,357 78
Leo Hahn	4,894 04
Total	$88,432 81

The trustees prayed that their report be approved as a final report, and that they be discharged and ordered to return the surplus assets to the bankrupts. J. E. Johnson and other holders of approved claims against the partnership estate, and S. S. Robinson, the holder of an approved claim against the individual estate of R. E. Walker, opposed the application, and prayed that the trustees be required to further administer the estate and to pay such interest as had accrued on all approved claims from and after November 6, 1907, the date of the filing of the petition. The referee denied the creditors' petition for interest, granted the trustees' application, and ordered the surplus assets turned over to the bankrupts. The creditors mentioned, whose claims aggregated over $70,000, filed their petition for review. On May 30, 1910, the matter came up for hearing before the district judge, who rendered a decree affirming the order of the referee and refusing the creditors' prayer for interest, and ordering the trustees to return to the bankrupts the surplus, $88,432.81. In their petition for review, the creditors assign this decree as error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walter F. Brown (Carothers & Brown, on the brief), for petitioners.

T. M. Kennerly and J. F. Wolters (C. A. Warnken, Richard G. Maury, and Lane, Wolters & Storey, on the brief), for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). This controversy involves the disposition of $88,432.81, a surplus left in the hands of the trustees of the bankrupts after paying the principal of all claims proved and allowed, and the interest thereon up to the date of the filing of the petition in bankruptcy. The contention of the creditors is that interest on their claims accruing subsequent to the filing of the petition should be computed and paid out of the surplus, and that the bankrupts are entitled to have returned to them only the surplus left after paying such interest. The contention of the respondents is that the creditors are entitled to collect only the principal of their claims and interest to the date of the filing of the voluntary petition, and that therefore the entire surplus should be returned to the bankrupts. The referee sustained the contention of the respondents, and the District Court affirmed the referee's decision and directed by decree that the trustees pay the entire surplus to the bankrupts.

The creditors seek to review and reverse that decree.

The record presents this question for decision: Where there is a surplus of a voluntary bankrupt's estate after the payment of all proved claims with interest thereon to the date of the filing of the petition, should all of such surplus be returned to the bankrupt, or should it be first applied to the payment of the interest which has accrued on the claims subsequent to the filing of the petition and the remainder only be returned to the bankrupt?

Section 63 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]) designates the debts which may be proved and allowed against the bankrupt's estate, and the first class of debts named is described as follows:

"A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

And section 65e provides that:

"A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act."

Relying on these provisions, the respondents contend that only such claims as are a fixed liability at the date of the filing of the petition can be proved, and that no interest can be proved or paid except that which has accrued when the petition is filed.

[1, 2] Ordinarily, no question as to subsequently accruing interest can arise, for it is a very rare occurrence that a surplus is left after paying the principal and interest to the date of the filing of the petition. When the fund is insufficient to pay the whole amount of the debts, it is immaterial between creditors holding claims bearing interest at a uniform rate as to what time interest should be computed. The bank-

rupt would have no interest in the question, and it is unimportant to such creditors whether the dividend is at a higher or lower rate per cent., as the amount received by them would be the same. That the interest on all interest-bearing claims should be computed to the same time is necessary to secure an equitable distribution, and both state insolvency statutes and bankruptcy acts usually fix a time, or the courts, in practice, adopt a time. The purpose is to secure uniformity and an equitable distribution. The provision is made in both state insolvency statutes and in bankruptcy laws as a rule for the settlement of an insolvent or bankrupt estate. It was not intended to be applied to a solvent estate. It was not in the contemplation of Congress that a solvent estate would be settled in the bankruptcy courts. In involuntary cases, the adjudication is only had when an act of bankruptcy has been committed and when the estate of the alleged bankrupt is insolvent; that is, "whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts." Bankruptcy Act, § 1. The voluntary bankrupt is required to allege in his petition "that he owes debts which he is unable to pay in full." General Order 38, Form 1 (89 Fed. xv, 32 C. C. A. xxxix). With the exception of property exempt under state laws from liability for debts, the bankruptcy act provides for the distribution of the bankrupt's entire estate among his creditors. The only reference in the act to returning any of the estate to the bankrupt relates to unclaimed dividends. Dividends that remain unclaimed for six months after the final dividend has been declared are to be paid by the trustee into court; and dividends unclaimed for one year are, under the direction of the court, to be distributed to the creditors whose claims have been allowed, but not paid in full, and, after such claims "have been paid in full, the balance shall be paid to the bankrupt." Bankruptcy Act, § 66.

This section relates to unclaimed dividends only. It shows that the Legislature intended (exempt property and costs, and debts having priority, being excepted) that the entire estate should be divided pro rata among the creditors by the declaration of dividends. When a dividend is unclaimed, it provides for its disposition—it is to go to the satisfaction of other claims till they are paid in full. It is only after the claims are paid in full that "the balance shall be paid to the bankrupt." The balance meant is not a surplus, but the remainder of unclaimed dividends—the remainder of sums allotted to creditors who have failed to claim them; the remainder, after satisfying in full the claims of other creditors who have not failed to claim their dividends. This section gives no authority to pay a surplus to the bankrupt which has never been embraced in a declaration of dividends, and it shows that the act neither contemplates the existence nor provides for the disposition of any surplus which shall not be embraced in the declaration of dividends.

[3] But, unquestionably, a surplus after paying in full all debts, including all interest due on the debts accruing before and subsequent to the filing of the petition, would equitably belong to the bankrupt, and no statute would be needed to authorize the court to direct its payment to the bankrupt.

[4] The act provides that any person, except certain corporations, shall be entitled to the benefits of the act as a voluntary bankrupt. Section 4a. The adjudication on a voluntary petition is ex parte, and the creditors are not heard to contest it. In re Carleton (D. C.) 115 Fed. 246; In re Jehu (D. C.) 94 Fed. 638. Can it be that the act means that a voluntary petitioner may, although solvent in fact, stop the interest on his debts, while collecting by the trustee the interest on his assets; and that he may accomplish this in an ex parte proceeding which his creditors are not heard to resist? In such case, if the contention of the respondents is to prevail, the proceeding may be greatly to the profit of the bankrupts after paying the referee and trustees the fees allowed by law. The extraordinary result would be that a delay in payment arising from a proceeding begun by the debtors, and which the creditors were powerless to resist, would prevent the creditors from collecting interest out of an estate able to pay it, when the general rule is that interest is always given for delay in payment. The bankrupt's estate often, as in this case, may consist, in the main, of interest-bearing assets. The act provides that the trustee shall account for and pay over to the estate all interest received by him upon the property of the estate. Section 47 (1). Where the settlement is delayed, this interest may amount to a large sum. A construction of the act that would give it to the bankrupt, and leave unpaid interest on debts due from the bankrupt, would seem strangely inequitable.

It is true, as a general rule, that, where property of an insolvent passes into the hands of the court, subsequently accruing interest is not allowed against the fund. Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663. This principle is applied as between creditors claiming the fund. It is properly applicable doubtless, in some cases, in favor of a debtor who has been enjoined or prevented from paying a debt by litigation begun by a creditor. But in this case there is no dispute between creditors. The contest is between the creditors and the debtors, and the litigation was begun by the debtors, and no proceeding was had at the instance of others to delay payment.

If it be conceded that there is no express provision of the statute allowing interest that accrues after the filing of the petition to be paid out of a surplus, the statute is certainly silent, also, as to paying such surplus to the bankrupt and leaving such interest unpaid. Under the general rule of law, the debtor is required to pay interest up to the time he pays his debt. If the bankruptcy act does not control, the general law does.

As said by Jenkins, Circuit Judge, in Re Kane, 127 Fed. 552, 553, 62 C. C. A. 616:

"A court of bankruptcy is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter."

When the bankrupts, or the trustees acting for them, move the court to direct the fund to be paid to them, they should be required to do equity by paying the interest due by law up to date. Even in cases where there is a statute making usury forfeit all interest, a complain-

ant seeking relief in equity from usury is required to pay legal interest.

The bankruptcy act of March 2, 1867, c. 176, 14 Stat. 517, provided that all debts due and payable at the time of the adjudication of bankruptcy may be proved against the estate, providing for a rebate of interest as to debts existing but not payable until a future day. Under that statute, to secure equitable uniformity in the distribution, interest was computed to the same time on each claim. When a question arose between the bankrupt and a creditor as to the payment of subsequently accruing interest out of a surplus, the question stood on principle just as it stands under the present bankruptcy act. The act in neither case makes express provision for such contingency. In Re Hagan, 6 Ben. 407, 11 Fed. Cas. No. 5,898, Blatchford, District Judge, approved a decision of the register, holding that the creditors, out of a surplus left in the estate after paying the claims, with interest up to the date of the filing of the petition, were entitled to collect the subsequently accruing interest. Bond, Circuit Judge, in Re Bank of North Carolina, 12 N. B. R. 130, 2 Fed. Cas. No. 895, likewise held that the creditors were entitled to receive the subsequently accruing interest out of a surplus fund. In re Town, 8 N. B. R. 40, Fed. Cas. No. 14,112, decided by Longyear, District Judge, is to the same effect.

The same question has arisen under the insolvency laws of several of the states.

In Clemons v. Clemons, 69 Vt. 545, 548, 38 Atl. 314, 315, a case involving the construction of an insolvency statute, the court said:

"It is true the statute provides that, upon debts subject to the payment of interest, interest shall be computed to the date of filing the petition. It is a matter of convenience that a time should be fixed for that purpose, and the time chosen is as convenient as any; but the statute does not mean that interest shall in no event be computed to a latter date, for obviously it should be when, for instance, the assets are more than enough to pay the face of the debts as allowed."

The insolvency statutes of other states have been construed in the same way. Brown v. Lamb, 6 Metc. (Mass.) 203, 210, 211; Williams v. American Bank, 4 Metc. (Mass.) 317; Prichett v. Newbold, 1 N. J. Eq. 571. Chancellor Walworth, construing the New York statute, in the Matter of Murray, 6 Paige (N. Y.) 204, 205, said:

"In settling the tableau of distribution, therefore, the interest upon those debts which bear interest or upon which it is recoverable as damages, upon settled legal principles, should be computed to that time (the date of assignment); and, if any debts are not then due, and which are not upon interest, a proper discount should be made. As to subsequent interest, if the debts are not paid at that time, and the fund which is afterwards realized by the assignee is more than sufficient to pay the amount thus found due at the time of the assignment, the interest on all the debts subsequent to the assignment should be paid ratably out of the surplus."

In Sexton v. Dreyfus, 219 U. S. 339, 344, 31 Sup. Ct. 256, 257 (55 L. Ed. 244), Mr. Justice Holmes said:

"We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state."

In 1743, long before the passage of our first bankruptcy act, Lord Chancellor Hardwicke, in Bromley v. Goodere, 1 Atkyns, 75, considered and decided, under the English statutes, the exact question involved here. It was a contest between the creditors and the heirs of the bankrupt over a surplus. The debts had been paid in full, principal and interest; the interest being computed, as the English statute required, up to the date of the commission. The creditors claimed the subsequently accruing interest out of the surplus, and the bankrupt's heirs claimed the entire surplus, pleading the bankrupt's discharge. The Lord Chancellor held that the creditors were entitled to have the subsequently accruing interest paid out of the surplus. This rule was approved in later English cases. Ex parte Mills, 2 Vesey, Jr., 295; Ex parte Clarke, 4 Vesey, Jr., 676.

Blackstone states the usual English rule to be that all interest on debts shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive. 2 Blackstone's Commentaries, 488.

The facts are not very clearly and fully stated in Re John Osborn's Sons & Co., 177 Fed. 184, 100 C. C. A. 392, 29 L. R. A. (N. S.) 887; but the statement is sufficient to show that certain claims based on accounts had been proved against the bankrupt's estate and paid in full by dividends, and that the controversy was as to whether a surplus should be paid to the bankrupts or be used in paying interest on the claims, including interest which accrued subsequent to the allowance of the claims. The court, deciding that the proof and allowance of the claims were, in effect, judgments, held that they were entitled to be treated as judgments, and, as such, interest accruing both before and after their allowances should be paid on the claims. And National Bank of Commonwealth v. Mechanics' National Bank, 94 U. S. 437, 24 L. Ed. 176, is cited as sustaining this view by analogy. The Osborn Case is the only one to which our attention has been called, involving the distribution of a surplus, that has arisen under the present bankruptcy act.

It is said that the subsequently accruing interest should not be paid because it has never been proved as a debt. We do not think this objection is sound. The proof of an interest-bearing claim is proof of the interest collectible on such claim. Interest is an incident of, or a part of, the debt, and no separate proof of it is required.

The fact that the surplus to be distributed arises from the individual estates of the partners does not affect the question; for it is expressly provided by section 5f of the act that:

"Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts."

[5] It is argued that the respondents, having been discharged in bankruptcy, are protected by the discharge from the payment of the interest claimed. The discharge ordinarily operates to relieve the bankrupt of further liability; but it does not relieve the fund in the hands of the trustees, nor affect in any way the claim that creditors may have to the fund. It is a trust fund held by the trustees for ad-

ministration under the direction of the court, wholly unaffected by the discharge of the bankrupts. Bromley v. Goodere, 1 Atkyns, 75, 80.

The statute contains no express provision that answers the question involved in this case. There is in court a fund amounting to $88,432.-81. The court must give directions as to its disposition. Whether we are governed by the apparent intention of Congress as shown by the general purpose of the bankruptcy law, or by the general principles of equity, the result would be the same. The bankrupts should pay their debts in full, principal and interest to the time of payment, whenever the assets of their estates are sufficient. The balance then remaining should be returned to the bankrupts.

The petition for revision is allowed, and the decree of the District Court is reversed, with directions to distribute the fund in conformity with the foregoing opinion of this court.

JOHNSON et al. v. NORRIS et al.

(Circuit Court of Appeals, Fifth Circuit. October 2, 1911.)

No. 2,109.

Appeal from the District Court of the United States for the Southern District of Texas.

Petition by J. E. Johnson and others against F. O. Norris and others, trustees in bankruptcy of the firm of Vineyard, Walker & Co., for distribution of an alleged surplus in the hands of defendant as trustees for the payment of interest accruing subsequent to adjudication on claims otherwise paid in full. From an order denying such relief, petitioners appeal. Dismissed.

Walter F. Brown (Carothers & Brown, on the brief), for petitioners.

T. M. Kennerly and J. F. Walters (C. A. Warnken, Richard G. Maury, and Lane, Wolters & Storey, on the brief), for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This case involves the same questions and record that are in the case of the same style that we have just decided (190 Fed. 459). The questions involved having been decided on the petition for revision, this appeal is:

Dismissed.

JOHNSTON et al. v. SHAW et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1911.)

No. 1,840.

1. MINES AND MINERALS (§ 71*)—RIGHTS UNDER LEASE—PROPERTY SUBJECT TO ATTACHMENT.

A., having purchased the interest of his partner in a mining lease containing an option to purchase, contracted with J. that he should have full control of the ground in consideration of his advancing all the money necessary to pay operating expenses until "said parties" to the agreement should "commence to hoist pay," after which all the profits of the mine "coming to said parties hereto" should be taken possession of by J. to reimburse him for money so advanced until he should be paid in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

full, after which payment of the profits from the mine should be paid to A. until $3,500 was paid, to pay A.'s creditors, and that thereafter all profits should be divided between the parties share and share alike, J. agreeing to mine "for the joint profit and benefit of the parties hereto," and that the agreement should continue and exist for the full term of the lay or lease agreement. Thereafter A. assigned the lease to J., taking another agreement, however, that the parol contract should not be affected in any way thereby. After J. had received from the mine sufficient to reimburse him for his outlay, and while the profits were being received by him for the purpose of paying the $3,500 due to A. for the benefit of his creditors, A.'s interest in the mine was attached. *Held*, that under such agreements A. and J. were tenants in common of the property held under the lease, and that A.'s interest was subject to attachment notwithstanding J.'s possession.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 71.*]

2. ATTACHMENT (§ 332*)—REDELIVERY BOND—LIABILITY OF SURETIES—SPECIAL EXECUTION.

Carter's Ann. Code Civ. Proc. Alaska, § 145, provides that the marshal may deliver any of the property attached to the defendant or to any other person claiming it upon his giving a written undertaking therefor, executed by two or more sufficient sureties, engaging to redeliver it or to pay the value thereof to the marshal, to whom execution on a judgment obtained by the plaintiff in that action may be issued. *Held*, that where plaintiff in attachment recovered a judgment on which an execution was issued requiring the marshal to satisfy the judgment with interest out of the personal property of the debtor, and the marshal levied on the property attached and surrendered under a redelivery bond and no other, and returned that the principal in such bond refused to deliver the property or pay the value thereof, such return was sufficient to fix the liability of the principal and sureties on the redelivery bond without a special execution authorizing and commanding the marshal to sell the attached property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1186–1192; Dec. Dig. § 332.*]

3. ATTACHMENT (§ 217*)—JUDGMENT—CONSTRUCTION.

Where a judgment recited that it appeared to the court that certain property of the attachment defendant had been attached in the action, described the same, and that it was ordered that the property and the debtor's interest therein be sold to satisfy plaintiff's demands, the judgment showed on its face that the court and not the clerk ordered the sale of the attached property, and was therefore not objectionable on the theory that the clerk in entering the default of the defendants in attachment had no power to order a sale of the property attached.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 735–752; Dec. Dig. § 217.*]

4. ATTACHMENT (§ 349*)—ACTION ON BOND—PLEADING.

Where, in an action on redelivery bond, defendants did not controvert the allegation of the complaint that after the default of the attachment defendant "was duly entered" by the clerk of the court, the clerk thereupon "duly entered judgment therein" against the debtors, a copy of which judgment was annexed as an exhibit, defendant thereby admitted that the judgment, including the order of sale, was duly entered as an order of the court, and not a mere clerk's order.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 349.*]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by C. M. Shaw and another against Harry Johnston and others. On a redelivery bond to secure the release of certain property attached at plaintiffs' instance in an action by them against certain others. Judgment for complainants, and defendants bring error. Affirmed.

On the 16th day of January, 1907, Wm. J. Nolan leased to Samuel Applebaum and H. H. Darud a certain placer mining claim known as No. 15 Below Discovery, on Cleary creek, in the district of Alaska, with the privilege of entering and mining for gold. This lease provided for the payment of a 30 per cent. royalty to Nolan and contained an option of purchase in favor of the lessees. Applebaum and Darud entered into possession of the claim, sunk a shaft to bed rock, and put up a bunkhouse; but, being without sufficient funds to further prosecute the work, Darud withdrew from the enterprise, and Applebaum on September 5 and 7, 1907, made and entered into three certain contracts in writing with Harry Johnston, one of the plaintiffs in error, under which Johnston, with the consent of said Wm. J. Nolan, went into possession of the said mining claim, and furnished all the funds and purchased and provided all the machinery, tools, and appliances necessary for the proper mining operations thereon, worked and mined the same, and was so in possession at the time of the attachment in question.

The agreement of September 5, 1907, contained the following provision:

"Whereas the said party of the first part herein (Applebaum) is desirous that H. R. Johnston shall take full control, charge and supervision of the working of said ground and to that end and purpose hereby enters into the following agreement—that in consideration that the said H. R. Johnston will take full charge, control and supervision of the mining, operating and working of said mine as hereinbefore mentioned, and continue the same, the said party of the second part is to receive one-half of the net profits of said mine and undertaking upon the following conditions:

"The said H. R. Johnston is to advance the money necessary to pay the operating expenses now until the said parties hereto shall commence to hoist pay, and thereafter all the profits of said mine coming to the said parties hereto shall be taken possession of by the said H. R. Johnston to reimburse him for the money so advanced, and until he shall be paid in full. That thereafter and after the payment of the said money to the said H. R. Johnston so mentioned all profits taken from said mine shall be paid to the said party of the first part herein until the sum of three thousand five hundred is paid, which sum is for the purpose of paying the creditors of the said Samuel Applebaum. That thereafter all profits taken from said mine shall be divided between the parties hereto share and share alike. And in consideration of the foregoing the said H. R. Johnston hereby agrees to take full control, management and supervision of said mine and premises and work and mine the same according to his best ability and endeavors in a minerlike manner and for the joint profit and benefit of the parties hereto."

On September 7, 1907, Applebaum assigned the lease of the property to Johnston, and on the same day the parties entered into an agreement which contained the following provision:

"Witnesseth: That whereas the party of the first part (Applebaum) did on this date sell, convey, assign, transfer and set over unto the party of the second part herein (Johnston) all the right, title and interest of the party of the first part in and to the lay or lease agreement which is the subject of that certain agreement entered into by and between the parties hereto on the 5th day of September, 1907.

"Now therefore, it is hereby mutually agreed by and between the parties hereto that the said agreement made and entered into on the 5th day of September, 1907, between the parties hereto shall be and remain in full force and effect and shall not in any way be affected by the assignment this day made.

"It is further hereby mutually agreed that when the party of the first part hereto shall have paid or caused to be paid to the party of the second part

all of the money advanced by the party of the second part for the operating expenses upon said ground, then the party of the second part will convey to the party of the first part a one-half interest in and to said lay or lease."

In order to properly mine the claim it was necessary for Johnston to use, and he thereupon purchased, a boiler, hoist, and engine, together with all appliances, fittings, and tools then located on the claims, paying therefore the sum of $1,450. He also purchased wood to the amount of $1,229.50. These articles were purchased for use in working the mine, and under the agreement of September 5, 1907, the mine was to be worked for the joint profit and benefit of Applebaum and Johnston.

About eight months thereafter, and while Johnston was still in possession and carrying on his mining operations under his contracts with Applebaum, an action was instituted by the defendants in error in the District Court at Fairbanks, Alaska, against Applebaum and Darud upon a promissory note and certain accounts for goods sold and delivered, etc., for certain sums amounting in the aggregate to $5,124.08, and interest. In this action a writ of attachment was issued and placed in the hands of the United States marshal, who, on May 25, 1908, without taking possession of any of the property in question, executed the same by serving upon Johnston a copy of the writ "together with a notice of garnishment specifying the property attached," to wit, "all of the moneys, or personal property of the within defendants, or either of them, due from or in the possession or control of H. R. Johnston." Johnston, upon being served with this notice of garnishment, made and gave to the marshal a written certificate to the effect that he was not indebted to Applebaum and Darud or either of them in any sum whatever. Thereafter, on May 29, 1908, the marshal returned to the mining claim in question, with the same writ of attachment, and further executed the same by attaching all of the defendants' rights, title, and interest, in and to the remains of dump of gold-bearing ground, gold in sluice-boxes, boiler, pump, and all fittings, all wood (eight to ten cords) on said claim, by delivering a certified copy of said writ, together with a notice of the property attached, to H. R. Johnston, the person having possession of the same, and by putting a keeper in charge of said property, and at 16 Below Cleary Creek, Alaska, on the 29th of May, 1908, by attaching all of the defendants' right, title, and interest in and to a 6x6 little Giant Hoist, by delivering a certified copy of said writ, together with a notice of the property attached, to S. Weise, the person in possession of the same. Thereupon Johnston, in order to have his property restored and to enable him to go ahead with his work, furnished the redelivery bond in suit in this action. The bond is in the sum of $5,824, with plaintiffs in error Bonnifield and Aitken as sureties.

Thereafter on June 29, 1908, a default judgment was entered by the clerk against Samuel Applebaum and H. H. Darud in the sum of $5,496.28, together with attorney's fee of $500 and costs. In such default judgment there was embodied an order that the same should be enforced against the joint property of both defendants and the separate property of Applebaum, that execution issue, and that all interest of Applebaum in the property be sold to pay plaintiffs' demands. A general execution upon this judgment was thereafter issued, which was executed by the marshal by making a demand upon Johnston who refused to deliver the possession on the ground that the property belonged to him. The present action was accordingly brought on the bond.

In its second amended complaint on the bond, the proceedings in the attachment suit are set forth. It is alleged that the property attached was the property of Applebaum, the defendant in that case, and that it was of the value of $6,000; that Harry Johnston, the defendant in this action, claimed the property as his own. It is alleged that a redelivery bond was given by Harry Johnston as principal and Samuel A. Bonnifield and Thomas A. Aitken as sureties, in the sum of $5,824, in and by which, in consideration of the delivery of said property to the said Harry Johnston, said defendants jointly and severally undertook and promised to "redeliver said property or pay the value thereof to the United States marshal, to whom execution upon a judgment obtained by the plaintiffs in said action may be issued."

It is alleged that in consideration thereof the property so attached was by the marshal delivered to Johnston; that Applebaum and Darud made no

appearance whatsoever in the action, and on about the 29th day of June, 1908, the clerk of the court entered judgment against them; that after the entry of the judgment an execution was issued thereon and delivered to the marshal; that the marshal duly demanded of Johnston the redelivery of said property or the payment of the value thereof, but neither Johnston nor defendants Bonnifield or Aitken have redelivered the said property to the marshal or paid the value thereof to the marshal, nor paid any sum whatsoever as provided in their undertaking; that no part of the judgment has been paid. Plaintiffs demanded judgment in the sum of $5,824 with costs and disbursements.

Plaintiffs in error demurred to the complaint on the ground that it did not state a cause of action. The court overruled the demurrer, and plaintiffs in error then answered, alleging that the property attached was, at the time of the execution of the writ of attachment, the property of the defendant Johnston. Defendants in error filed a reply, putting in issue the affirmative defense.

The case was tried before the court and a jury. A verdict in favor of the plaintiffs in that case, defendants in error in this case, for the sum of $3,496.44, was rendered, upon which judgment was thereafter duly entered. From this judgment the plaintiffs in error sued out this writ of error.

John McGinn, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for plaintiffs in error.

L. P. Shackleford, Alfred Sutro, and Pillsbury, Madison & Sutro, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The controlling question in this case is whether Applebaum, the defendant in the attachment suit had any interest in the attached property at the time of the levy of the attachment. Whether he had such an interest depends upon the construction to be placed upon the contracts entered into between himself and Johnston and the situation and relation of the parties with respect thereto at the time of the attachment; that is to say, the contracts provided for a succession of relations between the parties with respect to the working of the property, and these successive relations may tend to show what interest, if any, Applebaum had in the property.

The agreement of September 5, 1907, after reciting that Applebaum and Darud were lessees of a certain mining claim, and that Applebaum was desirous that Johnston should take full control, charge, and supervision of the working of said ground, provides that Johnston "is to advance the money necessary to pay the operating expenses now until the *said parties* hereto shall *commence to hoist pay.*"

It appears from the evidence that a small quantity of gold-dust was taken from the mine as early as September 14, 1907. There was also a small quantity taken on September 23, 1907, and there was evidence of a third clean-up in the fall of 1907, and then on May 5, 1908, the taking of the gold-dust from the mine was resumed and continued until the attachment was levied on May 29, 1908, at which time the value of the gold-dust taken from the mine amounted to the sum of $16,420.92. On June 3d another small quantity was taken, amounting to $261.50, making a total of $16,682.41.

In books kept by Johnston it appears that he cleaned up from the working of the mine gold-dust at the dates and in the amounts as follows:

		Credits.			
Sept.	14.	4.55	Oz.	Dust	78.50
	23.	15.83		"	273.06
May	5.	88.20	at	17.35	1,521.45
	9.	168.44		17.40	2,930.85
	12.	266.55			4,737.97
	15.	101.94			1,773.75
	18.	103.90			1,807.86
	23.	57.60			1,002.24
	27.	30.47			530.18
	29.	101.44		"	1,765.05
June	3.	15.03		"	261.50
	Balance				$16,682.41

It is therefore not disputed that the first stage in the working of the mine—that is to say, the period prior to the time when the said "parties hereto shall commence to hoist pay"—had passed when the attachment was levied on May 29, 1907.

The agreement then provides:

"And thereafter all the profits of said mine *coming to the said parties hereto* shall be taken possession of by the said H. R. Johnston to reimburse him for the money so advanced, and until he shall be paid in full."

There was evidence tending to show that this stage had also been passed when the attachment was levied. Johnston had advanced money for the working of the mine; but the gold-dust taken out had fully reimbursed him for such advances. The agreement then provides:

"Thereafter and after the payment of the said money to the said H. R. Johnston so mentioned that all profits taken from said mine shall be paid to the said party of the first part herein until the sum of three thousand five hundred is paid, which sum is for the purpose of paying the creditors of the said Samuel Applebaum."

The evidence tends to show that it was during this last stage in the working of the mine that the attachment was levied. It was after Johnston had been reimbursed for money advanced by him and when all the profits of the mine were to be paid to Applebaum for the purpose of paying his creditors until the sum of three thousand five hundred dollars had been paid him; but no money had been paid Applebaum under this provision of the contract. It was next provided:

"That thereafter all profits taken from said mine shall be divided between the parties hereto share and share alike."

For the purpose of this case it is not necessary to consider whether the working of the mine had reached the stage when Applebaum was interested in the working of the mine under this last provision of the agreement. It is sufficient if he was interested in the property and by reason of his relation to the working of the mine was a tenant in common of all the property under the preceding provision of the agree-

ment. The next provision is applicable to the entire relationship of the parties to the property, and is as follows:

"And in consideration of the foregoing the said H. R. Johnston hereby agrees to take full control, management and supervision of said mine and premises and work and mine the same according to his best ability and endeavors in a minerlike manner and *for the joint profit and benefit of the parties hereto.*"

It is further provided that:

"This agreement shall continue and extend to the full term of the lay or lease agreement."

We have here in the whole contract successive relations carefully balancing the rights of each of the parties to an equality with the other in the joint enterprize of working the mine, but no money had been paid Applebaum under the provision providing for such payments. There does not seem to be much doubt that under this contract Applebaum and Johnston were tenants in common of all the property attached at the time the attachment was levied. But on September 7, 1907, Applebaum executed an assignment of the lease to Johnston. Did this assignment change Applebaum's relation to the property? A second agreement executed by the parties on that day appears to answer this question. It provided:

"It is hereby mutually agreed by and between the parties hereto that the said agreement made and entered into on the 5th day of September, 1907, between the parties hereto shall be and remain in full force and effect and shall not in any way be affected by the assignment this day made."

In other words, as between Applebaum and Johnston Applebaum's relation to the property was to continue as before. It was not to be in any way affected by the assignment. If he was a tenant in common before the assignment, he continued a tenant in common after the assignment. The fact that Johnston was in possession of the property was immaterial. He was in possession for the interest and benefit of Applebaum as well as for himself.

"The defendant's interest in personal property need not, in order to its being subject to attachment, be several and exclusive. An interest held by him in common with others may be attached; and the property may be seized and removed, though the rights of the other joint owners may thereby be impaired." Drake on Attachment (5th Ed.) § 248.

[2] It is next contended by the plaintiffs in error that the second amended complaint did not state facts sufficient to constitute a cause of action for the reason that defendants did not allege that after the rendition of the judgment in the attachment suit a special execution was issued thereon to the marshal authorizing and commanding him to sell the attached property. It is contended that until a valid order of sale had been made and incorporated in the judgment, and a special execution issued on such judgment and placed in the hands of the marshal, he was not lawfully authorized to demand of the plaintiffs in error the delivery of the attached property, or the payment of its value. The condition of the redelivery bond executed by Johnston and his sureties, and under which Johnston procured the release of the at-

tached property, was that in consideration of such redelivery Johnston and his sureties, jointly and severally, undertook and promised "to redeliver the said property or pay the value thereof to the United States marshal, to whom execution upon a judgment obtained by the plaintiffs in said action may issue."

Section 145 of the Alaska Code of Civil Procedure (Carter's Ann. Codes, p. 175), under which this redelivery bond was given, provides that:

"The marshal may deliver any of the property attached to the defendant, or to any other person claiming it upon his giving a written undertaking therefor, executed by two or more sufficient sureties, engaging to redeliver it or pay the value thereof to the marshal, to whom execution upon a judgment obtained by the plaintiff in that action may be issued."

There is no requirement here, either in the statute or in the bond, for a special execution. An execution was issued requiring the marshal to satisfy the judgment with interest out of the personal property of the judgment debtor, and to make sale thereof according to law. The marshal levied upon the property ordered to be sold by the judgment, and on no other property, and so made return upon the execution, with the further return that "said Johnston then and there neglected and refused to deliver said property or to pay the said value." This was sufficient to fix the liability of the defendants on the redelivery bond. No further or other demand was necessary or required. The plaintiffs in error, in support of their contention that this was not sufficient, cite the case of Gass v. Williams, 46 Ind. 253. In that case the question presented to the court upon a demurrer to a complaint was this:

"Can an action be maintained upon a redelivery bond under * * * the Code when upon final hearing only a personal judgment is required and the attachment is dissolved?"

The court answered this question in the negative. Nothing was said concerning the necessity of alleging in the complaint that a special execution had been issued as a condition precedent to liability upon the redelivery bond. The case, therefore, is not an authority for the position taken by the plaintiffs in error in this case.

The case of Lowry v. McGee, 75 Ind. 508, is also cited. The action in that case was for the possession of real estate. Each party to the action claimed title under a sheriff's deed executed upon a sale under an execution. The party holding the later deed in date claimed priority of title by reason of the fact that the suit upon which his judgment had been rendered was commenced with an attachment proceeding and the property had been attached prior to the date of the judgment in favor of the party holding the prior deed. But it appears that his judgment was in personam for the amount of his claim without any judgment in rem against the property, or any order whatever in relation to the property or attachment proceeding. His claim that the attachment lien was merged in the personal judgment could not therefore be sustained, and the court so held. The decision is not applicable to the present case.

The last case is that of Wright v. Manns, 111 Ind. 422, 12 N. E. 160. The action in that case was upon a redelivery bond given in an attachment suit where it was provided in the bond, in accordance with the statute in that behalf, that the party to whom the attached property had been delivered would "properly keep and take care of said property, and * * * on demand deliver to said sheriff * * * the personal property so attached." There was no allegation in the complaint upon this bond that the sheriff had made the demand required by the statute and provided for in the bond. The Supreme Court accordingly held that the demurrer to the complaint pointing out this defect should have been sustained by the trial court. The court held further that the statute required a special execution commanding the sheriff to sell the attached property, and that until such a special execution had come into the hands of the sheriff he was not authorized to make the demand. The complaint before the court in the present case is not open to the objection sustained in that case, and we are of opinion that under the Alaska statute a special execution is not required to fix the liability of the obligors on the redelivery bond where a judgment has been entered directing the sale of the attached property and the execution follows the direction of the judgment.

[3] It is finally contended that the clerk of the court in entering the default of the defendants in the attachment suit had no power or authority to enter other than a personal judgment against the defendants, and that in so far as the judgment ordered the sale of the attached property it was void. This contention cannot be sustained. The judgment shows on its face that the court, and not the clerk, ordered the attached property to be sold. The recital of the judgment in this behalf is as follows:

"And it further appearing to the court that certain property of the said defendant Samuel Applebaum has been attached in this action, to wit, all the right, title, and interest of the said Samuel Applebaum in and to the following described property (describing the property).

"It is further ordered and adjudged that the said property and the right, title, and interest of the defendant Samuel Applebaum therein, be sold to satisfy the plaintiffs' demands."

[4] It will be presumed that such an order was an order of the court; but further than this it was alleged in the complaint that after the default of Applebaum "was duly entered therein by the clerk of said court, and said clerk thereupon duly entered judgment therein against said Applebaum and Darud, a copy of which said judgment is hereunto annexed marked 'Exhibit C' and prayed to be read as a part hereof."

In their answer to the complaint the defendants did not deny this averment of the complaint. It therefore stands admitted and confessed and must be accepted as a fact that the judgment was duly entered. If duly entered, it was an order of the court, and the order of sale was an order of the court.

Finding no error in the record, the judgment of the District Court is affirmed.

THE EUROPE.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1911.)

No. 1,957.

1. COLLISION (§ 69*)—MOVING AND ANCHORED VESSELS—ANCHORING IN CHANNEL.

An ocean-going vessel may lawfully lie at anchor in the nighttime in the deep channel of a navigable river if not so placed as to prevent or obstruct the passage of other vessels, in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), and the words "prevent or obstruct" in such statute are positive words indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 69.*]

2. COLLISION (§ 77*)—VESSEL AT ANCHOR—DUTY OF WATCHMAN.

It is not a fault constituting a legal ground of liability for a collision for the watchman on a ship at anchor to fail to give warning by sounds or signals to an approaching vessel when the weather is clear, and therefore the absence of a watchman from the position from which he could best see an approaching vessel cannot be charged as a contributing cause of a collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140–149; Dec. Dig. § 77.*]

3. COLLISION (§ 75*) — INLAND RULES — CONSTRUCTION — ANCHOR LIGHTS — "HULL."

In article 11 of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 98 [U. S. Comp. St. 1901, p. 2879]), which requires a vessel 150 feet or more in length when at anchor to carry a light forward "at a height of not less than twenty and not exceeding forty feet above the hull," etc., the word "hull" includes the forecastle deck.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 105–121; Dec. Dig. § 75.*]

4. COLLISION (§ 71*)—ANCHORED AND MOVING VESSELS—FAULT.

A harmless fault, even when a positive mandate of the statute has been disobeyed, cannot be made the basis of a recovery of damages nor palliate the fault of another which does inflict the injury, and the fact that the riding lights of a vessel at anchor were not at the exact height prescribed by the rules will not render her liable for a collision where the lights were clearly visible for the required distance, and the failure of the moving vessel to see them was due solely to the negligence of her navigators.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

5. COLLISION (§ 154*)—SUIT FOR DAMAGES—COSTS—EXPENSE OF BOND.

Where a foreign vessel libeled for collision was exonerated and recovered damages on a cross-libel, the cost of obtaining a bond for her release, including not only the premium paid to the bonding company, but also the necessary incidental expenses incurred, was properly allowed her as costs.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 308; Dec. Dig. § 154.*]

6. COLLISION (§ 136*)—SUIT FOR DAMAGES—DAMAGES—DETENTION OF VESSEL.

Demurrage allowed a vessel for the time she was detained for repairs after a collision may properly be based on evidence showing her average daily earnings during the preceding five years.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 136.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the District of Oregon.

Suit in admiralty for collision by the Western Transportation & Towing Company, as owner of the steamer Annie Comings, against the French barque Europe, Theophile Rollier, master, claimant. Decree for respondent, and libelant appeals. Affirmed.

For a statement of this case the following is copied from the appellant's brief:

"This is an appeal brought by the Western Transportation & Towing Company from a decree of the District Court of the United States for the District of Oregon, sitting as a court of admiralty. On the evening of December 30, 1907, the river steamer Annie Comings, owned and operated by the appellant, collided with the French barque Europe, anchored in the Willamette river near the city of Portland, resulting in the sinking and total destruction of said steamer, and damage to said barque in certain parts of its rigging. The appellant filed its libel against said barque Europe for the loss of said Annie Comings and her cargo, and thereafter the master of the Europe filed a cross-libel for the damage sustained by said barque.

"At the time of the collision the Europe was anchored in the deep-water channel of the Willamette river, and in the usual track of vessels plying up and down said river. While at anchor in this position, up to the time said collision occurred, the forward anchor light of the Europe, which is a vessel 303 feet in length, was placed at a height of 17 feet and 6 inches above the forecastle deck, which in this case was about 100 feet in length extending back of the foremast, the light aft being placed at a height of about 8 feet lower than the one forward. The forward light was hung under the forestay leading from the Europe's foretopmast to the knighthead, said forestay consisting of two wires bound together and being about 4 inches in circumference, and being also bound about with chafing-gear to the extent of about 9 inches in diameter extending down even with the center of said light, which as it hung was from 14 to 18 inches back of said forestay. In this position, said forward light was also on a level with the end of the jib boom, around which sails were furled to a width of about 2½ feet in diameter, at a distance of about 65 feet in front of said light.

"When the collison occurred, and for some time prior thereto, all of the officers and crew of the Europe were below deck at what the chief officer refers to as a French dinner, excepting the boatswain, who was on the main deck between the forecastle and poop decks, which were each 7½ feet higher than the main deck. When he felt the shock of the collision, the boatswain climbed to the top of the forecastle, and discovered the Annie Comings swinging across the bow of the Europe. The captain of the Europe followed the boatswain to the forecastle deck, and, to relieve the pressure on his ship, gave orders to let go two more shackles of the anchor chain (two shackles having been already released by the shock of the collision), which was done, and the ship prevented from going adrift, although it was carried down the river for some distance, and across the deep-water channel toward the west shore. The Annie Comings was proceeding down the river loaded with machinery, and was running at her average speed. The pilot was at the wheel, and a lookout was stationed forward on the passenger deck. Both were keeping a watch ahead. The pilot first discovered a light shade on the water straight ahead in his course, and immediately put the wheel over to swing clear of it. When the object appeared, the pilot did not know it was a ship, but instantly discovered that it was from the electric lights on the lower deck of the steamer shining on her hull. There was no light visible on the ship from the pilot's position in the pilot house, and the lookout could see none from his position on the forward passenger deck. The ship was discovered by both pilot and lookout at almost the same instant. When the ship was discovered, the steamer was meeting her 'head on' within one degree. The steamer struck within about three seconds after the ship was discovered. There was a strong current in the river, and, when the wheel of the steamer was put over, it swept the steamer around with her broad-

side against the bow of the ship, where she hung until broken in two by the strong current and sunk, one part of her hull being carried down the Columbia river about 15 miles.

"The fault charged in the libel against the Europe is very clearly and succinctly stated in the opinion of the District Court, as follows: 'It is alleged that the Europe was anchored in the fairway, and directly in the course of vessels plying the river. This is set down as a fault against the ship. But the especial complaint is made that she was so anchored without proper riding lights, as required by law, so disposed and situated as to give notice and warning of her position and presence in the stream, and without a proper anchor watch on duty before and at the time of the collision. As to the lights, it is specifically alleged that at no time did the Europe exhibit a large white light, visible around the horizon, situated in the proper place, or at the proper distance above the deck, to give suitable warning to boats plying to and fro upon the river.' The fault charged against the Annie Comings by the cross-libel is also stated in the opinion of the District Court, as follows: 'As showing the fault of the Annie Comings, it is further alleged that while descending the river she was so carelessly navigated by an attempt to cross the bow of the Europe in such close proximity with the current then running in the river as to foul the Europe's bowsprit, causing the hogchains of the Comings to part, by reason whereof she broke in two and sank, at the same time rendering damage to the Europe. Such are the issues presented by the pleadings.' The testimony introduced upon the trial herein presents no disputed questions of fact, except upon the point as to whether or not the forward anchor light was a bright or a dim light, some of the witnesses testifying that it was a very bright light, while others testified that it was a very dim light.

"The District Court in its opinion and decree held the barque Europe to be without fault in the collision and sinking of said Annie Comings, and that the Annie Comings was solely at fault in said collision in failing to observe and distinguish the anchor lights of the Europe."

Cake & Cake, for appellant.

Williams, Wood & Linthicum, for appellee.

Before MORROW, Circuit Judge, and HANFORD and DIETRICH, District Judges.

HANFORD, District Judge (after stating the facts as above). By the record it appears that the learned district judge before whom this case was tried made a painstaking and exhaustive analysis of the evidence upon which the case was submitted, from which he evolved the following conclusions:

"Finally, I conclude that the Europe was not anchored in an improper place, but was so anchored as to require of her great care in protecting other, navigating vessels against collision; that she carried two lights, of requisite size and dimensions, so placed, and without substantial obstruction, that they could be seen for a distance of two miles or more; that the forward light was not carried to the proper height, by 2½ feet, required by the statutory inland rules for a vessel at anchor of the class of the Europe; that the aft light was not hung at a point 15 feet below the forward light, nor more than 8 feet lower; that the Europe had a watchman on board at the time of the collision, but not in a position just then to discover the approach of the Annie Comings; that the navigators on the Annie Comings either saw or ought to have seen the lights on the Europe and distinguished them as riding lights upon a vessel at anchor, and that they were grossly negligent in allowing their boat to come into collision with the latter vessel; that the position of the lights on the Europe contrary to the regulations of law manifestly could not have contributed as a cause to the collision; and that the Europe was supplied with a competent and proper watch, and, if not upon the forecastle at the time, the fault, if it be a fault, could not in

all reasonable probability have contributed to the cause of the accident. I therefore find the Annie Comings liable, and the Europe free from fault."

In making these conclusions, consideration was given to the testimony of witnesses in connection with knowledge of the general physical geography surrounding the place of the collision, derived from examination of a purported blue print, copy of a government chart, confirmed, no doubt, by the local knowledge which the judge in common with all intelligent inhabitants of his state necessarily possesses. The general direction in which the river flows and its width and depth were matters proper to be considered. We deem the criticism of the decision on the ground that exact accuracy of the map was not proved to be unmerited, and after a careful study of all the evidence we find the quoted conclusions, as to all questions of fact, to be true and accurate.

The appellant urges for a reversal or modification of the decree on the following grounds:

(1) At the time of the collision the Europe was lying at anchor in the deep channel of the Willamette river between the city of Portland and the town of Linnton.

(2) The rules for the prevention of collisions applicable to harbors, rivers, and inland waters of the United States (30 U. S. Stat. 98; 2 F. S. A. 176; Pierce's Fed. Code, § 2026 [U. S. Comp. Stat. 1901, p. 2879]), prescribes that vessels of 150 feet or more in length, to which class the Europe belongs, when anchored at night shall carry in the forward part of the vessel at a height of not less than 20 feet, and not exceeding 40 feet above the hull, a white light so constructed as to show a clear uniform and unbroken light visible all around the horizon at a distance of at least one mile, and another such light at or near the stern of the vessel, at such a height that it shall not be less than 15 feet lower than the forward light, which requirement was not complied with on the part of the Europe, for that her forward light was hung at an elevation not greater than 17 feet and 6 inches above her hull, and her stern light was not more than 8 feet lower; and said forward light was obscured by the forestay to which it was suspended and by the jib boom on which sails were furled and which extended upwards so that its tip end was on a level with said light.

(3) The watchman on board the Europe on duty at the time of the collision was on the main deck, in which position he could not observe the approach of vessels coming down the river, and he failed to do anything to give warning of her presence, or to attempt any maneuver which might possibly have prevented the collision.

(4) The District Court included in its decree as part of the taxable costs a large and unusual item of expense incurred in obtaining a bond to release the Europe from attachment.

[1, 2] The argument based upon the first and third grounds, as stated above, is completely refuted by the decision of the Supreme Court in the case of The Oregon, 158 U. S. 186.[1] On the authority of that case, we hold the law to be settled that an ocean-going vessel may lawfully lie at anchor in the nighttime in the deep channel of a

[1] 15 Sup. Ct. 804, 39 L. Ed. 943.

navigable river, if not so placed as to prevent or obstruct the passage of other vessels, in violation of the act of Congress prohibiting such obstruction. 30 U. S. Stat. 1152; U. S. Compiled Stat. 1901, 3543; 6 F. S. A. 817; Pierce's Fed. Code, § 11105. We also hold that the words "prevent or obstruct," in this statute, are positive words indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition; and that it is not a fault constituting a legal ground of liability for the watchman on a ship at anchor to fail to give warning by sounds or signals to an approaching vessel, when the weather is clear. It would have been impracticable for the watchman on duty in a position to observe the approach of the steamer towards the bow end of the Europe to have operated her rudder so that the current of the river would change her position; and he would not have been justified in paying out the anchor chain so as to change the position of the ship in order to get out of the way of the approaching steamer until it was clearly apparent that she was about to ram his vessel; and, as the on-coming vessel was going under steam at full speed and with a strong current, the discovery of danger by an alert watchman would necessarily have been too late to avert a collision by lengthening the anchor chain, and, inasmuch as failure on the part of the watchman to do any of the things suggested cannot be charged as a fault, we cannot regard his absence from the position best adapted for efficient service as a contributing cause of the accident.

[3] One of the contested points in the case is in the question whether the rule requiring the forward light to be at an elevation not less than 20 feet above the hull requires in a vessel constructed like the Europe that the elevation shall be not less than 20 feet above the forecastle deck, or whether the measurement shall be from the main deck. This court approves the interpretation of the rule given by the district judge; that is, that the word "hull" includes the forecastle deck, and that, to strictly comply with the requirements of the rule, the light should be elevated not less than 2½ feet higher than the light of the Europe was at the time of the collision, and the stern light should be at least 15 feet lower than that elevation. This fault in the detail of placing the forward and stern lights respectively at the prescribed elevations is the only important circumstance distinguishing this case from the case of the Oregon, supra. The difference between the two cases even in this particular cannot be very great, for in its opinion in that case the Supreme Court said:

"The International Code, (Rev. Stat. § 4233 [U. S. Comp. St. 1901, p. 2895]), in force at this time, provided (rule 10) that 'all vessels, whether steam vessels or sail vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all round the horizon, and at a distance of at least one mile.' This rule was substantially, if not literally, complied with. The light was of the regulation size, and, if it were hung a little over 20 feet above the hull, the difference was entirely immaterial, as it is found to have been seen by the pilot of the Oregon, though mistaken for the Coffin Rock light."

Conceding that a fault on the part of the Europe has been shown, the vital question to be decided in this case is: Was that fault a contributing cause of the injury? In his testimony the pilot of the libelant's steamboat stoutly maintained that he did not see lights on the Europe until he climbed upon her forecastle after the collision, but, if her lights were visible so as to have been seen by him at a distance of one mile, they were sufficient to indicate the presence of the Europe, and the failure of the steamboat to avoid her was inexcusable. The attempt to account for the failure of both the pilot and the steamer's lookout to see both or either of the lights on the Europe upon the theory that the forward light was obscured by the forestay to which it was suspended and the wrapping upon it, and by the jib boom with the furled sails thereon, is a complete failure. To accept that theory, it is necessary to assume that while the steamer was traversing a distance of one mile or more her pilot and lookout were both constantly in positions where, looking ahead, their eyes were in direct line with the keel of the Europe so that the tip end of her jib boom constituted a screen between their eyes and the light. That assumption necessarily involves the rejection of the pilot's testimony with respect to the course on which the steamer was running. The Europe was anchored so that the current of the river kept her jib boom pointing up stream, and, if it caused her to swing, her jib boom would not constitute a screen unless observers on the steamer constantly varied their positions in exact correspondence with the swinging of the ship. Of course, it would be impossible for two men to step in exact unison with the movements of an invisible object. The course of the steamer was at an angle with the ship's keel, for the steamer was on an oblique course from a point on the east side of the river towards the lights of Linnton on the west side. Therefore it is certain that the jib boom of the Europe and her forward light could not both be in range with the keel of the steamer and the Linnton lights towards which she was pointing, the light being 65 feet abaft the end of the jib boom. It seems to be hardly necessary to comment upon the argument based on the forestay and the chafing stuff wrapped upon it. The thickness or width of the stay was not sufficient to make a screen, and the wrapper was above the light, so that it could not affect the vision of a person on a lower level. The fact appears by the testimony of both of them that the pilot and the lookout were immediately prior to discovering the Europe intent in looking for and trying to avoid drift timber floating in the water. From this and the facts that the collision occurred and that they deny having seen the lights, which certainly were upon the Europe, there arises a necessary inference that they were negligent in not looking forward far enough and sweeping a space wide enough and high enough to see a light hung 17 feet and 6 inches above the forecastle deck of the Europe. The New York, 175 U. S. 204, 20 Sup. Ct. 67, 44 L. Ed. 126.

[4] This court concurs with the District Court in the conclusion that the lights on the Europe were sufficient to indicate her position, and that the insufficient elevation of her forward light was not a contributing cause of the collision. A harmless fault, even when a posi-

tive mandate of a statute has been disobeyed, cannot be made a basis for the recovery of damages in a civil suit, nor palliate the fault of another which does inflict an injury. On this point the Supreme Court in the case of The Blue Jacket, 144 U. S. 390, 12 Sup. Ct. 718, 36 L. Ed. 469, said:

"The provision of article 24 of the act of March 3, 1885, is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision. * * *"

[5] Referring to the fourth of the appellant's contentions, we deem the decision of the District Court allowing the expense of obtaining a bond to release the Europe from custody to be in strict accordance with the demands of justice. It is a serious matter to detain a ship by judicial process in a cause not founded upon a just claim, although prosecuted in good faith and, therefore, lawful. The cost of the bond was high, but necessarily so. The Europe is a foreign ship, and the amount of the bond was necessarily large because the libelant sued for a large amount. Forty-one thousand dollars was the amount of the security required. By competent evidence it was proved that the claimant was diligent in endeavoring to obtain a bond promptly and at a minimum of expense, and that the amount allowed, $1,269, was actually expended. In that sum there is included the premium paid to a bonding company and the expenses incurred in arranging with bankers in France and in New York to furnish the indemnity which the bonding company exacted. To these additional expenses objections are specially urged. It is said that such expenses are unusual and unnecessary, and that the District Court improperly received proof of the expenditure by a deposition taken after the trial to which letters were appended without authenticating evidence of their genuineness. The answer to these strictures is that it has always been usual for courts to mulct the defeated party in a lawsuit for the costs of the litigation, including the necessary disbursements of his adversary. Formerly, when security or bail was exacted, the litigant was obliged to importune his friends to become sureties, but, since the coming of corporations organized and capitalized to furnish security for compensation, it has become unnecessary for individuals to assume obligations for the accommodation of friends, and the instances are rare in which an individual can be prevailed upon to jeopardize his fortune by becoming a surety for a large amount. Hence the necessity of paying cash to obtain a bond to release a ship from legal custody. And payment of the premium is not the only burden which necessity imposes. Bonding corporations are not like insurance companies. They sell their credit only; they do not assume obligations without being fully indemnified. In this case the expense of providing indemnity was as necessary as payment of the premium. The deposition taken in France after the trial was in response to a request from the judge for additional information with respect to the contested additional expenses. The persistence of the opposition justified the request for more light.

The deposition was given under oath and it authenticates the letters annexed to it, which deponent produced in compliance with demands therefor in the appellant's cross-interrogatories, as well as in the direct interrogatories. That is to say, he identified them as the papers which he was required to produce.

[6] From consideration of the best evidence obtainable the District Court included in its decree, as part of the damages, demurrage at the rate of $101.99 per day for 18 days. The reasonableness of the estimate made for the purpose of fixing the demurrage is apparent, having in mind the size of the Europe and her class, and it has not been seriously questioned, but the appellant complains because a deposition setting forth statements of voyages made during a period of five years showing her earning capacity was received and considered. There was no better method of estimating the loss to her owner by detention for the particular days during which the damages caused by the collision were being repaired than the calculation which the court made, based on proof of daily expenses and estimated average daily earnings for the preceding five years. The Tremont (D. C.) 160 Fed. 1016, affirmed by this court in 161 Fed. 1, 88 C. C. A. 304. The deposition was competent proof for the purpose.

The Decree of the District Court is affirmed.

UNITED STATES v. DOUGLAS.

(Circuit Court of Appeals, Eighth Circuit. September 20, 1911.)

No. 3,487.

1. INDIANS (§ 4*)—"TRADE" WITH INDIANS—GOVERNMENT EMPLOYÉS—STATUTES.

Rev. St. § 2078, provides that no person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for and on account of the United States, and any person offending shall be liable to a penalty of $5,000 and shall be removed from office. Indian Appropriation Act July 4, 1884, c. 180, 23 Stat. 76, declares that where Indians are in possession or control of cattle or their increase, which have been purchased by the government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong, or to any citizen of the United States whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. *Held*, that the word "trade" was used in section 2078 in its ordinary sense, to mean the act or business of exchanging commodities either by barter or by buying and selling for money; commerce; traffic; barter; and hence such section prohibited a female industrial school teacher, while employed by the government, from purchasing from Indians cattle furnished by the United States and issued to them.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 8, pp. 7037-7042.]

2. INDIANS (§ 4*)—PROTECTION—STATUTES—OFFENSES.

Act Cong. April 18, 1796, c. 13, § 3, 1 Stat. 452, establishing trading houses with Indian tribes, provided that agents, their clerks, or other persons employed by them, shall not be directly concerned or interested

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in carrying on the business of trade or commerce on any other than the public account. Section 7 declared that if any agent, or agents, their clerks, or other persons employed by them, shall purchase or receive of any Indian by way of trade or barter a gun or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind usually obtained by Indians in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit $100 for each offense. *Held*, that there were two notable distinctions between the offenses described in the two sections, viz.: (1) Section 8 prohibited the carrying on of a business, rather than specific acts of purchase or sale, while section 7 provided for punishing each act of barter of the classes named as a separate offense. (2) Section 8 also prohibited certain persons engaging in the business of trade or commerce, except on government account, while section 7 prohibited certain trade, whether on account of the government or otherwise.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 4.*]

In Error to the District Court of the United States for the District of South Dakota.

Action by the United States against Jennie L. Douglas. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Edward E. Wagner, U. S. Atty.

Aikens & Judge, for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This action was brought by the United States to recover a penalty of $5,000 under section 2078 of the Revised Statutes, which reads as follows:

"No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office."

The facts are not in dispute. The defendant is one-sixteenth Sioux Indian, and during all times here material was a member of the Crow Creek band of Indians, and resided at the Crow Creek Indian agency in South Dakota. She was during said period also a citizen of the United States. She was for many years employed by the government as a female industrial teacher, and while so employed between January 3, 1907, and August 31st of the same year she purchased from Indians on said reservation 256 head of cattle, branded "I. D.," being cattle furnished by the United States and issued to said Indians. She supposed she had a right to do so. It does not appear whether the Indians of whom she bought cattle were citizens of the United States or not. It is probably to be presumed that they were not. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. The District Court found that she was not liable to the penalty prescribed by section 2078, R. S., and entered judgment for her, and the government appeals.

[1] The principal question in this case is: Did the defendant, in making the purchases in question, have an interest or concern in any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trade with the Indians, within the meaning of the section of the Revised Statutes quoted? There is a secondary question as to whether the statute in question was in any wise modified, limited, or explained by one of the provisions of the Indian appropriation law passed July 4, 1884, hereafter set out.

It is contended that trade with the Indians as used in the section of the Revised Statutes quoted did not cover or include such purchases as were made by the defendant. The statute in question, being penal in nature, should, of course, be strictly construed. There is little if any conflict as to the usual and ordinary meaning of the word "trade." It is defined in Webster's International Dictionary as:

"The act or business of exchanging commodities by barter or by buying and selling for money; commerce; traffic; barter."

The Century Dictionary defines it as:

"The exchange of commodities for other commodities or for money. The business of buying or selling, dealing by way of exchange, commerce, traffic. Trade comprehends every species of exchange or dealing either in the produce of land, in manufactures, or in bills or money."

In the New American Encyclopædic Dictionary it is defined as:

"The act, occupation or business of exchanging commodities for other commodities or for money. The business of buying and selling; dealing by way of sale or exchange; commerce; traffic."

In Bouvier's Law Dictionary it is said:

"In its most extensive signification the word includes all sorts of dealings by way of sale or exchange."

In Rapalje and Lawrence's Law Dictionary it is defined as:

"Traffic; commerce; exchange of goods for other goods or for money."

In 28 American and English Encyclopædia of Law, 338, it is said:

"In ordinary language the word 'trade' is employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation generally; and, third, in that of a mechanical employment in contradistinction to agriculture and the liberal arts."

In May v. Sloan, 101 U. S. 237, 25 L. Ed. 797, it is said:

"The word 'trade,' in its broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money or commerce and traffic generally."

In Queen Insurance Company v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, and in Texas Coal Company v. Lawson, 89 Tex. 401, 34 S. W. 920, it is said:

"The word 'trade' means traffic, which is defined to be the passing of goods and commodities from one person to another for an equivalent in goods or money."

It has further been judicially defined as:

"The exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." In re Grand Jury (D. C.) 62 Fed. 840; U. S. v. Cassidy (D. C.) 67 Fed. 705; U. S. v. Coal Dealers' Association (C. C.) 85 Fed. 265.

Similar citations could be almost indefinitely multiplied. It is manifest that, if the word "trade" was employed in the statute in question in its ordinary use and acceptation, the defendant had both interest and concern in trade with the Indians on her own account, and not on account of the United States.

It is contended that an examination of the laws prior to the enactment of section 2078 of the Revised Statutes, which was, with a slight modification, taken from Act June 30, 1834, c. 162, § 14, 4 Stat. 738, would reveal that the word "trade," as used in that statute, did not include such purchases as those made by defendant. The construction of various acts of Congress of widely different dates should be entered on mindful of the history of the advance of sentiment with reference to the Indians and their relations to our people.

It would probably be accurate to say that in a legal sense they have always been regarded as an alien, but dependent, people. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. But it is to the credit of the government that there has been from the earliest times an increasing sense of our obligations to them in their dependency. In the early times it was the custom to treat Indian tribes as so far foreign that treaties were made with them under subdivision 2 of section 2 of article 2 of the Constitution; but in 1871 Congress by an act provided that:

"Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." Act March 3, 1871, c. 120, 16 Stat. 566.

Since that time many agreements have been made with them, but none by treaty. It was after this change of policy that the statutes were revised in 1874 to December 1, 1873, and it was in this revision that the section in question first appeared in its exact present form. We have gradually emerged from that state in which we accentuated the alien character of the Indians by making treaties with them as foreign powers, and now treat them as wards of the government under tutelage for American citizenship. Our policy with the Indians has at times been influenced by the existing state of war or peace and by the relative strength and difficulties of the parties at the time. In June, 1775, long before the adoption even of the Articles of Confederation, Congress prohibited any person from trading with the Indians without a license from one or more of the commissioners; and in April, 1776, it provided for the employment of a schoolmaster to teach the youth of the Delawares. Article 9 of the Articles of Confederation contains the following provision:

"The United States in Congress assembled shall also have the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated."

The treaty of October 22, 1784 (7 Stat. 15), with the Six Nations received them into the protection of the United States, and from that time on practically every treaty with the Indian tribes declared them

under the sole protection of the United States. The Ordinance of 1787 provided that:

"The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Subdivision 3 of section 8 of article 1 of the Constitution confers upon Congress power to regulate commerce with foreign nations and among the several states and with the Indian tribes. July 22, 1790, the First Congress passed "An act to regulate trade and intercourse with the Indian tribes." Act July 22, 1790, c. 33, 1 Stat. 137. The plan then adopted was very simple. Any proper person could obtain a license for two years to trade with the Indians, upon giving bond in the sum of $1,000 for the true and faithful observance of governmental rules, regulations, and restrictions. March 1, 1793, the Second Congress passed "An act to regulate trade and intercourse with the Indian tribes." Act March 1, 1793, c. 19, 1 Stat. 329. This in many points was quite similar to the act of the First Congress, but in the sixth section provided:

"That no person [that is, not even a regularly licensed trader] shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose."

It appears that even thus early Congress realized that the Indians required even more protection against purchases of horses from them than as against persons vending merchandise to them. The plan was adhered to, however, of leaving trading with the Indians wholly to private enterprise.

[2] April 18, 1796, the Fourth Congress made a radical change by passing "An act for establishing trading houses with the Indian tribes." Act April 18, 1796, c. 13, 1 Stat. 452. Under this law the President was authorized to establish trading houses with the Indians, for the purpose of carrying on a liberal trade with the several Indian nations within the limits of the United States. It will hereafter appear that this included, not only selling goods to the Indians, but acquiring such property from them as they had to dispose of by sale or barter. The act did not contemplate the carrying on of this trade for profit, but practically provided for the selling of goods to the Indians at cost. Thus was recognized more fully than before the dependent character of this alien people, and it was thus sought to reasonably protect them against the cupidity of private enterprise. Every agent was required to make oath or affirmation that he would not, "directly or indirectly, be concerned or interested in any trade, commerce or barter, with any Indian or Indians whatever, but on the public account." By section 3 of this act it was provided:

"That the agents, their clerks, or other persons employed by them, shall not be, directly or indirectly, concerned or interested in carrying on the business of trade or commerce, on their own, or any other than the public account."

Any person, on conviction of violating this section, was required to be removed from his employment and forever disqualified from holding any public office under the United States and pay a forfeit of not to exceed $1,000.

Section 7 of this act provided:

"That if any agent or agents, their clerks, or other persons employed by them, shall purchase, or receive of any Indian, in the way of trade or barter, a gun or other article commonly used in hunting; any instrument of husbandry, or cooking utensil, of the kind usually obtained by Indians in their intercourse with white people; any article of clothing (excepting skins or furs) he or they shall, respectively, forfeit the sum of one hundred dollars for each offense."

It is strenuously contended that section 7 clearly shows that the prohibition of section 3 did not extend to ordinary purchases from the Indians. Two broad and notable distinctions exist between the offenses in section 3 and section 7. Section 3 prohibits carrying on a business rather than specific acts of purchase or sale. Under it in all probability there could be only one punishment inflicted for all the acts of barter up to the commencement of a prosecution. Section 7 provided for punishing every act of barter of the classes named as a separate offense. Section 3 prohibited certain persons engaging in a certain business except on government account, and section 7 prohibited certain trade on government or other account. It cannot be said, as claimed, therefore, that purchases from the Indians were not included in the prohibition of section 3.

May 19, 1796, the same Congress, at the same session passed "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers." Act May 19, 1796, c. 30, 1 Stat. 469. It was provided by section 7 that any citizen or other person residing in the United States, or either of the territorial districts of the United States, might be licensed as a trader substantially as provided in the acts of 1790 and 1793. By section 8 punishment was prescribed for unlicensed traders, and by section 9 it was provided that if any such citizen, or other person, should purchase or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he should forfeit a sum not exceeding $50, and be imprisoned not exceeding 30 days. It will be observed that this had reference to private traders, and not to the agents or employés of the government, which has more and more come to be regarded as standing substantially in the relation of guardian of the Indian during his period of tutelage. Substantially this same offense, if committed by an agent or employé of the government, was to incur double the forfeiture under section 7 of the act of the same Congress just referred to. So far as these trades with reference to indispensable articles of daily use might be concerned, every transaction was made a separate offense, but was regarded as more heinous when committed by the agent of the guardian people.

March 3, 1799, the Fifth Congress passed "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the

frontiers." Act March 3, 1799, c. 46, 1 Stat. 743. This was largely a re-enactment of the act of the Fourth Congress. The tenth section of this act contained a similar provision to that in section 6 of the act of March 1, 1793, prohibiting a citizen or resident, even though a licensed trader, from purchasing horses of the Indians without a special license therefor.

Up to this time the laws both with reference to government trading houses and private trading with the Indians were by their terms temporary; but on March 30, 1802, the Seventh Congress passed a permanent "Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." Act March 30, 1802, c. 13, 2 Stat. 139. Sections 7, 8, 9, and 10 of this act were substantially identical with sections 7, 8, 9 and 10 of the act of March 3, 1799.

The act of April 21, 1806, "for establishing trading houses with the Indian tribes" (Act April 21, 1806, c. 48, 2 Stat. 402), by section 2 provided for the appointment of a superintendent of Indian trade and required him to swear or affirm that he would not directly or indirectly be concerned or interested in any trade, commerce, or barter but on the public account; and by section 5 every agent was required to so make oath or affirmation. Section 11 of this act was substantially identical with section 7 of the act of April 18, 1796. The exception as to skins and furs in section 9 of the act of May 19, 1796, became of increased importance, because it was clearly apparent from this act of April 21, 1806, that the government at its trading houses was engaged in the acquisition of furs and peltry on government account.

March 2, 1811, the Eleventh Congress passed a new law "for establishing trading houses with the Indian tribes." Act March 2, 1811, c. 30, 2 Stat. 652. This was as to most points here under consideration substantially like the act of April 21, 1806. It again specifically recognized that one of the purposes of the trading house was to acquire for the government furs and peltry. In section 6 it emphasized that the trading houses were to be places for acquiring from the Indians such property as they had to dispose of by sale or barter, as well as to dispose of goods to the Indians, by providing:

"That the superintendent of Indian trade, the agents, or their clerks, or other persons employed by them shall not be directly or indirectly concerned or interested in carrying on trade or commerce in any of the goods or articles bought for, or supplied to, or received from the Indians."

This amounted to substantially an express declaration that one of the purposes of trading houses was to acquire property by barter or purchase from the Indians; but, not satisfied with prohibiting the government employés from competing with the government in its trade either of sale or purchase, the same section further provided that:

"The said agents, assistant agents, or any persons employed by them, shall not be directly or indirectly concerned or interested in carrying on the business of trade or commerce, on their own or any other than the public account."

The latter provision can only have one interpretation. Having already prohibited the government employé from being concerned in trade in articles bought for, supplied to, or received from the Indians,

the second prohibition can only have been intended to prohibit the government agents from being concerned in the business of trade in articles not bought for, supplied to, or received from the Indians by the government. These provisions throw considerable light on the meaning of section 7 of the act of April 18, 1796, section 9 of the act of May 19, 1796, sections 9 and 10 of the act of March 3, 1799, sections 9 and 10 of the act of March 30, 1802, and section 11 of the act of April 21, 1806. It has already been stated that section 7 of the act of May 19, 1796, was a prohibition of the purchase of articles there enumerated either on individual or government account. The whole purpose was to prevent the Indian from improvidently parting with his indispensable articles, either to the government or to any one else. How absurd it would be to assume that there was any other purpose, when as early as 1796 an exception was made of skins and furs. The government was engaged in buying and trading for skins and furs on its own account. Did Congress then provide that its own paid agents in charge of such purchases might compete with it, and buy on their own account skins and furs?

The sections of the statutes are all clear and consistent, if these various sections prohibiting government servants from buying certain articles refer to purchases whether upon government or individual account; and, so construed, none of the prior statutes cited have any real bearing on the meaning of the word "trade" as finally used in section 2078 of the Revised Statutes.

June 30, 1834, the Twenty-Third Congress passed two Indian acts. The first, "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers" (Act June 30, 1834, c. 161, 4 Stat. 729), prohibited any one except an Indian from trading with Indians in the Indian country without a license. Section 7 of this act provided:

"That if any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars."

Thus Congress again made clear its purpose to protect the Indians from improvidence in selling their necessaries, and forbade their purchase by any one except Indians. This provision was incorporated in the Revised Statutes as section 2135.

The second act on the same day on this subject was entitled "An act to provide for the organization of the Department of Indian Affairs." Act June 30, 1834, c. 162, 4 Stat. 735. It provided for the appointment of superintendents of Indian affairs, Indian agents, subagents, interpreters, blacksmiths, assistant blacksmiths, farmers, mechanics, and teachers. It provided that in the employment of interpreters and other persons employed for the benefit of the Indians preference should be given to persons of Indian descent, if such could be found properly qualified for the execution of the duties. Section 14 of the act read:

"And be it further enacted, that no person employed in the Indian department shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall forfeit the sum of five thousand dollars, and upon satisfactory information of such offense being laid before the President of the United States, it shall become his duty to remove such person from the office or situation he may hold."

This section, with some modifications, became section 2078 of the Revised Statutes. The Indian appropriation law passed July 4, 1884, contained the following provision:

"That where Indians are in possession or control of cattle or their increase which have been purchased by the government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs."

It is contended that this is the only direct expression the law makes concerning cattle of the character involved in this case, and that it is valuable in considering the meaning of the expression "any trade with the Indians." It is further contended that all persons except Indians are prohibited from trading with the Indians without a license, and if the purchase of cattle from any Indian or Indians of itself constitutes trade with the Indians the act of 1884 was superfluous as a prohibition. An analysis of this statute shows there is little of force in this contention. While it may be said that the exception with reference to purchases by members of the tribe implies that Indians may purchase "I. D." cattle from members of the same tribe, Indians of other tribes and citizens of the United States, whether intermarried with Indians or not, and whether in general licensed to trade with Indians or not, were prohibited from buying these cattle except with the consent in writing of the Indian agent. Defendant did not procure the consent of the Indian agent as provided by the statute; but if she was a member of the same tribe with the Indians of whom she purchased it is claimed that she had a right to make the purchases. As an Indian of the same tribe she could probably have lawfully made these purchases, were it not for the fact that by reason of her also being a government employé in Indian affairs she was prohibited from doing so. There was nothing in this act to indicate a purpose on the part of Congress to authorize the government's own agents, placed in a controlling position to use that position, to overreach its wards. All the statutes relied upon as bearing on the construction of the word "trade," and many others, have been carefully considered; but none of them have any tendency to show that the word "trade" was used in the act in question in any other than its usual and ordinary sense.

The government in its capacity as quasi guardian ought not to allow its agents to be tempted to overreach its wards. A schoolmaster placed by the government among a people under tutelage might well be expected to wield a large influence, and it is revolting that this influence should be used to subserve self-interest in barter with those who are the subject of wardship. We sustain a trust relation with the Indians imposed by the laws of the land, if not by an even higher law; and

when Congress, recognizing this, forbade its agents to trade with the Indians, no strained effort should be made to construe trade in some unusual way, so as to include only sales to the Indians, and not purchases from them, when it is a matter of common knowledge that there would be more danger of the Indians improvidently parting with their property than of their improvidently acquiring new property.

The judgment is reversed and remanded, with directions to the District Court to render judgment for the government as prayed.

UNITED STATES v. MINIDOKA & S. W. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1911.)

No. 1,930.

1. PUBLIC LANDS (§ 92*)—RAILROAD RIGHT OF WAY—"PUBLIC LANDS" DEFINED—WITHDRAWAL UNDER RECLAMATION ACT.

Public lands withdrawn from entry under Reclamation Act June 17, 1902, c. 1093, § 3, 32 Stat. 388 (U. S. Comp. St. Supp. 1909, p. 597), as lands susceptible of irrigation from the contemplated works, but which remain subject to homestead entry under specified conditions, and upon which such entries have been made by entrymen who are in possession but have not yet fulfilled the conditions to entitle them to patents, are still "public lands" within the meaning of Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting to railroads right of way through public lands of the United States, and a railroad company by complying with the terms of that act may acquire right of way through such lands subject to the possessory rights of the entrymen, which rights in the right of way it must also acquire by contract under Rev. St. § 2288, as amended by Act March 3, 1891, c. 561, 26 Stat. 1097 (U. S. Comp. St. 1901, p. 1385), and Act March 3, 1905, c. 1424, 33 Stat. 991 (U. S. Comp. St. Supp. 1909, p. 537), which authorizes any homestead settler to transfer right of way through his claim by warranty against his own acts, or by condemnation.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 92.*

For other definitions, see Words and Phrases, vol. 6, pp. 5793–5795; vol. 8, p. 7772.]

2. PUBLIC LANDS (§ 92*)—RAILROAD RIGHT OF WAY—ACQUISITION UNDER STATUTE.

Under Act March 3, 1875, c. 152, § 4, 18 Stat. 483 (U. S. Comp. St. 1901, p. 1569), which provides that any railroad company desiring to secure right of way thereunder through public lands shall within 12 months after the location of any section of 20 miles of its road file with the register of the land office of the district a profile of its road, which, on its approval by the Secretary of the Interior, shall be noted upon the plats in said office, the filing and approval of such profile is an essential prerequisite to the acquisition of any such right of way, and is especially requisite and important where the lands are included in an irrigation and reclamation project, since the Secretary may withhold his approval except on conditions which will insure that the road will not interfere with such project.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 92.*]

3. PUBLIC LANDS (§ 92*)—"PROFILE."

A "profile" within the meaning of Act March 3, 1875, c. 152, § 4, 18 Stat. 483 (U. S. Comp. St. 1901, p. 1569), which provides that any railroad company desiring to secure right of way thereunder through pub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied November 6, 1911.

lic lands shall file with the register of the land office a profile of its road, etc., is the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 92.*]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Suit in equity by the United States against the Minidoka & Southwestern Railroad Company and the Utah Construction Company. From an order denying in part a motion for a preliminary injunction, complainant appeals. Reversed.

See, also, 176 Fed. 762.

Action on the part of the United States to restrain the defendants from going upon certain reserved lands withdrawn for the purpose of irrigation and reclamation under the act of Congress of June 17, 1902 (32 Stat. 388), and cutting up said lands with embankments, cuts, fills, and borrow pits for a line of railroad, and from constructing a railroad along said line without the approval and in violation of the alleged rights of the complainant.

C. H. Lingenfelter, U. S. Atty., B. E. Stoutemyer, and S. L. Tipton, Asst. U. S. Atty.

P. L. Williams and D. Worth Clark, for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge. The question involved in this case is whether the defendant the Minidoka & Southwestern Railroad Company has acquired a right of way for a line of railroad over certain lands reserved and withdrawn from public entry for the purpose of reclamation and irrigation under the act of June 17, 1902 (32 Stat. 388). The act provides for the sale and disposal of public lands in certain western states, including the state of Idaho, and appropriating the receipts from such sale to the construction of irrigation works for the reclamation of arid lands. For the purpose of carrying out this project, the act authorizes the Secretary of the Interior to withdraw public lands from entry for two specific purposes: (1) Lands required for any irrigation works contemplated under the provisions of the act. (2) Lands believed to be susceptible of irrigation from said works. The Secretary of the Interior has designated withdrawals of the lands required for irrigation works as "withdrawals under the first form," and withdrawals of lands believed to be susceptible of irrigation from said works, as "withdrawals under the second form." Instruction of June 6, 1905 (33 Land Dec. Dept. Int. 607).

The lands withdrawn under the first form cannot be entered, selected, or located in any manner so long as they remain so withdrawn. Lands withdrawn under the second form can be entered only under the homestead laws, and subject to the provisions, limitations, charges, terms, and conditions of the reclamation act. Under the power conferred by this act, the Secretary of the Interior by order dated No-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vember 12, 1902, withdrew from entry the lands described in the bill of complaint as part of the Minidoka project in the state of Idaho. The withdrawal of these lands was under the second form, which does not exclude entries under the homestead laws, but such homestead entries are made subject to all provisions, limitations, charges, terms, and conditions of the act. These provisions, limitations, etc., may be briefly summarized as follows: (1) The entries are not subject to the commutation provisions of the homestead laws. (2) The Secretary of the Interior is required to limit the area per entry. The entry shall be not less than 40 nor more than 160 acres, and shall represent the acreage which in the opinion of the Secretary may be reasonably required for the support of a family upon the land in question. This area is designated by the Secretary as the "farm unit." (3) Before the entryman shall be entitled to a patent for the lands described in his entry, he must show that he has reclaimed at least one-half of the total irrigable area of his entry for agricultural purposes. (4) Before a patent will issue, he must also show that he has paid the entire apportioned water charges fixed by the Secretary of the Interior in not more than 10 annual payments. (5) No water right permanently attaches until all payments therefor are made. (6) A failure to make any two payments when due render the entry subject to cancellation, with a forfeiture of all rights under the act, as well as all money paid thereon. (7) Water service to not more than 160 acres of one owner. (8) Water service only to owners resident on or in the vicinity of the land.

The Minidoka project provides for the diversion of the waters of Snake river by gravity and by pumping for the irrigation and reclamation of certain arid lands lying north and south of the river in Lincoln and Cassia counties, in the state of Idaho. The lands involved in this case lie south of the river in Cassia county, and form part of the south side Minidoka pumping project, upon which the United States has expended a sum of money in excess of $1,300,000 in the construction of irrigation works consisting of a pumping plant, numerous canals, laterals, and irrigation ditches for the irrigation of such lands. The defendant railroad company has projected a line of road connecting with an existing line at the town of Burley, on the south side of Snake river, and running south from Burley to the town of Oakley, a distance of about 20 miles. For the distance of about six miles south from Burley the projected road transverses lands which have been entered as homesteads within the area of the South Side Minidoka pumping project. The line of road over these lands will, when constructed, cross three of the main canals and ten of the laterals constructed and operated by the reclamation service. The defendant railroad company claims to have acquired the right of way for its railroad over these lands under and by virtue of the act of March 3, 1875, entitled "An act granting to railroads the right of way through public lands of the United States," approved March 3, 1875 (18 Stat. 482), and by contracts with homestead entrymen (with two exceptions) granting to the railroad company the right to construct its railroad over and across said lands. With respect to the two exceptions for

which no contracts have been made, the railroad company represents that it will obtain such contracts before extending its line of road over said lands. Has the railroad company acquired a right of way under the act of March 3, 1875? A fundamental rule of construction for such a grant has long been established. This rule requires the courts to construe the grant strictly in favor of the public. Nothing passes but what is granted in clear and explicit terms. Sutherland, Stat. Const. § 548; Holyoke Co. v. Lyman, 15 Wall. 500, 511, 21 L. Ed. 133. The act grants a right of way through the "public lands of the United States."

[1] The first question is: Are these entered lands "public lands of the United States"? In Winona & St. Paul R. R. Co. v. Barney, 113 U. S. 618, 624, 625, 5 Sup. Ct. 606, 609 (28 L. Ed. 1109), the Supreme Court had before it a controversy respecting rights under grants to certain railroad companies. The court said with respect to the construction of these grants:

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

In United States v. Blendaur, 128 Fed. 910, 913, 63 C. C. A. 636, 639, this court said:

"The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results."

If we look at the several provisions of this act, we find that it includes as "public lands," not only lands to which no claims or rights have attached, but specifically includes lands to which possessory claims have attached, for in section 3 it is provided that the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned.

It is further provided that:

"Where such provision shall not have been made, such condemnation may be made in accordance with section three of the act approved July 2, 1864 [Act July 2, 1864, c. 216, 13 Stat. 357]."

That is to say, the act grants the right of way through the public lands of the United States, and, if upon any of the public lands through which a right of way is required there is a possessory claim, the railroad company can proceed to acquire a right of way from that claim in the manner specified. But for the purpose of the act the mere possessory right of the settler does not remove the land from the legal classification as "public lands of the United States," and the homestead settler under the provisions of the reclamation act has certainly nothing more than a possessory right prior to the time when he shall have paid for the land and for the water charges as provided in the

act. In the present case none of the homestead entrymen have made final proof or received a final certificate or a patent for the land. Neither have they or any of them repaid the United States for any part or installment of the cost of construction of said reclamation project. These claims are therefore nothing more than possessory; and the lands to which they relate public lands of the United States.

But it is contended on the part of the United States that no right of way can be acquired by the railroad company over the lands included in the reclamation project under the act of March 3, 1875, for the reason that they had been previously withdrawn under the second form authorized by the reclamation act for the accomplishment of a governmental purpose authorized by law, and were excluded from railroad appropriation by section 5 of that act, which provides:

"This act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale."

The contention is that lands withdrawn under the second form of the reclamation act are "specially reserved from sale." We cannot agree to this construction of the act. It seems to us to provide directly to the contrary. The title of the act is:

"An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands."

One of the stipulations in the record of this case is that:

"All the lands under said Minidoka project and the extension thereof are arid in character and require irrigation to produce agricultural crops thereon, but are productive when irrigated."

Being arid lands, they are not salable in their natural condition, but a system of reclamation and irrigation is provided by the act to make the lands salable, and, being salable, they are offered for sale. They are not specially or otherwise reserved from sale, but are offered for sale under specified conditions. It follows that the act of March 3, 1875, "granting to railroads the right of way through the public lands of the United States," is applicable to these lands. But there is another statute, the counterpart of the Act of March 3, 1875, under which so much of the possessory right of the settler as may be required can be obtained by the railroad company. This statute is section 2288 of the Revised Statutes, as amended by section 3, Act March 3, 1891, c. 561, 26 Stat. 1097 (U. S. Comp. St. 1901, p. 1385), and Act March 3, 1905, c. 1424, 33 Stat. 991 (U. S. Comp. St. Supp. 1909, p. 537), which is as follows:

"Any bona fide settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

These two statutes taken together appear to meet the requirements of the situation, and to authorize the railroad company upon complying with certain conditions to acquire from both the government and

the settler a right of way which the government should not in justice to the settler grant without his consent, and which the settler could not convey without the permission of the government, since he can only "transfer by warranty against his own acts."

It appears from the record that the railroad company has acquired by contract the right of way for its railroad over all the lands held by the homestead entrymen except two, and, with respect to these two, it is conceded that the railroad company must obtain such an agreement with the entrymen before extending its line of road over their lands. The right of way also passes through a section of school lands (section 36), which has passed to the state of Idaho. With respect to these lands the railroad company holds contracts for a right of way with parties to whom the state of Idaho has conveyed or contracted to convey said lands.

[2] This brings us to the consideration of the conditions under which a railroad company may obtain a grant of a right of way over the public lands of the United States. These conditions are specified in the act of March 3, 1875. Section 1 provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization, * * * to the extent of one hundred feet on each side of the central line of said road."

Section 4 provides:

"That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The defendant railroad in this case filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior. It is contended by the railroad company that, having filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, it has placed itself in a position to become a grantee under the act, and having staked and laid out its road across the lands in question, and having established and partly constructed a grade, a right of way has been secured under the act, notwithstanding no profile of the road has been filed with or approved by the Secretary of the Interior. We cannot assent to this interpretation of the requirements of the statute, and we do not understand that the case of the Jamestown & Northern R. Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed.

698, sustains such an interpretation. In that case the railroad company had filed with the Secretary of the Interior its articles of incorporation and due proofs of its organization under the same on January 26, 1883, and had filed its profile map or map of definite location on March 13, 1883, and it had been approved by the Secretary of the Interior; but the road had been surveyed in 1881 and constructed upon this line of survey in 1882. The defendant in error who was a settler upon the land through which the railroad had been constructed had filed a declaratory statement in the land office on June 5, 1883, alleging settlement of the land on March 3, 1883. The settlement of the defendant in error was 10 days earlier than the filing of the profile map by the railroad company, but all the other acts required by the statute and performed by the railroad company were prior to such settlement and the railroad company had been engaged in operating its line of railroad on the right of way over the land for more than a year, and the question was whether, the railroad company having complied with the statute in all other respects prior to the settlement of the defendant in error upon the land, the grant of the right of way took effect upon the construction of the road or upon the filing of the profile map. The Supreme Court held that the right of way was definitely located by the actual construction of the road and determined the rights of the parties upon that fact.

The subsequent case of Minneapolis, St. Paul, etc., Ry. Co. v. Doughty, 208 U. S. 251, 257, 28 Sup. Ct. 291, 52 L. Ed. 474, was also a controversy between the railroad company and a settler as to priority of right. The railroad company contended that, when it had located its line of road and had commenced proceedings under the act to acquire the title to the right of way, it was first in right to any unoccupied public land. This claim was denied and full effect given by the court to the requirement of section 4 of the act when it says that:

"To secure a right of way three things are necessary: (1) location of the road; (2) filing a profile of it in the local land office; and, (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office."

But there is no such question of priority between the railroad company and the settler in this case. The question is, What right has the railroad company acquired from the United States? The road has not been constructed and is not in operation over its projected right of way, and not having filed its profile map with the register of the land district, and such map not having been approved by the Secretary of the Interior, the railroad company has acquired no right of way under the act of March 3, 1875. Red River & Lake of the Woods R. Co. v. Sture, 32 Minn. 95, 95 N. W. 229; Enoch v. Spokane Falls, etc., Ry. Co., 6 Wash. 393, 397, 33 Pac. 966.

In the case of the Spokane Falls & N. Ry. Co. v. Ziegler, 61 Fed. 392, 9 C. C. A. 548, this court, referring to the act of March 3, 1875, said:

"The act therefore did not grant a right of way presently, but entitled any company to obtain the right of way upon performing certain conditions,

and its right attached upon filing a profile map of its road, as provided in section 4. It will be observed that the provision of section 4 is that, after filing the profile of the road, all lands over which the right of way shall pass shall be disposed of subject to such right of way. Lands, therefore, which had been disposed of theretofore, were exempt."

This case was taken to the Supreme Court, and there affirmed. Spokane Falls & N. Ry. Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79. The authority of these cases disposes of the construction sought to be placed upon the act by the appellees.

The requirement of the statute that the railroad company shall file with the register and receiver the profile of its road and this profile shall be approved by the Secretary of the Interior before any right attaches is an important and far-reaching provision in view of the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and particularly by section 441 of the Revised Statutes (U. S. Comp. St. 1901, p. 252), wherein he is charged with the supervision of the public business relating to public lands. The requirement in the Sundry civil appropriation act (Act Aug. 30, 1890, c. 837, 26 Stat. 391 [U. S. Comp. St. 1901, p. 1570]) "that all patents for lands hereafter taken out under any of the laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States," and the provisions of the reclamation act wherein he is "authorized and directed, among other things, to make examinations and surveys for, and to locate and construct," as in the act provided, "irrigation works for the storage, diversion and development of waters" for the irrigation and reclamation of arid lands.

[3] It is to be observed that the map required to be filed with the register of the land office and approved by the Secretary of the Interior by the act of March 3, 1875, is a profile of the road. This is something more than an alignment map or a map of definite location. A "profile" is "the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows." Standard Dictionary. "A drawing exhibiting a vertical section of the ground along a surveyed line, or graded work, as of a railway, showing elevations, depressions, grades," etc. Webster's In. Dictionary. "A vertical section through a work or a section of country, to show the elevations or depressions." Century Dictionary.

With a map of this character before the Secretary of Interior showing the contour of the projected line of railroad through the public lands included in an irrigation and reclamation project, he can determine whether the construction of such a road would interfere with the project. He can determine, also, whether suitable provision has been made for the crossing of canals and other waterways, and, if not, what provision is required to preserve the work of the reclamation service from encroachment and impairment. All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road. In this case the Circuit Court in its decree denied

the prayer of the complaint for an injunction restraining the defendants from constructing its road across the lands of the reclamation project, except as to the crossings over the several canals and laterals constructed by the United States. As to these crossings the court imposed certain conditions. The conditions appear to have had the approval of the reclamation service, but as it seems without the waiver of any right under the statute on the part of the United States; that is to say, the United States did not waive its contention that, before the defendant railroad company could have a right of way through its public lands, its profile map must have received the approval of the Secretary of the Interior, and have the consent or agreement of all the settlers, or the legal title acquired by condemnation or other proceedings to construct a road over their lands. In this view we concur. We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map. We are of the opinion, also, that the railroad company must have the consent or agreement of all the settlers or the legal title acquired by condemnation or other proceedings to entitle the railroad company to construct a road over their lands.

The decree of the Circuit Court is accordingly reversed, with instructions to grant the injunction prayed for in the complaint, to continue until such time as the court shall be advised that the railroad has the consent of both the United States and the settlers through whose lands the projected road will pass that the road may be constructed; the evidence that the United States consents to the construction of the road being the approval of a profile map of the road by the Secretary of the Interior, and the evidence that the settlers consent to the construction of the road being an agreement or conveyance of the right of way by the settlers. In the event that such agreement or conveyance cannot be had, then the title of the company to a right of way may be evidenced by a title secured according to law under condemnation or other proceedings.

SPECKART v. SCHMIDT et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,908.

1. TRUSTS (§ 305*)—ACCOUNTING—RIGHTS OF CESTUI.

Where complainant on coming of age was entitled to receive her distributive share of her father's estate from her mother, it was no answer to complainant's suit for an accounting that she was dominated in bringing the suit by another person to such an extent that she was not free to exercise her own will and was incompetent to manage her property, since such condition, if true, was ground only for the appointment of a guardian.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 305.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

2. TRUSTS (§ 305*)—ACCOUNTING BY TRUSTEE—CESTUI'S RIGHT TO SUE.
Where complainant's mother held complainant's share in her father's estate under a provision in a will that complainant was not entitled to receive the sum until she became of age, but for more than five years after that event the mother had made no accounting, and had failed and refused to pay over or account for complainant's share, she was justified in filing a bill for an accounting.
[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 305.*]

3. EQUITY (§ 359*)—SUIT—DISMISSAL—EFFECT.
Where complainant in a suit for an accounting did not waive an answer under oath, and, a full verified answer having been filed, the case was dismissed, such dismissal created no equities in defendant's favor, and did not affect complainant's right to file a new bill.
[Ed. Note.—For other cases, see Equity, Dec. Dig. § 359.*]

4. WILLS (§ 525*)—CONSTRUCTION—"Go To."
Testator bequeathed to his wife and to his son and daughter each an undivided one-third of all of his property, declaring that all revenues arising from the property bequeathed to the children should "go to" the wife until the children became of age or should reach majority, according to the laws of Montana, after which the children should have their portions absolutely, the wife being directed to take and receive all the revenues of the property of both the children and use the same for their support and education. *Held*, that the words "go to," as so used, were not to be construed as equivalent to "give," "devise," or "bequeath," and hence did not vest in the wife any right to the surplus of the income of the children's portion not expended for their support and education.
[Ed. Note.—For other cases, see Wills, Dec. Dig. § 525.*
For other definitions, see Words and Phrases, vol. 8, p. 7672.]

5. TRUSTS (§ 292*)—EXPRESS TRUSTS—RELATION OF PARTIES.
Testator, having bequeathed to his wife, son, and daughter each an undivided one-third of his property, directed that the wife should receive the income of the children's portion until they became of age, and employ so much thereof as was necessary to their support and education. She was also appointed executrix of the will with authority to sell any of the property as she might think for the best interests of herself and children with the advice and consent of S., whom testator desired to advise and assist her in all matters relating to the estate. S. had been testator's partner and confidential friend in his lifetime, and, after settlement of the estate, he induced her to loan a portion of the funds through him to a corporation of which he was vice president, with which he consolidated certain breweries and made large profits. *Held*, that the relation between the widow and the corporation and S. was that of borrower and lender, and hence neither the corporation nor S. was required to account for any portion of such profits as trustee.
[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 292.*]

Appeal from the Circuit Court of the United States for the Western Division of the Western District of Washington.

Suit by Harriet F. Speckart against Leopold F. Schmidt and others for an accounting. From a decree directing dismissal on terms, plaintiff appeals. Reversed and remanded, with directions.

On February 15, 1893, Adolph Speckart died in Montana, leaving a will by which he devised and bequeathed to his wife, Henriette Speckart, and to his daughter, Hattie Francis Speckart, and to his son, Joseph Robert Speckart, each an undivided one-third of all his property. It was provided in the will that all the revenues arising from the property so devised and bequeathed should go to the widow until the children should reach the age of majority as provided by the laws of Montana, "after which my said children shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have their said proportions absolutely, and I desire that my said wife shall take and receive all the revenues of the property of both my children hereinbefore bequeathed to them and each of them, and that my said wife shall use and employ said revenues for the support and education of my said children before named." The widow was appointed the executrix of the will with authority to sell and dispose of any or all of the property at such price and upon such terms as she might think for the best interests of herself and the children "with the advice and consent of Leopold Schmidt, who I desire shall advise and assist my wife in all matters pertaining to my estate." The will gave to the executrix also power to lease, convey, or agree to convey any or all of the property, and to have absolute and complete control and disposition thereof, "with the advice and consent of said Leopold Schmidt, and shall convert the same into money and the proceeds thereof shall be given as hereinbefore set forth to my said wife and children in equal proportions except that the revenues of said money or property belonging to my children shall be used by my said wife for the support and education of my children prior to their majority." The will was admitted to probate in the district court of the Second judicial district of Montana, for Silver Bow county, and the property was appraised at $55,800. The executrix thereafter disposed of the estate, realizing therefrom about $110,000. In May, 1896, she went to Germany, taking her two children. There she remained with them until November 1, 1901, when she and they returned to the United States. She bought a home in San Diego, Cal., where she and her children lived until about May, 1906. Harriet F. Speckart, the appellant herein, came of age on February 22, 1901. On September 28, 1907, she filed a bill in the Circuit Court of the United States for the Western District of Washington, Western Division, against the same parties who are the appellees herein, demanding an accounting, and the payment and delivery to her of her one-third share in the property of the Speckart estate, not waiving a verification to the answer. To that bill Henriette Speckart presented her verified answer, wherein was set forth her statement of the account between her and the appellee.

Thereupon that suit was dismissed, and on February 4, 1908, the appellant filed a second bill, which was the beginning of the present suit, in which an answer under oath was waived, and, in substance, the following averments were presented: After setting forth the death of Adolph Speckart, the terms of his will, the probate thereof, and the disposition of the property, it was alleged that for many years prior to the death of said Adolph Speckart Leopold Schmidt, his associate in business and his brother-in-law, was upon the most intimate business and friendly relations with him, and that while on his deathbed said Speckart requested Schmidt to assist and advise Mrs. Speckart in the management and settlement of the estate, and that Schmidt promised that he would carry out said wishes and requests, and that he voluntarily accepted said trust; that thereby, as well as by virtue of the will, the control and management of the estate was vested in Schmidt and Henriette Speckart, with all the duties and disqualifications incident thereto; that in 1895 and 1896 the executrix filed accounts of her trust, but thereafter filed no accounts; that from July, 1896, until the latter part of the year 1901, she and the appellant resided in Germany; that while in Germany she disposed of the last item of the property of the estate, namely, Centennial Brewing Company stock, for $100,000; that the money so received by her from the estate she used and invested on her own account; that all the investments still stand in her name, and none of them show or indicate that they are the investments of a trust fund or held in any fiduciary character. The bill specifies the stocks and property and notes so held, and proceeds to allege that Schmidt induced Mrs. Speckart to enter into an arrangement whereby the former was to use the funds of the estate in his business of managing brewing companies, and obtaining control over such companies, and thereby, in the use of said funds in such investments, he has gained large profits, the amount of which is unknown to the appellant, and one-third of which she is entitled to receive upon an accounting. The appellant further averred that it was not until May, 1906, more than five years after she reached majority,

that she was informed that her father had left a will with some provisions in her behalf, that she then sought information from her mother, and requested an accounting, which was refused. Mrs. Speckart in her answer denied these last-mentioned allegations, and alleged that the appellant knew of her rights under the will prior to the date mentioned, but she admitted that the appellant had requested of her an accounting of the property of the estate belonging to her, and the payment of her share to her. Mrs. Speckart did not allege that she had ever offered to account or had presented a statement of account of the estate, but she denied that she had refused to make such accounting or to deliver to the appellant her share in the property. Mrs. Speckart in her answer admitted that she had certain property, shares of stock, and money in her possession belonging to the appellant. Upon that admission, the appellant's counsel on July 20, 1909, obtained an order of the court requiring that Mrs. Speckart deposit in the registry of the court all moneys and other property capable of delivery, which she admitted to belong to the appellant. She thereupon surrendered to the clerk of the court certain shares of stock, and paid into the registry of the court $67,535.74, but in the memorandum of deposit she denied that the appellant was entitled to receive the whole of said money, or more thereof than $46,574.94 as of February 22, 1901, together with such sums as had been actually earned by investment, thereafter to be discovered and ascertained, and she claimed the right upon the final decree to have returned to her from the deposit so made such sum as should be found to be in excess of the amount payable to the appellant. On September 13, 1909, on the stipulation of the solicitors for the respective parties that the appellant was entitled to receive $50,000 of said fund, that sum was paid to her, and thereafter the further sum of $6,000 was paid to her upon a similar stipulation.

Upon the issues and the testimony, the court below made no specific findings of fact, but in an opinion on the merits held that the harsh accusations of the bill were not only not sustained by the evidence, but that the contrary was established affirmatively, and observed: "From the evidence it appears that the complainant is not heartless, nor avaricious, and that her unnatural conduct in prosecuting this suit is actuated by the baneful influence of a meddlesome person who dominates her by the exertion of a mysterious psychological power. The complainant is not the real litigant in this case, but is a mere tool of one who has no rights as against any of the defendants, and for that reason the court finds that there is no equity in the bill. Part of the funds belonging to the estate have been deposited in the registry of the court, and it will be necessary to retain jurisdiction of the case until proper disposition thereof can be made. After subsidiary questions shall have been disposed of, a final decree will be entered dismissing the suit, at the complainant's costs."

J. W. Robinson, for appellant.

Martin L. Pipes and G. C. Israel, for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] The ground upon which it was held that there was no equity in the bill, which was that the appellant was under the influence of and was dominated by another, cannot be sustained. If, in fact, the appellant was dominated by another person to such an extent that she was not free to exercise her will, and was rendered incompetent to look after her property, and her property was in danger of being wasted, the case was one for the appointment of a guardian of her estate, and the duty was imposed upon her relatives to see that that was done. The person whose baneful influence is so adverted to in the opinion of the court is a female physician, whom the appellant met at a private hotel

in Portland in the fall of 1905. An ardent friendship grew up between them. A month later the appellant went to San Diego, and while there, during the next four months, she almost daily received letters from the physician and answered them. The appellant was eager to return to Portland to be again with her friend. In letters which she wrote to others about that time she made frequent references to her friend, and of their mutual devotion. After the appellant returned to Portland in 1906, her mother found in her room a package of 106 letters written to her by her friend within a period of 125 days. What the contents of the letters were is not disclosed, but they caused the mother great distress. Almost immediately thereafter the appellant left her mother, and has since, and up to the time of taking the testimony in the case, been with her friend. The evidence indicates that, whereas the relation between the mother and daughter up to that time had been of the most friendly and affectionate nature, the daughter became estranged from her mother and her brother, and changed in her demeanor toward all her relatives. But the facts as they are disclosed in the record are not sufficient to justify a court of equity in denying the appellant an accounting and a decree for the possession of her property, and upon this appeal it is not seriously contended that they are.

[2] Nor do we find merit in the contention that the appellant was not justified in bringing the suit. The issue that a suit was not necessary was not raised in the pleadings, nor was it alleged in Mrs. Speckart's answer that she had ever made a statement of account, or had offered to turn over to the appellant any particular property as her share of the estate. In her answer to the first bill Mrs. Speckart made for the first time a statement of the account as she claimed it to be.

[3] The fact that the first suit was dismissed, however, creates no equities in her favor. The appellant was not bound to accept that statement of the account. She was entitled to the judgment of the court upon the issues in the case, and the evidence to be adduced thereunder. Mrs. Speckart's attitude to the accounting is forcibly exhibited in the memorandum of deposit which she made at the time when she paid $67,535.74 into the registry of the court, in which she plainly stated her own want of knowledge as to the amount due the appellant on the accounting, and submitted the question to the decision of the court. Instead of accounting or offering to account upon the first demand of the appellant in the spring of 1906, Mrs. Speckart went to Olympia, Wash., and almost immediately after her arrival there, on May 16, 1906, she assented to an application which was filed in the superior court at Olympia for the appointment of an administrator with the will annexed of the Speckart estate. In June, 1906, Schmidt was appointed such administrator. He sought and obtained an order of the superior court that the estate was community property, and that the testator could dispose of but one-half thereof by will. That position was subsequently abandoned by his counsel on discovering that no community property law was in force in Montana at the time of the testator's death, but the order was not set aside, and it still remained in force until December 20, 1907, when, on a writ of

review from the Supreme Court of Washington, on the relation of Harriet Speckart, the order appointing the administrator and admitting the will to probate were set aside, the court holding that there was no justification for administration with the will annexed 13 years after the death of a testator who died in Montana where the widow was appointed administratrix, and where notice to creditors had been duly given, and where her accounts had been approved, and nothing remained to be done except to distribute the estate according to the law of that state, vesting the same in the devisees. Said the court:

"If the final account of the administrator should be approved as rendered, the cost of administration will approximate $20,000. By reason of its pendency the relator is deprived of the use and enjoyment of her portion of the estate for an indefinite period, and is compelled to contribute $6,000 or $7,000 towards the expenses of what is at best an idle ceremony. Against such a proceeding under the forms of law, we think she has ample grounds to complain." State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 Pac. 942.

Before the date of that decision, and on March 29, 1907, the appellant's counsel wrote to the attorney for Mrs. Speckart, saying:

"For almost one year we have been endeavoring without litigation to procure for Miss Speckart her interest in what your people have been pleased to term her father's estate. * * * If you desire to confer with us here either Monday or Tuesday of next week, please notify me upon the receipt of this letter. Otherwise I am authorized to state that action will be instituted without any further delay by her to obtain what we believe to be her interest in the estate, which has been used by Mr. Schmidt for more than 14 years."

Nothing seems to have been done in response to this demand. Six months later the appellant filed her bill in equity for an accounting. The weight of the evidence indicates that up to the spring of 1906 she was never informed of her rights under her father's will, but that she supposed that all the property had been left to her mother during her lifetime, and that, upon her mother's death, the children would come into a share of the estate. There is evidence of disinterested witnesses that the mother made in the appellant's presence statements to that effect. On the other hand, there is evidence of other disinterested witnesses that on at least two occasions Mrs. Speckart made statements in the presence of the appellant indicating that the latter on coming of age would come into a large property. Those statements, however, in view of the language used, may in the main be harmonized with the appellant's understanding that she was not to come into her property until her mother's death, and that her mother had a life estate in all the property left by her father. It is probable that information as to the appellant's property rights was withheld from her by the mother, for in her own testimony it appears that she feared that, if it were known that her daughter at 18 years of age would come into a large estate, she might become the object of the pursuit of fortune hunters. The evidence clearly indicates, also, that after the appellant had demanded an accounting her mother was reluctant to give it, and reluctant to relinquish the daughter's share in the estate. Actuated by motives which can easily be understood, and, indeed, commended, the appellant's mother and uncle evidently felt justified from

their viewpoint in interposing obstacles to the payment to her of her share of the estate so long as she was under the influence of that strange friendship which they deplored, the influence of which, they feared, might result in the dissipation of the property which they had so carefully and prudently managed and invested.

[4] The appellees present in this court for the first time a contention which, if sustainable, would call for a readjustment of the statement of the account which they claim to have made, and an accounting upon a basis different from that which they assume in their answers. The contention relates to the fifth clause of the will, which provides that all the revenues arising from the property devised and bequeathed to the children "I direct shall go to my wife Henriette Speckart until my said children shall become of age, or shall reach the age of majority by the laws of Montana, after which my said children shall have their said proportions absolutely, and I direct that my said wife shall take and receive all the revenues of the property of both my children hereinbefore bequeathed to them, and to each of them, and that my said wife shall use and employ such revenues for the support and education of my said children before named." It is urged that thereby Mrs. Speckart was made the absolute owner of all the revenues of the children's property until their majority, subject only to the requirement that out of same the expense of the support and education of the children should be paid, and that the overplus after the payment of such expenses belongs to her. Counsel for the appellees cite cases which hold that where the income of children's legacies is given to a parent to be applied for or towards their maintenance and education, in the absence of a provision indicating a contrary intention, the parent shall not be held to account for the surplus. Gilbert v. Bennett, 10 Sim. 371; Hadow v. Hadow, 9 Sim. 348; Leach v. Leach, 13 Sim. 304. In the first of the cases cited there were words in the will which expressly relieved the parent from the obligations to account. In Hadow v. Hadow, the funds were to be by the widow applied "for and towards the maintenance, education and advancement in life of my said sons, or the survivor of them, in such manner as she shall think proper." The vice chancellor said that the testator meant that his widow and children should live together, and that during her life she should have the income of the children's property to maintain them without being liable to account. But in other cases where there has been found in the will an expression of the testator's intent that the income for maintenance and education should be held in trust the English courts have given effect to that intention, as in Taylor v. Bacon, 8 Sim. 100; Weatherell v. Wilson, 1 Keen. 80; Wilson v. Madison, 2 Y. & C. C. C. 372; Re Harris, 7 Exch. 344. In the present case we find evidence of the intention of the testator that the surplus of the income after payment of the maintenance and education of the children was not to go to the widow in her own right. The will begins by giving to her one-third of all the testator's property "absolutely and unconditional." Therein was expressed the full measure of the testator's intention to give to the widow property in her own right absolutely. From the use of the words "absolutely"

and "unconditional" here and not elsewhere in the instrument it is reasonable to infer that the further provision of the will by which all the revenues of the children's property are "to go to"—that is to say are to be paid to the widow, and are to be received by her and used in the payment of the expense of the maintenance and education of the children until their majority—means that the revenues were not to go to her absolutely, but upon condition, the condition that she use the whole of the same for the children's maintenance and support until their majority. It is to be observed that the will does not say that "out of" the revenues she shall pay for the support and education of the children. It is evident that in the mind of the testator it was contemplated that the whole of the revenues of their shares would be necessary for that purpose. There is nothing in the language of the will to indicate his intention that the widow was to be the beneficiary of any part of those revenues. If there was a surplus after the payment of those expenses it is the fair construction of the will that the widow received the same in trust for the children. The full extent of the testator's bounty to the widow was that she should receive one-third of the property and the income of the same. She so understood the meaning of the will, and acted on that understanding until the presentation of the case here on the appeal. Counsel for the appellees refer to the words "go to" as indicating an intention to vest in the widow the revenues subject to the obligation to pay the designated expense out of the same. Undoubtedly in many cases the words "go to" as used in a will are to be construed as equivalent to "give," "devise," or "bequeath," and cases are cited which so hold, but they are all cases in which effect was thereby given to the evident intention of the testator.

[5] One of the principal questions in the case is whether the appellant is entitled to receive from the appellees Schmidt and the Olympia Brewing Company one-third of the earnings of certain sums loaned by Mrs. Speckart to that company, a corporation of which Schmidt was the vice president, and used by the company in the purchase of stock in other breweries. On December 18, 1901, the brewing company through Schmidt had borrowed from the trust fund $3,000. On the following day it borrowed $5,000 and on February 19, 1902, $4,523. On the date last named which was two days before the appellant came of age, Schmidt induced Mrs. Speckart to invest $20,000 of the trust fund in shares of stock of the Olympia Brewing Company. On April 9, 1902, Mrs. Speckart loaned to the Olympia Brewing Company $50,000 for which that company gave her its note and offered to give her security by mortgage on its property or by the personal indorsement of the members of its board of directors. With that sum Schmidt enlarged the breweries of the company, purchased other breweries, and established a brewery trust which made large profits. The question is, Shall he be required to account as a trustee for his share of those profits? The will appoints Henriette Speckart the executrix, gives her authority to sell and dispose of the property upon such terms as she may think for the best interests of herself and children, "with the advice and consent of Leopold Schmidt, whom I desire shall ad-

vise and assist my wife in all matters pertaining to my estate." Any words which indicate with sufficient certainty the intention to create a trust will have that effect notwithstanding that there may be no use of the word "trust" or "trustee," but it would be a forced construction to hold that the words of the testator in this case indicate an intention that Schmidt was to be a trustee. He was not by the terms of the will entrusted with any property, nor was he vested with the possession, management, or control of any of the property of the estate. He stood in a relation of trust and confidence toward the executrix, and that is all. It was sufficient to cast upon him the burden of proving his utmost good faith in all his dealings with her. He was not prohibited from borrowing the money of the estate from her, but, having done so, it devolved upon him to prove that the transaction was fair and honest, and was fully understood by the executrix, and was not to the detriment of the estate. The executrix in loaning the money had the legal custody thereof, and had the sole right to invest it. The mere fact that she had trust and confidence in Schmidt, and was directed by the will to consult and advise with him, did not prevent her from loaning money to him, or to a corporation in which he was a stockholder. Such a transaction is not void, but is voidable only in case of an abuse of the confidential relation. "In brief, where parties occupy a relation from which an unusual degree of confidence or affection arises, the party in whom such confidence is reposed is held to the utmost good faith. Thus a confidential adviser, though not an attorney or solicitor, may be subject to the same rule." 9 Cyc. 459. The evidence sufficiently shows the good faith of Schmidt in the transaction. The money had been placed at interest by the executrix in Germany, where it was earning 4 per cent. Schmidt induced her to bring it to the United States upon the representation that here it could be securely invested at a higher rate of interest. For the money which he and the brewing company borrowed 6 per cent. has been paid. There has been no loss, nor does it appear that there has been danger of loss of any of the money.

The decree is reversed, and the cause is remanded to the court below to find the account, and render a final decree not inconsistent with the views herein expressed.

CITY AND COUNTY OF SAN FRANCISCO et al. v. UNITED RAILROADS OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,922.

1. CONSTITUTIONAL LAW (§ 115*)—IMPAIRMENT OF CONTRACT—STATE ACTION. Though a state may act through a municipal corporation to which it has delegated powers of legislation, yet, if a municipal ordinance is relied on as constituting an alleged impairment of a contract right, it must be shown to have been enacted pursuant to legislative authority

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the state; otherwise it does not constitute state action within the constitutional prohibition.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 115.*]

2. COURTS (§ 282*)—FEDERAL COURTS—FEDERAL QUESTION.

Where complainant street railroad company sued to restrain a city from proceeding to construct a municipal railroad along certain streets, claiming that the ordinance providing for such construction was in violation of both complainant's franchise and Civ. Code Cal. § 499, providing that two or more lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without lease or contract, but in no case shall the company owning or operating one line of street railway be allowed to condemn the right to occupy and use the same street or tracks for more than five blocks consecutively, such bill alleged that the city's action was at most a violation of the city's covenant and of the express paramount law of the state, and therefore void, and hence did not show state action so as to sustain federal jurisdiction on the ground that the ordinance was violative of the constitutional provision prohibiting the state from passing any law impairing the obligation of contracts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Mining Co., 35 C. C. A. 7; Earnhart v. Switzler, 105 C. C. A. 262.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit by the United Railroads of San Francisco against the City and County of San Francisco and others. Decree for complainant, and defendants appeal. Reversed and remanded, with instructions to dismiss.

See, also, 180 Fed. 948.

The appeal in this case is taken from an order of the Circuit Court granting a temporary injunction restraining the appellants, pending the suit or until the further order of the court, from building, constructing, or operating a street railroad in San Francisco over and along "Market street from East street to Geary street, a distance of seven blocks," and "over and along Point Lobos avenue from Thirty-Third avenue, the point of intersection of Cliff avenue with Point Lobos avenue, a distance of nine blocks." The bill of complaint filed by the appellee sets forth several franchises granted by the city and county of San Francisco to various street railroad corporations, all of which franchises are alleged to have been assigned to the appellee. It alleges that these franchises were granted upon the condition that no more than two corporations should be granted the right to use any of the streets covered thereby for more than five consecutive blocks. It alleges certain proceedings taken by the appellants with a view to the construction of a municipal railroad beginning at the ferry and extending up Market street to Geary and out Geary to the ocean, with a branch to the City Park. These proceedings are alleged to be the action of the city resulting from the vote on two distinct propositions which had been submitted to the voters of the city; proposition No. 1 covering the Market Street Railway from the ferry to Geary street, proposition No. 2 covering the street railway from the intersection of Geary and Kearney to the ocean, with its branch to the park. The bill alleges that this railroad is about to be constructed along the said streets which are covered by the complainant's franchises and its roads. It alleges that, unless the city is restrained, the construction of its road will cause irreparable damage to the appellee, that the value of its property will thereby be depreciated, also the value of its securities and bonds. Other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts are set forth showing the threatened injury to the appellee's property. There is no diversity of citizenship between the parties to the suit, and the jurisdiction of the Circuit Court was invoked on the ground that a federal question was involved, in that the construction of the road under the ordinances adopted by the city would result in impairing the obligation of the appellee's contracts, and taking the property of the appellee without due process of law, in violation of the fifth and fourteenth amendments to the Constitution of the United States; that the franchises granted to the appellee's predecessors in interest "were so granted and accepted upon the express condition and provision that it should be lawful for the board of supervisors of the city and county of San Francisco to grant to one other corporation than to the grantee, and to no more, the right to use the street or streets named therein for a distance of five blocks and no more, and that said grant was made upon the terms and conditions specified in section 499 of the Civil Code as said section existed in the Civil Code at the date of the passing and the adoption of said order, to wit, in the year 1879, which said section of the Civil Code is in the terms and figures following, to wit: '499. Two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks.'" The bill alleges that the road which the appellants are proceeding to construct will, when constructed, cover the same streets with the appellee's street railway, a distance of seven blocks on Market street and a distance of nine blocks on Point Lobos avenue. It is not alleged that the appellee had a franchise for the exclusive use of any of the streets of San Francisco, or that the appellants were unauthorized to grant franchises to others over the same streets, or to build a municipal railway in the city of San Francisco. The illegality of the proposed action of the city is alleged to consist in the fact that on Market street the road which the city proposes to build will occupy the same street with the appellee's road for a distance of two blocks, and on Point Lobos avenue for a distance of four blocks in excess of the distance which was permissible under section 499 of the Civil Code.

Percy V. Long, City Atty., Thomas E. Haven, and John T. Nourse, Asst. City Attys., for appellants.

Wm. M. Abbott, Joseph D. Redding, and Tirey L. Ford, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The question arises whether there is jurisdiction on the ground that the bill presents a federal question. As sustaining the jurisdiction, the appellee relies on the allegation that section 499 of the Civil Code entered into and became a part of its contract, and that the ordinances adopted by the city with a view to the construction of a municipal railroad and its acts in carrying out those ordinances would result in an impairment of the appellee's contract as expressed in its franchises. Referring to those franchises, which are made exhibits to the bill, it will be seen that in the franchise for a street railway on Market street it is provided in section 5, as follows:

"It shall be lawful for the board of supervisors of the city and county of San Francisco to grant to one other corporation and no more the right to use either of the aforesaid streets for a distance of five blocks and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies, as well as corporations."

In the franchise under which the appellee operates its road on Point Lobos avenue, no reference is made to section 499, but it is provided that the rights and privileges therein granted shall be held and enjoyed by the grantee, "upon such terms, conditions and restrictions as are now or may be hereafter imposed by the laws of the state of California relative to street railroads in the cities and towns therein, or are or shall be hereafter imposed by orders of the board of supervisors, and a strict compliance with said laws and orders is hereby required." So long as section 499 remained in force, these provisions of the contract added nothing to its obligations. They would have force only in case of the material amendment or repeal of the statute. But the statute has not been repealed. It is still in force, and not substantially amended. At the time of the adoption of the ordinances which are here complained of, the statute read as follows:

"Two or more lines of street railway, operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such lease or contract, upon payment of an equal portion for the construction of the tracks and appurtenances used by such railways jointly; but in no case shall a company owning or operating one line of street railway be permitted to condemn the right to occupy and use the same street or tracks for a distance of more than five blocks consecutively."

The inquiry is whether on the facts alleged in the bill there has been state action impairing the obligation of the contract.

[1] A state may act through a municipal corporation to which it has delegated powers of legislation, but, where the ordinance of such a corporation is relied upon as constituting the impairment, it must be shown to have been enacted pursuant to the legislative authority of the state. Otherwise it is not state action.

[2] If, as alleged in the bill, the impairment of the appellee's contract consists in the fact that the city is proceeding to disregard its covenant, and to construct a road in violation of the provisions of section 499, which was made a part of the contract, we are confronted with the fact that the city is proceeding to violate a law of the state. If its action is illegal and unwarranted, it is primarily so because it violates that law. If its action has the effect to impair the obligation of the contract, it also has the effect to violate the express and paramount law of the state, and it is therefore void, and is not state legislation. In Hamilton Gaslight Co. v. Hamilton City, 146 U. S. 258, 266, 13 Sup. Ct. 90, 36 L. Ed. 963, Mr. Justice Harlan said:

"A municipal ordinance not passed under a supposed legislative authority cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts."

In Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, jurisdiction was invoked on the ground of deprivation of property without due process of law in violation of the fourteenth amendment. It appeared on the face of the plaintiff's bill that the acts of the city officers therein complained of were not only unau-

thorized, but were forbidden by state legislation. It was held that no federal question was involved. The court said:

"In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions."

In Dawson v. Columbia Trust Company, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713, the trust company, as mortgagee of the Dawson Waterworks Company, brought a suit to restrain the city of Dawson from taking measures to build new waterworks. It set forth the contract of the waterworks company with the city, the repudiation of that contract by the city, the calling of an election to determine whether the city should issue bonds to erect or buy waterworks, the vote in favor of the issue, and the issuance of the bonds. It was alleged that all these acts were unlawful, and were not warranted by the laws of the state. The court held that the acts of the municipality under the averments of the bill did not constitute an impairment of the contract by the act of the state. In Memphis v. Cumberland Telephone Co., 218 U. S. 624, 31 Sup. Ct. 115, 54 L. Ed. 1185, the complainant, which had a contract with the city, alleged the impairment thereof by ordinances of the city, which were alleged to have been enacted without authority either by express terms or by necessary implication in the legislative act whereby the city was incorporated. The court reviewed its former decisions, and held that the case was not one arising under the Constitution and laws of the United States. The opinion reviewed also and approved the decision of the Circuit Court of Appeals for the Sixth Circuit in City of Louisville v. Cumberland Telephone & Telegraph Co., 155 Fed. 725, 84 C. C. A. 151. In that case it was sought to restrain the enforcement of a municipal ordinance regulating charges for telephone service on the ground that the ordinance violated the obligation of a contract between the complainant and the city, and the bill alleged that no power to regulate the rates had been granted by the Constitution or by the Legislature of the state. "If this be true," said Judge Lurton, delivering the opinion of the court, "there was no state authority behind the action of the Louisville common council and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state. But, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises." In line with these authorities is the decision of this court in Seattle Electric Co. v. Seattle, R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421. In that case the ordinance which was complained of and which it was said would operate to deprive the complainant of its property without due process of law was alleged in the bill to have been granted illegally, and without right, and to be "without authority in law, and null and void and of no force and effect." We held, following the cases above cited, that, taking those averments to be true, the ordinance complained of was not the act of the state, and that there was no federal question involved. When it comes to the question whether the ordinance of a munici-

pality is or is not legislation by the state, there can be no difference between an ordinance which has been enacted ultra vires and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law. Whether or not the ordinances complained of here would in fact, if carried out, have the effect to impair the obligation of the appellee's contract, we do not undertake to decide. What we hold is that the averments of the bill itself exclude the case from the cognizance of a federal court as a case arising under the Constitution of the United States by alleging that the very ordinances which the appellee relies upon as constituting a violation of its contract have been enacted in violation of the positive law of the state.

The judgment is reversed, and the cause remanded with instructions to dismiss the bill.

MORROW, Circuit Judge. I concur in the foregoing opinion written by Judge GILBERT. I am also of the opinion that the facts alleged in the complaint charge the city and county of San Francisco with acts that will simply amount to a breach of contract.

Section 12 of the ordinance under which the predecessors of complainant acquired the right to operate street railroads over the streets mentioned in the ordinance provides:

"Said railway company is hereby required to file in the office of the clerk of the board of supervisors of the city and county of San Francisco an acceptance in writing of the provisions of this order, under its corporate seal, signed by its president and countersigned by its secretary, and thereupon the provisions of this order shall be taken and deemed to be a contract between said company and said city and county. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void."

It is alleged in the bill of complaint that the predecessors of complainant accepted in writing the provisions of the order, and thereafter performed all the conditions required by the ordinance or by law to be performed. The ordinance thereupon became a contract between the city and county of San Francisco and the predecessors of the complainant. One of the conditions of this contract was specified in section 5 of the ordinance that it would be lawful for the board of supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the streets mentioned in the ordinance for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of the state. Section 499 of the Civil Code provided that corporations may be permitted to use the same streets if each pay an equal portion of the construction of the track, but in no case must two railroad corporations occupy and use the same street for a distance of more than five blocks. The complainant alleges that the city and county of San Francisco is proceeding in violation of the terms of this contract to construct and operate a municipal railroad along the streets occupied by the complainant. The facts alleged amount to an

allegation that the city and county of San Francisco is about to do an act that will amount to a breach of contract. There is no law of the state impairing the obligation of the contract. The law of the state is otherwise. It maintains the validity and terms of the contract. In the recent case of Shawnee Sewerage & Dr. Co. v. Stearns, 220 U. S. 462, 31 Sup. Ct. 452, 55 L. Ed. 544, the Supreme Court said with respect to the violation of a similar ordinance:

"The breach of a contract is neither confiscation of property nor a taking of property without due process of law."

HANFORD, District Judge (concurring). I concur in the foregoing opinion and all of it with this reservation, that as the decision of this court in the case of Seattle Electric Co. v. Seattle R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421, is cited, I am unwilling to acquiesce in that part of said decision found in the quotation from 5 Ency. U. S. Sup. Ct. Rep. p. 545, asserting that a party complaining of an invasion of rights guaranteed by the Constitution of the United States and also in violation of the Constitution or laws of the state, "must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort" before he will be entitled to invoke the jurisdiction of a federal court.

The federal courts ordained and established pursuant to the Constitution of the United States have an important function in adjudicating controversies involving questions of national law, and the jurisdiction of the United States Circuit Courts in actions at law and suits in equity, if not exclusive, is concurrent with, and not secondary to, the jurisdiction of state courts. I consider that a United States court has no right to deny its jurisdiction, in a case where jurisdiction is conferred by Congress, merely because of a presumption that the rights of the complainant will be fully protected by a state court, or on a review of its decision by the Supreme Court of the United States.

UNITED STATES v. MILLS et al.

(Circuit Court of Appeals, Fifth Circuit. October 2, 1911.)

No. 2,017.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—GROUNDS FOR RELIEF.

The United States has the same remedy in a court of equity to set aside or annul a patent for public land on the ground of fraud in procuring its issue that an individual would have in regard to his own deed procured under similar circumstances, and a patent may be canceled either on the ground that it was obtained by false and fraudulent statements or evidence, or that it was issued through the inadvertence or mistake of the officers of the Land Office, where both grounds are alleged.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PUBLIC LANDS (§ 35*)—HOMESTEAD ENTRIES—NECESSITY OF RESIDENCE.

Under Rev. St. §§ 2289, 2290, 2291 (U. S. Comp. St. 1901, pp. 1388–1390), construed in connection with other cognate provisions of the homestead law, a homestead entryman owning no land, and applying to enter 160 acres as a homestead, in order to be entitled to a patent, is required to show both actual residence on the land in good faith and cultivation for the required length of time.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72–77; Dec. Dig. § 35.*

Rights acquired by homestead settlements and entries, see note to McCune v. Essig, 59 C. C. A. 434.]

3. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—FRAUD IN HOMESTEAD ENTRY.

Defendant in making final proof under a homestead entry testified, as did his witnesses, that he established actual residence on the land which he continued for the required five years, and on such proof a patent was issued. It was shown without contradiction that defendant, who was unmarried, never at any time actually resided on the land, but with an uncle some miles distant, going to the land frequently, and once in four or five months taking his bedding and remaining overnight. He built a house on the land, and cleared a small tract, which was cultivated by tenants. Shortly after receiving the patent, he sold the land. *Held*, that such evidence did not show a compliance with the law, but that the patent was issued in reliance on the proofs made which were untrue, and that the government was entitled to its cancellation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. § 120.*]

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

Suit in equity by the United States against Henry C. Mills and others. Decree (169 Fed. 686) for defendants, and complainant appeals. Reversed.

Wm. H. Armbrecht, U. S. Atty., and Alex T. Howard, Asst. U. S. Atty.

Joseph C. Rich and J. Gaillard Hamilton, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a bill in equity by the United States seeking the cancellation of a patent issued to the defendant Henry C. Mills, and the cancellation of a deed made by Mills to Henry Brannan and Thomas H. Brannan. Mills on November 15, 1897, made application to enter 160.66 acres of land in Mobile county, Ala., under section 2289 of Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1388). On January 3, 1903, he made final proof of his entry, testifying that he had established actual residence on the land about January 15, 1898, that he had never been absent from the land more than a month or six weeks at a time, and that the land was cultivated each season. In further proof of the homestead claim, Henry Brannan testified that Mills settled upon the homestead in January, 1898, establishing his actual residence thereon, and that he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had resided continuously on the homestead since January, 1898, and that he had not been absent from the homestead except for two or three weeks at a time when he was off at work. Similar proof was made by Julius Cooley. Upon this proof being made by affidavits signed before the clerk of the Circuit Court of Mobile county, Alabama, the patent was issued by the United States to Mills on March 19, 1904. After Mills obtained the patent, he conveyed the land to Henry Brannan and Thomas H. Brannan on June 16, 1904, for a recited consideration of $80.

The bill alleges that the proof made by Mills was false and fraudulent; that, in fact, Mills never established his residence on the homestead and never lived on it, as testified to by him and by Henry Brannan and Julius Cooley; and that he never cultivated the land. It is also alleged that Mills did not act in good faith in making the entry, that he never lived on the land or intended to live on it, and that Henry Brannan, to whom Mills subsequent to the entry conveyed an interest in the land, was interested in the entry from the first. The answers of Mills and the Brannans deny fraud, and allege the good faith of Mills in making the entry and of the Brannans in making the purchase from Mills.

The main question in the case is one of fact—whether or not Mills entered the land in good faith and really established a residence on it, and lived on it and cultivated it, as required by the homestead law and substantially as shown by his final proof of entry. But the case incidentally involves a construction of the homestead statutes.

[1] The United States has the same remedy in a court of equity to set aside or annul a patent for land on the ground of fraud in procuring its issue that an individual would have in regard to his own deed procured under similar circumstances. United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110. In fact, there are reasons why the government in cases of this kind should not be held to the same diligence in guarding against fraud and imposition as a private owner of real estate. The government owns immense tracts of land which are placed in the hands of officers of the government subject to entry under the pre-emption and homestead laws, and usually these officers are, from necessity, forced to act solely on the ex parte statements of the claimants and their witnesses. If the claimant obtains a patent by false and fraudulent statements or evidence, the government, by direct proceeding in equity, can have it annulled. And the same rule obtains where, by mistake or inadvertence of the officers of the land office, the claimant procures a patent. Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Germania Iron Co. v. United States, 165 U. S. 379, 17 Sup. Ct. 337, 41 L. Ed. 754. In cases where the allegations of the bill and the evidence point to fraud and wrong, and also point to inadvertence and mistake, the bill may be sustained upon the latter ground, if proved, although the proof fails to fully establish the first ground. Williams v. United States, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026. The bill in this case with particularity charges fraud on the part of the defendants—that the

claimant did not act in good faith; that he never intended to settle on and live on the land as his homestead; that he never lived on it; and that his evidence on final proof to the contrary was false and fraudulent. Besides, it is alleged that the patent was issued by the complainant, relying upon the good faith of this testimony, and believing it to be true in fact.

The averments of the bill being denied, the burden of proof is, of course, on the complainant, and the patent will not be annulled unless the evidence clearly and fully sustains the charges made. Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949.

The evidence on which the case was tried below shows that after Mills' entry about an acre and a half of the land was cleared and fenced, part in a garden and part in a lot, and that a building valued at from $50 to $150 was erected, that this building was occupied for several years by negroes placed in possession by Mills, and that they cultivated the garden and lot. It does not clearly appear on what terms the tenants occupied the land, further than that Mills furnished some fertilizers, and that the tenants were not charged rent, but were to take care of the place. The evidence unquestionably shows that Mills never lived on the place. During the five years after application for entry, Mills lived with his uncle, Henry Brannan, either at Brannan's turpentine distillery or at Brannan's house. His own statements in evidence show this. His only acts tending to show an actual personal residence or personal occupancy of the homestead by him was that he would about every four or five or six months take some bedclothes with him and go to the homestead and spend the night, sleeping either on the porch or in the house, and the next day would take his bedclothes and go home. He would sometimes take a witness with him to prove that he did sleep on the homestead. His own testimony shows, we think, that his purpose was not to make a home for himself on the land, but merely to claim the place as a home, and to obtain the title without actual residence on it. Shortly after obtaining the patent, he conveyed it to his kinsmen, who were cognizant of all the facts, and with one of whom he lived during the time he and one of the kinsmen both swore that he had an actual residence on the homestead. The evidence clearly shows that Mills never intended to live on the place during the five years succeeding his entry, and that he did not live on it; that he slept there one night in every four, five, or six months so as to "fulfill the law," as he expressed it to Cowart, and in that way he intended to obtain a patent to the land. If this constitutes residence on the land, he could have obtained in like manner a residence on a dozen other quarter sections at the same time.

[2] The homestead act was passed May 20, 1862, and its purpose is indicated by its title: "An act to secure homesteads to actual settlers on the public domain." Act May 20, 1862, c. 75, 12 Stat. 392. The portions of the act material to this case are found, as amended, in sections 2289, 2290, and 2291 of the Revised Statutes (U. S. Comp. St. 1901, pp. 1388–1390). For convenience of reference, they are cop-

ied in the margin.[1] The first section cited provides that named persons are entitled to enter one-quarter section, or a less quantity, of the unappropriated public lands. The last paragraph of the section provides that a person owning and residing on land may enter other land contiguous to his land, which shall not, with the land already owned by him, exceed 160 acres. The second section cited provides that the applicant shall file in the land office an affidavit stating that the application is made "for the purpose of actual settlement and cultivation," etc., and that the applicant "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title," etc. The third section cited pro-

[1] Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any state or territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Sec. 2290. That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified.

Sec. 2291. No certificate, however, shall be given, or patent issued therefore, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

vides that no patent shall be issued for the land "until the expiration of five years from the date of such entry," and it is required that the applicant shall prove by two witnesses that he has "resided upon or cultivated" the land for five years. It will be noted that the first section allows an entry, first, by an applicant who owns no land; and, second, by an applicant who owns less than 160 acres, and who is allowed to enter enough contiguous land to enlarge his homestead to 160 acres. The third section cited, standing alone, would indicate that both residence and cultivation were not required to obtain a patent, because the applicant is required to prove that he has "resided upon or cultivated" the land for which he seeks the patent. But the second section cited contains language, which we have quoted, which tends to show that "residence *and* cultivation" are necessary to acquire title. When the applicant is a person who, owning less than 160 acres, seeks to enlarge his homestead by an entry of other land, it is clear that he would not be required to move from the land owned by him to the contiguous land which he seeks to enter. In such case residence on the land sought to be added to his homestead would not be necessary. Cultivation for the required length of time would be sufficient. But in the case at bar the entryman was not applying for an addition to land already owned by him, but, owning no land, he applied to enter a homestead of 160 acres. And the question is in such case, Should the statute be so construed as to require him to show both residence and cultivation to entitle him to a patent?

It is contended by the claimant that his actual residence on or occupancy of the land was unnecessary; that it was sufficient for him to have had part of it cultivated.

This contention is based mainly on section 2291 of the Revised Statutes. This section provides that "no certificate * * * shall be given, or patent issued therefor, until the expiration of five years from the date of such entry," and that the claimant, to be entitled to a patent, shall prove by two credible witnesses that he has "resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit," etc. Insistence is made on the disjunctive conjunction "or," and the contention is made that it is unnecessary for the claimant to have resided on the land if he cultivated it or caused it to be cultivated. The government contends that this statute should be construed in pari materia with other sections of the Revised Statutes, which, together, constitute the homestead law. Section 2290, the section immediately preceding the one just quoted, provides that the person seeking to make the entry under the homestead law shall make affidavit that his "application is honestly and in good faith made for the purpose of actual settlement and cultivation," and that he "will faithfully and honestly endeavor to comply with all the requirements of law as to *settlement, residence, and cultivation* necessary to acquire title to the land applied for," etc. And in stating the circumstances under which the entered homestead will revert to the government it is provided that it will so revert when the claimant "has actually changed his *residence, or abandoned the land* for more than six months at any time. * * *" R. S. U. S. § 2297 (U. S. Comp.

St. 1901, p. 1398). This language strongly indicates that the claimant is required to establish a home on the land, but that he may absent himself from it temporarily for as long as six months.

Again, section 2308 (page 1417) provides that, where a soldier or sailor is actually enlisted and thus employed at the time of entry, his service shall be construed as equivalent "to a residence for the same length of time upon the tract so entered," and, if his entry has been canceled by reason of such absence and the tract has been disposed of, he may enter another tract, and his right to a patent therefor may be determined "by the proofs touching his residence *and* cultivation of the first tract." Section 2305 (page 1413) had already provided, referring to soldiers and sailors, that no patent shall issue unless the settler has "resided upon, improved, *and* cultivated his homestead" for at least a year; and this section also refers to certain acts as being equivalent to a performance of all requirements as to residence and cultivation for the full period of five years.

These sections, all found together in chapter 5, tit. 32, Rev. St., strongly indicate the legislative intention that both residence and cultivation of the land are required to entitle the entryman to a patent.

In laws passed subsequent to the homestead law Congress has uniformly referred to the latter as requiring of the entryman actual residence on the land.

In Act Jan. 19, 1895, c. 34, 28 Stat. 634 (U. S. Comp. St. 1901, p. 1408), providing relief for settlers whose homesteads were destroyed by forest fires in Wisconsin, Minnesota, and Michigan, Congress, in extending two years' additional time in which to make final proof, said that any temporary absence within two years from the date of the act "shall be deemed constructive possession *and residence,*" but shall not be deducted from the time required to make final proof.

The Act July 1, 1879, c. 63, 21 Stat. 48 (U. S. Comp. St. 1901, p. 1399), provided for leave of absence where crops were injured by grasshoppers. Absence not exceeding one year was authorized under certain conditions. This provision would have been useless had residence not been required.

And again, in Act March 2, 1889, c. 381, § 3, 25 Stat. 854 (U. S. Comp. St. 1901, p. 1400), leave of absence is provided for when for good reason the settler cannot secure a support for himself and family "upon the lands settled upon." A leave of absence not exceeding one year was authorized; *"Provided,* that the time of such actual absence shall not be deducted from the *actual residence required by law."*

In Act Feb. 26, 1896, c. 31, 29 Stat. 16, absence for one year from settlements upon the Yankton Indian Reservation was authorized; *"Provided,* that the settler shall not receive credit upon the period of *actual residence required by law,"* for the time he was thus absent.

Act March 3, 1879, c. 191, 20 Stat. 472 (U. S. Comp. St. 1901, p. 1401), in granting additional rights to homestead settlers on public lands within railroad limits, provided that in cases of surrender of the original entry and re-entry under the conditions of the act:

"* * * The residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and culti-

vation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the *five years' residence and cultivation required by law.*"

The language is repeated in Act July 1, 1879, c. 60, 21 Stat. 46 (U. S. Comp. St. 1901, p. 1402).

Section 6, Act March 2, 1889, c. 381, 25 Stat. 854 (U. S. Comp. St. 1901, p. 1404), uses the words, "shall have actually and in conformity with the homestead laws resided upon *and* cultivated the lands," etc.

Since its enactment the homestead law has been consistently construed by the department charged with its administration as requiring of the homesteaders actual residence as well as cultivation for the five year period. This is shown by circulars issued by the department and by various decisions. Where parties made considerable improvements, but failed *in residence,* their rights as homestead claimants were held forfeited. Land Laws, Regulations and Decisions, 2 Lester, 264. In holding that a homestead entry should be canceled, Secretary Schurz said (December 5, 1878) that the claimant is one of a class "who do not reside upon the land entered by them, but seek to keep up a residence thereon by going thereto and remaining over night once or twice in six months." Byrne v. Catlin, 1 Copp's Public Land Laws (1882) 406. In that case it was shown that the entryman resided at his father's home, a few miles distant from the land he claimed as a homestead. The courts, except when there are strong reasons for a contrary course, will respect the construction of a statute upon which the department has uniformly proceeded in the administration of the public lands. McMichael v. Murphy, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766.

No controlling case is cited in which the court was required to decide the question we are considering, but there are numerous cases in which expressions are used which tend to sustain the legislative and departmental construction.

In St. Paul Minn. & Man. Ry. Co. v. Donohue, 210 U. S. 21, 31, 28 Sup. Ct. 600, 603 (52 L. Ed. 941), Mr. Justice White observed:

"By the homestead law residence upon and cultivation of the land was required."

In Anderson v. Carkins, 135 U. S. 483, 487, 10 Sup. Ct. 905, 906 (34 L. Ed. 272), Mr. Justice Brewer said:

"The law contemplates five years' continuous occupation by the homesteader. * * *"

In Adams v. Church, 193 U. S. 510, 516, 24 Sup. Ct. 512, 514 (48 L. Ed. 769), Mr. Justice Day said:

"The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself."

In Bohall v. Dilla, 114 U. S. 47, 51, 5 Sup. Ct. 782, 784 (29 L. Ed. 61), Mr. Justice Field said:

"Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erec-

tion of a dwelling thereon. This implies a residence both continuous and personal."

There are numerous other cases where observations are made to the same effect. Shiver v. United States, 159 U. S. 491, 497, 16 Sup. Ct. 54, 40 L. Ed. 231; McCune v. Essig, 199 U. S. 382, 389, 26 Sup. Ct. 78, 50 L. Ed. 237.

In United States v. Collett, 159 Fed. 932, 933, 87 C. C. A. 460, 461, the court said:

"The statute requires residence and cultivation in good faith for a period of five years by an entryman to entitle him to a patent of a homestead."

We are of opinion that by a proper construction of the statute the entryman in a case like this is required to show residence on the land for five years to entitle him to a patent.

[3] We concur fully in the contention of defendant's counsel that the statutes should not be construed strictly and harshly against the homesteader, but that the land laws should be administered liberally to fulfill their purpose. A temporary absence from the home or delay in making improvements or failure for unavoidable reasons to cultivate the land for a season might ordinarily be excused. Possibly, failure for unavoidable reasons to reside on the land might, under some circumstances, be excused. But it was not intended that a patent should be granted when the entryman never lived on the land—when he could have lived on it if he had wished to do so, and when, during the entire five years succeeding the filing of his claim, he had a home and residence elsewhere.

Technical considerations should not be allowed to defeat the claimant, but we cannot see how he could have justly claimed that he had established a home on the entered land within the meaning of the statute, when he had never lived on the land before he obtained the patent and when all the time he had a well-known and defined home elsewhere. He never kept his horse or his clothes, his bed or any personal property owned or used by him, on the place. He swore to the contrary to obtain the patent, but, the facts being substantially proved in this case by the government's witnesses, he admits that he had no actual residence on the land and that he kept no personal property on it. His mere thought that what he did was sufficient cannot override the law, which he is presumed to know. The claimant's testimony in this case, and that of Henry Brannan, is in direct conflict with their affidavits made to secure the patent. If the government had been cognizant of the facts, it is not to be presumed that the patent would have been issued. It was obtained by deceiving the government's officers as to the facts. The proof is quite sufficient to clearly establish this. Mills should not be permitted to hold the land, obtained by false affidavits, as against the government.

As found by the court below, there is no question of innocent purchaser in the case. Henry and Thomas H. Brannan, to whom Mills conveyed the land, were fully advised as to the facts proved on the trial. They both knew that Mills did not live on the land at any time,

and that, in fact, he lived elsewhere for the five years immediately following the filing of his claim.

We are of opinion that the complainant is entitled to relief as prayed for.

The decree of the Circuit Court is reversed, and the case remanded for further proceedings conforming to the opinion of this court.

BATES COUNTY, MO., et al. v. WILLS et al.

(Circuit Court of Appeals, Eighth Circuit. September 21, 1911.)

No. 3,470.

1. DRAINS (§ 20*)—CONSTRUCTION OF MISSOURI STATUTE—NATURE OF DRAINAGE DISTRICTS—LIABILITY ON CONTRACTS.

Under the Missouri drainage act (Rev. St. 1899. § 8283, as amended by Laws 1905, p. 182), which authorizes the county court of a county, if on petition it shall find in favor of the improvement, to contract for the construction of a drainage ditch and to set apart the lands found to be benefited as a drainage district to be known by a number, such districts are merely political subdivisions of the county and not corporations capable of being sued, and a contract let by the engineer on behalf of the county for drainage work, as provided by the statute, is a special contract of the county, the work to be paid for by assessment on the lands of the district, and on which the county is alone suable.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 20.*]

2. DRAINS (§ 49*)—CONTRACT FOR CONSTRUCTION OF PUBLIC DRAINS—CONSTRUCTION.

A contract by a county for the construction of a public drainage ditch, made under statutory authority and based on specifications and a plat and profile made by an engineer, presumably contemplates the completion of the work to conform to the specifications, and where by such a contract the contractor was to be paid stated prices per cubic yard for the excavation, different on different sections, and a lump sum additional for the removal of coal, stone, and shale, and was required to remove all trees, stumps, and logs, the contract cannot be construed to exempt him from removing stone found in the line because of a further provision that he should execute the work with a steam dredge, without dressing the sides by hand, nor because that particular stone was not shown by the profile, which was not required by law to show the character of the material to be removed.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 49.*]

3. DRAINS (§ 49*)—CONTRACTS FOR CONSTRUCTION—PERFORMANCE—MODIFICATION.

Where the contractors under such contract on encountering the stone notified the county court that they did not consider it within their contract, a further agreement that they might proceed without prejudice to their right to insist on such claim or to the right of the county to contest it did not change the rights of the parties under the original contract, nor entitle the contractors, who left the stone in place, to recover the final payment for the work which by the terms of such contract was reserved until the contract should be fully performed.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 49.*]

4. DRAINS (§ 49*)—PERFORMANCE—CONDITION PRECEDENT TO RECOVERY ON CONTRACT FOR DRAIN—ENGINEER'S CERTIFICATE.

Where a contract for the construction of a public drain provided that final payment thereon should be made only on the estimates of the en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gineer, to entitle the contractor to recover such payment, it must be both alleged and proved either that such estimate was made or that plaintiff had completed the work to entitle it to the same, and that the engineer had arbitrarily or fraudulently refused to make it.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 49.*]

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action at law by A. V. Wills and others against Bates county, Mo., and others. Judgment for plaintiffs, and defendant county brings error. Reversed.

See, also, 170 Fed. 812.

Frank Hagerman (Thomas J. Smith, on the brief), for plaintiff in error.

F. N. Judson and Frank M. Lowe (William Mumford and Judson & Green, on the brief), for defendants in error.

Before HOOK, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. By statute of the state of Missouri the county court of any county in the state was given the power, at any regular session thereof, when the same should be conducive to the public health, convenience, or welfare, or where the same would be of public utility or benefit, to cause to be constructed ditches and drains within said county, when the same were necessary to drain any lot, lands, public or corporate roads or railroads. This power was to be exercised upon a petition filed with the county court by landowners whose lands were liable to be affected by assessment for the construction of the same. The county court was then to appoint commissioners, and an engineer to make a preliminary survey and report as to the advisability of the proposed ditch, and for the organization of the lands to be benefited into a drainage district, to be known by a given number. After such report, if the county court should find that the proposed ditch or other improvement was necessary for sanitary or agricultural purposes, or would be a public utility or conducive to the public health, convenience or welfare, it was required to make an entry of record of such finding and appoint some competent engineer and three viewers to establish the precise location of such ditch, make a survey and level, and set a stake at every one hundred feet, numbering downstream, determine the dimensions and form of the ditch or other improvement, estimate the number of cubic yards of earth or other substance to be removed, and the cost per cubic yard for each section of one hundred feet and for the whole work, and to make a report, profile, and plat of the same, such profile to show the surface, the grade line, and grade. They were also to return a schedule of all lots and lands and of public and corporate roads or railroads that would be benefited, damaged, or condemned by or for the improvement, the damage or benefit to each tract of 40 acres or less, etc. Upon the filing of the report of the viewers the county court was required to set a date for a hearing of the same, and no-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tice was to be given to the parties affected of such hearing. The county court was required to fix the time and place of letting contracts for the construction of the ditch according to the report of the engineer and viewers, and cause notice thereof, containing a description of the work to be let, to be given by the clerk of the court by publication, and the county court should cause the engineer to attend the sale and offer the work, receive the bids, and make contracts on behalf of the county with the lowest responsible bidder. and take bonds for the performance of the work, no bid to be entertained which exceeded the estimated cost of location and construction of the work. The engineer was to return all contracts and bonds to the office of the county clerk, and the county court was then required to approve or reject such contracts and bonds.

Pursuant to these statutory provisions, drainage district No. 1 of Bates county, Mo., was organized, and on May 2, 1906, a contract was let by one Bell, the engineer, to Timothy Foohey & Sons for the construction of a ditch divided into three sections. The contract and the bond given by the contractors was subsequently approved by the county court.

The provisions of the contract material for proper consideration of this case were as follows:

"That in consideration of the covenants and agreements of the party of the first part hereafter mentioned to be kept and performed, the party of the second part covenants, promises, and agrees to and with said party of the first part to execute with a steam dredge, according to plans and profiles and specifications prepared by the engineer of said district and now on file in the office of the county clerk of Bates county, Missouri, the following ditch, to wit: * * * The said ditches are to be executed with a steam dredge, the sides and slopes of said ditches not being required to be dressed to a smooth surface by hand work. The berme required in the specifications will be kept as nearly passable as the convenience and conditions of the ground will permit, but it is not expected to be kept clean from slush and the roll of the dredge. * * * All of said work to be completed according to plans and specifications, and under the direction and with the approval of the engineer in charge. * * *

"In consideration of the foregoing covenants and agreements of the party of the second part, the parties of the first part on behalf of said district hereby promise, covenant, and agree to pay to the party of the second part for the construction of said works the prices stated as follows, to wit:

"The sum of eight (8c) cents per cubic yard for all excavation in sections No. one and two (1 & 2) as shown on the plans and specifications aforesaid, and for the excavation in section three (3) shown on said plans and specifications ten (10) cents per cubic yard from Station No. 1012 to Station No. 1130, and also from Station No. 1174 to Station No. 1234 plus sixty feet. and the sum of twenty (20c) cents per cubic yard for excavating from Station No. 1130 to Station No. 1174, and in addition thereto for the removing of coal, stone, and shale the further sum of ten thousand eight hundred thirty-three dollars and thirty cents ($10,833.30) and for construction of laterals No. one and three (1 & 3) the sum of fifteen cents (15c) per cubic yard, and for lateral No. four (4) twelve (12) cents per cubic yard.

"Payments therefor shall be made on estimates made by said engineer who shall examine and measure the work done, and make such estimates monthly, and shall ascertain whether said work has been completed according to contract and his directions given for said construction, and, if the work shall be found to be deficient in any respect, said engineer shall at once give to the contractor notice, specifying the respect in which the ditch is deficient and direct such contractor, the party of the second part, to im-

mediately remedy such defect, and the engineer's estimate of the work done shall be withheld and no payment made thereon until such deficiency is remedied.

"If the work is found to be completed, or when any deficiency therein shall have been remedied as required by such engineer, he shall then give his estimate, and the county court of Bates county, Missouri, shall then accept said part of the ditch, and the contractor shall not be responsible for any defects that may occur after the time the same shall have been accepted, and, when any part of said ditch is accepted, the contractor shall then be paid in accordance with the terms of this contract for the work done up to that time, less ten per cent. (10%) of the contract price thereof which said ten per cent. shall be reserved until the final completion of all the work in each working section as given in the plans and specifications, aforesaid, at which time the whole amount due for work done upon each such section shall be immediately paid."

On the day of the execution of the contract Timothy Foohey & Sons assigned and transferred to A. V. Wills & Sons the portion of the contract relating to section No. 3, said A. V. Wills & Sons obligating themselves to perform the contract relative to section 3, and the work which was done upon said section 3 was performed by said A. V. Wills & Sons.

Separate estimates were made by the engineer of work done by said A. V. Wills & Sons as the same progressed to August, 1908, and 90 per cent. of the total amount was paid by the county court, 10 per cent. being reserved.

During the progress of the work and on the 6th day of August, 1908, the records of the county court show that said A. V. Wills & Sons stated to the county court that there was found in the land required to be excavated under the plans and specifications provided for the work a large amount of stone, which was not included nor covered by the terms of the contract, and that they could not, under their contract, remove the stone from said ditch as referred to under the contract so entered into. The record then recites as follows:

"And all the parties being desirous that the work not be delayed, and the said Timothy Foohey & Sons appearing herein and consenting hereto, it is by the court ordered that the said A. V. Wills & Sons may proceed with the execution of their work as heretofore done by them, and it is understood that in so doing they shall not be held nor taken to waive any right that they may now have to insist upon, or maintain that under the terms of the contract heretofore entered into they are not required to remove from the ditch stone that has been uncovered, nor such as may hereafter be uncovered, but their right, if any they have, shall be preserved to them, as it now exists, to claim or maintain that they are not obligated by the terms of the contract to remove from said ditch the stone complained of.

"It is understood, however, by all the parties the county court of Bates county, Mo., acting in this behalf for said drainage district, the said A. V. Wills & Sons and the said Timothy Foohey & Sons that the said county court does not concede the correctness of the claim thus made by the said A. V. Wills & Sons in any respect, but expressly reserve whatever right it may have to insist upon the removal down to the grade line of all materials that may be found in or under the earth excavation as provided by the plans and specifications for the execution of said work, the sole and only purpose of this entry being to provide that the further prosecution of work in said ditch by the said A. V. Wills & Sons as has been done heretofore, or shall hereafter be done, shall not be taken or held of itself as a waiver upon their part of any rights which they now have, either to refuse to remove the stone from said ditch, or to abandon the work at this point."

Thereafter A. V. Wills & Sons proceeded with the work and removed all the material from the ditch excepting the stone, which they insisted they were not required to remove, the county court insisting that they were required, under the terms of the contract, to remove the same.

On April 3, 1909, A. V. Wills & Sons brought action in the Circuit Court of the United States against Bates County and Drainage District No. 1 to recover the sum of $58,000, which they claimed was the balance due them for the work done. In their petition it is stated that they have performed all the work which was required to be done under their contract, being all which could be removed with a steam shovel, stating and claiming in said petition that the profile referred to in the contract showed the stone in the ditch to be of a character, and located so, that it could be removed by a steam shovel, but that the stone actually contained in the ditch was of a kind and character which could not be removed with a steam shovel. and hence, under the terms of the contract, was not required to be removed by them.

A demurrer was sustained to the petition on behalf of the drainage district. Bates county filed an answer, denying its liability, and further claiming that the contract required the contractor to remove all of the material, including stone, from the ditch, in accordance with the plans and specifications, which had not been done, and that the plaintiffs had not completed their contract, alleged that the engineer had not given any estimates for work not paid for.

At the trial but little evidence was offered, for the reason that the trial court expressed the view that the agreement of August 6, 1908, constituted a new contract which entitled plaintiffs to recover the full amount of the balance due for the work which they had performed, and directed a verdict in favor of plaintiffs and against the county for that amount.

[1] The first contention made here upon the part of the county is that it in no manner is liable upon the contract, that the contract was not one made by the county for and on its behalf, but was a contract of the drainage district, and that the drainage district alone is liable. Viewing the legislation of the state relative to these drainage districts, we think it apparent that drainage districts were merely political subdivisions of the county for the special purposes of drainage. and were not at the time the contract was entered into created corporations capable of suing and being sued. The whole proceeding for the establishment of drainage districts, construction of ditches, assessing property therefor, and providing the funds to pay for construction, was vested in the county court. The statute expressly required that the engineer should make the contract for and on behalf of the county.

We think it apparent that the contract in question was a special contract of the county, differing from its general contracts, in that the funds for the payment of the enterprise were to be collected from the portion of the county only that derived special benefit from the improvement; that the district formation was for the purpose of designating the territorial part of the county to be assessed for the

payment thereof. Contracts of this character are analogous to those of a city, which establishes paving and sewer districts, issues paving and sewer district bonds, in which the real estate in the particular district only is assessed for the improvement, the work being done on the theory that it is a local benefit, and the expense borne by the property specially benefited. That the contract in question was a special county contract and the action properly brought against the county we think sustained by the case of Davenport v. County of Dodge, 105 U. S. 237, 26 L. Ed. 1018.

[2] The main controversy in the case arises over the proper construction of the contract in question. Plaintiffs claim that, as the contract provided for the work to be done with a steam dredge, they were only to remove such material as could be removed with a steam dredge; that material and obstructions which could not be removed with a steam dredge were not embraced within the contract. On the part of the defendant it is said that the contract considered as a whole was for a completed ditch according to the plans and specifications.

In Turner v. City of Fremont (C. C.) 159 Fed. 221 (affirmed in 170 Fed. 259, 95 C. C. A. 455), it was said:

"It is fundamental that the primary object of construction in contract law is to discover the intention of the parties. To do this, the entire agreement is to be considered. Not what separate parts may mean, but what the agreement means when considered as a whole, and, if possible, the agreement should be construed so as to give effect to each provision inserted therein."

In Pressed Steel Car Co. v. Eastern Ry. Co. of Minn., 121 Fed. 609, 57 C. C. A. 635, certain canons of interpretation of contracts were stated by Judge Sanborn, writing the opinion of this court as follows:

"The purpose of a written agreement is to evidence the terms upon which the minds of the parties to it meet when they make it. Hence the true end of all contractual interpretation is to ascertain that intention, and, when it is found, it prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulations. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then, from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met. Accumulator Co. v. Dubuque St. Ry. Co., 64 Fed. 70, 74, 12 C. C. A. 37, 41, 42; City of Salt Lake v. Smith, 104 Fed. 457, 462, 43 C. C. A. 637, 643; Fitzgerald v. First National Bank, 52 C. C. A. 276, 284, 114 Fed. 474, 482. The intention of the parties must be deduced from the entire agreement and from all its provisions considered together, because, where a contract has many stipulations, it is plain that the parties understood and agreed that their intention was not expressed by any single part or provision of their agreement, but by every part and stipulation so construed as to be consistent with every other part and with the entire contract. Jacobs v. Spalding, 71 Wis. 177, 189, 36 N. W. 608; Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469. Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract. Coghlan v. Stet-

son (C. C.) 19 Fed. 727, 729; Jacobs v. Spalding, 71 Wis. 177, 186, 36 N. W. 608; Russell v. Allerton, 108 N. Y. 288, 292, 15 N. E. 391."

Applying the foregoing rules of construction to the contract in question, it is clear that the parties had under consideration the construction of a drainage ditch in accordance with certain plans and specifications. Such plans and specifications were for a completed ditch of specified dimensions, and provided for the removal of all of the material therefrom. One provision in the specifications was as follows:

"All trees, stumps, logs or other obstructions that come within the cross-sectional area of the ditch and on specified bermes must be removed and any other such on the right of way that may present an obstruction to the proper execution of the work or effect its beneficial results in the future."

We do not think it would be seriously contended that if some portion of the section was covered by large trees, which could not be removed by a steam shovel, such portion was not covered by the contract because of the provision that the work was to be done with a steam shovel. That such was not plaintiffs' understanding is evident from the fact that it appears from the evidence that some trees they dug out with a machine and others with the brush they chopped off.

The statute required the viewers and engineer, not only to present specifications, but a plat and profile of the work, with an estimate of the amount of material which would be required to be removed and the cost thereof. The purpose of this was primarily to enable the county court to obtain at least a reasonably approximate estimate of the cost of the work. The several soundings appearing upon the profile, showing the character of the material, were not required by the statute, but were doubtless made in this case to furnish evidence to the county court as to the probable correctness of the estimated cost. The profile was not a representation or guaranty upon the part of the county that all of the material in the ditch consisted of such as was shown at the points where the soundings were made. Sanitary Dist. v. Ricker, 91 Fed. 833, 34 C. C. A. 91. That the character of the material to be removed would vary is clearly shown by the fact that the price per cubic yard for excavation varied from 10 to 20 cents, and that it was contemplated and understood by the parties that it would be necessary to remove coal, stone, and shale, is made evident by the fact that the contract provided that, in addition to the price paid per cubic yard, a lump sum of $10,833.30 should be paid for removing stone and shale. The object and purpose of the contract being to obtain a completed ditch, according to plans and specifications, it is apparent that the provision relative to the work being done by a steam shovel was only intended to expedite the work, relieve the contractor from smoothing the sloped surfaces by hand, and that the steam shovel was only to be used to the extent that it was practicable to perform the work required. Reading the contract as a whole, we conclude that it provided for the removal of all material within the dimensions shown by the specifications.

[3] The subsequent agreement of August 6, 1908, did not modify the contract in these respects. It had developed that there was stone

in the ditch to be excavated, which could not be done with a steam shovel, and plaintiffs promptly reported to the county court that such work was not within their contract. This was doubtless done to avoid any question of waiver which might possibly arise if they continued to simply remove such material as could be done with the steam shovel; that the work should not be delayed, the parties simply agreed that the work should continue as before; that such continuation should not operate as a waiver of the rights of either party; that the question as to whether or not the stone within the ditch was to be removed under the contract would be left open for final adjustment, unaffected by the act of the contractor in continuing with the work. By continuing the work A. V. Wills & Sons were entitled to receive from the engineer monthly estimates of the work as it progressed and to receive 90 per cent. of the pay therefor. They were not entitled to pay for the full amount of the material which they removed, but only 90 per cent. thereof. The remaining 10 per cent. they were not entitled to receive until the entire work in the section was completed. The judgment in this case awarded them the entire amount, and to the extent that it exceeded 90 per cent. was clearly erroneous.

Plaintiffs have cited authorities in support of the proposition that the impossibility of removing the stone from the ditch with a steam dredge excused plaintiffs from taking it out. Among the cases cited is that of Kinzer Construction Co. v. State (Ct. Cl.) 125 N. Y. Supp. 46. That case announces four grounds upon which parties may be relieved from their contract obligations: (1) Where the legal impossibility arises from a change in the law. (2) Where the specific thing which is essential to the performance of the contract is destroyed. (3) Where, by sickness or death, personal services become impossible. (4) Where conditions essential to performance do not exist. This case does not fall within any of the above exceptions. There was no change in the law which rendered it impossible to perform the contract. There was no destruction of the specific thing essential to performance. It is not a case where personal services were required, the rendition of which became impossible by reason of sickness or death. Nor do we think there were conditions essential to performance which did not exist. This latter could only be based upon the theory that the proper construction of the contract called for the removal of only such material as could be removed by a steam dredge. But, as stated, such is not our view of the contract.

Again, it is urged, and authorities cited in support of the proposition, that an exhaustion of the funds provided for the payment of the work justified plaintiffs in failing to complete the same. This position is not well taken, for plaintiffs only claimed in their petition that the sum of $58,000 was due them, and it was alleged that there was $74,000 applicable to its payment. The evidence does not show that the fund applicable for the payment was exhausted or was insufficient to pay for the completion of the work. As plaintiffs did not fully perform and complete their contract, they are only entitled to recover 90 per cent. of the amount due for the work which they did perform in accordance with the contract. If the county has sustained

any damage by reason of the nonfulfillment of the contract, which would reduce this amount, it should be set up as a counterclaim.

[4] A fatal defect to plaintiffs' right to recover at all consists in the fact that the contract provided that payments were to be made only upon estimates of the engineer; and, while it is true that a willful failure or refusal of the engineer to give estimates would not defeat their right to recover, yet it was incumbent upon plaintiffs to plead and show either that estimates had been made by the engineer or that work had been done in accordance with the contract and a failure or refusal of the engineer to give estimates. There is no allegation in the petition either that estimates were given of the work in question or of a failure or refusal on the part of the engineer to give such estimates. It is true that plaintiffs' testimony shows that a request was made for estimates and the engineer refused to give them, he giving as a reason for such refusal that the county court had directed him not to give further estimates. Testimony, however, is admissible only as it tends to support some issue made by the pleadings. As there was no such issue tendered by the petition, this evidence was wholly immaterial, and cannot be considered. Cucullu v. Hernandez, 103 U. S. 105–116, 26 L. Ed. 322. As the case, however, must be remanded for a new trial, this defect in the pleading may possibly be cured by amendment.

For the foregoing reasons, the judgment is reversed, with directions to grant a new trial.

LILLIS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,715.

1. CRIMINAL LAW (§§ 370, 371*)—EVIDENCE—OTHER OFFENSES—KNOWLEDGE—INTENT.

Where, in a prosecution for maintaining an unlawful inclosure of, and hindering free passage on, public lands, defendant testified and sought to show that the fence had been constructed only to prevent cattle from straying back to the place from which they had been brought, and that he had instructed his workmen to construct gates over every trail, and not to impede others from using the government land, so that it was material to show whether the fence was constructed with a lawful or unlawful intent, evidence that defendant and his foreman had procured settlers to homestead certain tracts of government land within the inclosure, had defrayed their expenses in filing and making proofs at the land office, and, in some instances, had paid the settlers a consideration beyond such expense and in others had built cabins for the settlers to live in, and inferentially had agreements with such homesteaders whereby he would ultimately obtain title to the land, was admissible to show defendant's knowledge that there was public land within the inclosure, and to show the intent with which the fence was maintained, though tending to show the commission of another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825–832; Dec. Dig. §§ 370, 371.*

Evidence in criminal prosecutions of other acts and offenses to show knowledge, see note to Lobosco v. United States, 106 C. C. A. 479.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PUBLIC LANDS (§ 21*)—OFFENSES—INCLOSURE—INDICTMENT—"OR."

An indictment for inclosing public lands, alleging that accused so constructed, maintained, and controlled the inclosure then and there having no claim or color of title made or acquired in good faith or otherwise or at all to any of the land, "or an asserted right" thereto by or under claim made in good faith, with a view to entry thereof, etc., was not fatally defective for failure to sufficiently negative the asserted right by a direct and positive averment, since the word "or," both in the statute and in the indictment, should be construed to mean "nor."

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 21.*

For other definitions, see Words and Phrases, vol. 6, pp. 5002–5015; vol. 8, p. 7739.]

In Error to the District Court of the United States for the Northern Division of the Southern District of California.

S. C. Lillis was convicted of maintaining an unlawful inclosure of, and hindering free passage upon, public lands, and he brings error. Affirmed.

H. H. Welsh, E. O. Miller, Sutherland & Barbour, and P. F. Dunne, for plaintiff in error.

Oscar Lawler, Asst. Atty. Gen., A. I. McCormick, U. S. Atty., and Frank Stewart, Asst. U. S. Atty., for the United States.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a writ of error from a judgment of conviction upon the charge of maintaining an unlawful inclosure of, and hindering and impeding free passage upon, public lands. The record contains 100 assignments of error, but in the arguments of counsel and the presentation of the cause here in reality but two are relied upon for reversal. These pertain, first, to the admission of certain evidence over objection; and, second, to the sufficiency of the indictment, which was challenged for the first time by motion in arrest of judgment. The indictment was returned November 5, 1906.

[1] Evidence was introduced tending to show that beginning with the early part of 1901 and embracing a period of about two years the defendant constructed a fence of posts and wires, commencing at the southwest corner of township 15 S. range 13 E., and running thence east 5½ miles, thence meandering practically about the section boundaries, in a southeasterly direction, to the southwest corner of township 16 S., range 15 E., thence south three miles, thence southeasterly, meandering the section boundaries, to the southwest corner of section 27, township 17 S., range 15 E., thence south 3½ miles, thence west 2 miles, thence in a southwesterly direction, meandering the quarter section boundaries, to the southeast corner of section 24, township 18 S., range 14 E., thence west 1½ miles, and thence south to termination; also another line of fence beginning at the southeast corner of section 33, township 18 S., range 14 E., and running thence west about 5½ miles, thence northwesterly ½ mile to termination near the center of section 34, township 18 S., range 13 E., Mount Diablo

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

base and meridian, state of California, both stretches covering a distance of from 40 to 45 miles; that thereafter Lillis maintained said fences down to the time of the finding of the indictment; that such fencing, conjoined with natural barriers extending a short distance on the south and for 18 miles or more on the west, constituted an inclosure which comprised within its boundaries approximately 32,760 acres of the public lands, the property of the general government, and that said fences prevented and obstructed free passage and transit to and from the said public lands. In connection with these proofs, and as part of the government's case, the government was permitted, over the objection of the defendant, to introduce evidence tending to show that the defendant by himself and through his foreman—principally through the latter—procured pretended settlers to homestead certain tracts of the government land situated within the boundaries of the supposed inclosure; that defendant defrayed the expenses of the settlers in filing and making the requisite proofs at the land office, and in some instances paid the settler something beyond these expenses; that in some cases he built cabins for the claimants to live in, and inferentially that he had entered into agreements with the homesteaders whereby he was to obtain the title to the claims eventually after patents had issued; that in other cases he arranged to pay the expenses of homesteaders for commutation and cash purchase from the government, and, again, that he acquired other tracts of the public lands lying within the confines of said inclosure by the use of certain lieu land scrip, thus indicating a purpose on his part of acquiring from the government, either directly or indirectly, much of the public lands under the cover of this alleged inclosure. Further evidence was admitted to the effect that the accused had signified to his foreman that he desired to procure certain of such lands, and instructed such foreman to keep him advised and to assist him in that purpose.

The specific and strenuous objection to this testimony is that it, or such part as relates to the homestead entries, tends to establish the guilt of the defendant of a wholly different and distinct offense from that for which he is on trial, and, further, that it is entirely irrelevant and beside the issues of the case, having no tendency whatever to support any ingredient of the crime of unlawfully inclosing or impeding free access to the public lands. In this relation it is urged that intent is not an element of the offense, nor necessary to be shown in order to make out the charge.

On the other hand, counsel for the government insist that the testimony complained of is pertinent and relevant for two reasons: First, as tending to show knowledge on the part of the accused that public lands were situated within the inclosure, or in such relation to the fencing that free access thereto would be impeded; and, second, as tending to show with what intent and purpose he maintained the fencing.

It must be predicated of the defense that the effort was to show that the purpose on the part of the defendant in maintaining the fences was not to inclose any lands whatever, but as a barrier only to keep his stock from ranging back to the locality from which they were driven, or to certain swamps, and from trespassing upon the lands of

private owners living to the east and south of defendant's holdings. The premise is abundantly supported by the testimony of Mr. Lillis. He says:

"I use that land for cattle grazing, horses. I have not always had stock on the land since I owned it. I have had and now have stock upon the land. * * * When I put the cattle on the land in the fall of 1901, I had very great trouble about keeping them on my ranch. When you move cattle to a new place, they want to go back home; and another cause in that region was on account of the dry condition of the country, and the atmosphere. When they got out a little ways, they would get thirsty. They would get very thirsty and leave. The cattle always wanted to go in the direction from which they were brought. For instance, if you brought them from the south, they wanted to go south; if you bring them from the east, they want to go east. These cattle principally went southeast, out by Mr. McCord's, and by Mr. Ladd's and went to the swamp, on what was known as the 'grant.' They would go out in numbers, small groups, from 5 to 100, sometimes, go together, though cattle usually in drifting off that way go in small numbers, as though they were acquainted with each other. This fence that has been referred to in evidence here and shown upon the map I constructed or caused to be constructed. I first began making preparations for the fence some time before those cattle reached the ranch. There was part of the fence built in 1901, and finished in 1902. I completed that fence in the fall of 1902. The reason and purpose of building that fence was to keep my cattle from running away from the ranch, going to the swamps, and also, in the eastern portion of it, to prevent them getting on any grain planted on the outside. * * * I gave the foremen or the men who constructed that fence instructions to put in a gate at every trail and every road, wherever they crossed it, and, so far as I could ascertain, they did put in a gate at every trail or opening. I made an examination of it after the construction of the fence and found the gates there. At that time I did not give them any other instructions to leave any openings at any other places except the trails and roads, but I did shortly thereafter. * * * I gave instructions to my foremen not to molest anybody on government land, sheep, cattle, horses, men, or anything else. I never gave any instructions to my foremen not to allow cattle, sheep, or persons to cross and recross my land to go to the government land. I gave them instructions that I didn't want them to graze my land, and, if necessary, I would furnish horses to help them cross my land to any government land they wanted to go to. * * * I constructed the fence along my own land, except, I think, in two places. It run a little on government land in 34, 18, 13, I believe, and also it crossed a piece of government land at the north end. All the government land that I could possibly exclude I did, and would that if it was of any consequence, but I wanted to get the line as straight as I could there, section 34, 18, 13. * * * This fence that has been constructed was not constructed, having in view the acquisition of any land by homesteaders or others. My principal object in erecting that fence was to keep my cattle from straying off onto the plains and going to the swamps. My second object was to keep them off the farmers, because I knew I would have trouble with them if I didn't."

So that, in reality, whether essential or not, the intent and purpose with which the fencing was maintained, if at all, was made an issue in the case, the defendant seeking to show a lawful rather than an unlawful intent and purpose, and this to excuse his acts in view of the law.

As to the reason first assigned, that the testimony tended to show knowledge on the part of the accused that the lands inclosed were public lands, it may be that the defendant was bound to know that fact and it was sufficient for the government to prove, prima facie,

that the lands were yet a part of the public domain. However, it is made incumbent upon the government to show that the accused had no claim or color of title to the lands, made or acquired in good faith, nor an asserted right thereto by or under claim made in good faith with a view to entry thereof in the proper land office under the general laws of the United States at the time. The government is required to allege as much. United States v. Churchill (D. C.) 101 Fed. 443. And, being required to allege it, it is also required to prove it.

Clearly, while the testimony may show an unlawful arrangement whereby to procure the lands from the government without compliance with the statute, it tends to show want of any claim or color of title made or acquired in good faith, or any asserted right by or under claim made in good faith, with a view to entry. It tends to show that, while the defendant would have fraudulently possessed himself of the title if he could, yet he acquired no such right or claim to any of the land in good faith. For this reason, if for no other, the proofs were competent and pertinent.

We are of the opinion, also, that the evidence was competent and pertinent to show the intent, motive, and purpose of the accused in maintaining the fencing. In the case of Potts v. United States, 114 Fed. 52, 51 C. C. A. 678, the defendant constructed fencing wholly upon his own land, inclosing two sections, one lying north of the other. The county road ran along on the east of the inclosure, and certain tracts of the government lands were situated to the west. The defendant's fences were so connected with the fences of other owners that they formed a chain, thus constituting a barrier between the public land in question and the county road. The trial court instructed that:

"The inclosure by a fence, or a combination of fences, or joining of fences that is wholly upon the land which the person does own, is unlawful, if, in effect, it does inclose and shut out the public from any part of the public domain. A man has no right to build a fence upon his own land that connects with another fence that is so connected as to form an inclosure of public land, and shut the public out, or prevent their passage over the public lands."

The case was reversed on account of this instruction, this court, speaking through Morrow, Circuit Judge, saying:

"It is evident that this portion of the country is not well populated, and that public roads are few, as the greater part of the public land claimed to be unlawfully inclosed by the fence in question is two miles from the county road. Upon this evidence, it was clearly the duty of the court to submit to the jury the question whether the defendant's fence or inclosure was erected by him in good faith to inclose his own land, or whether in joining his fence to that of others it was his intent and purpose to prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence upon the tract of public land described in the indictment."

That was a case where the proof of the intent, motive, or purpose with which the fencing was constructed was an absolute essential to the maintenance of the prosecution for the offense charged. The fence had been wholly constructed on the accused's own land—a thing which he had a right to do, unless he did it with the ulterior purpose, by con-

joining with the fences of other owners, so it is held, of inclosing the public lands of the general government. It was only the intent and purpose with which the fencing was done that would render it unlawful. The case at bar is somewhat analogous. The fencing is from 40 to 45 miles in length. Of itself it incloses nothing, and it is disputed whether the country to the west is of such a nature as to form a barrier to free access to the lands within. The fencing generally was constructed upon the lands of the defendant, and it was material to show that his purpose was to construct a practical inclosure of public lands, or to impede free access thereto, and that it was not designed only to prevent the ranging of stock in certain directions, as contended by him. The fact that he had knowledge that a portion of the lands embraced between the fencing and the hills on the west was public land, the further fact that he himself owned by far the greater proportion of the lands embraced, together with the fact, if it be a fact, that he was endeavoring to acquire other tracts of the public lands, would all tend to show his purpose and motive in maintaining the lines of fencing. If it be that he was attempting to acquire public lands unlawfully, the inference would be the stronger that his purpose was to avail himself of their use for his exclusive benefit.

[2] The only question remaining is whether the indictment is insufficient to support the verdict. The objection is that it does not sufficiently negative the exception in the statute relating to lands to which the accused may have a claim or color of title or an asserted right, etc. The language of the indictment in that respect is:

"The said S. C. Lillis, so constructing, maintaining, and controlling the said inclosure, then and there having no claim or color of title made or acquired in good faith, or otherwise or at all, to any of said described public lands of the United States, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office of the United States, to-wit, the United States Land Office at Visalia, in the county of Tulare, state, division, and district aforesaid, under the general laws of the United States."

The contention is that the negativing language is not by direct and positive statement, and, moreover, that there is a total failure to negative the exception pertaining to "an asserted right."

From the manifest intendment of Congress, it is evident that an error in grammar has crept into the statute. The word "or" preceding the words "an asserted right" should be "nor," and then all would be rendered clear. The statute would then read "no claim or color of title," etc., "nor an asserted right." It is, however, sufficient to negative the exception in the language of the statute, and especially is this so when the question is raised for the first time by motion in arrest of judgment.

Hence the judgment of the district court is affirmed.

UNION CASTLE MAIL S. S. CO., Limited, et al. v. THOMSEN et al.

(Circuit Court of Appeals, Second Circuit. July 26, 1911.)

No. 189.

APPEAL AND ERROR (§ 1177*)—REVERSAL—DISPOSITION OF CAUSE.

Where counsel in the trial of a cause and the court in its charge to the jury proceeded on an erroneous construction of the statute on which the action was based, an appellate court will not undertake to determine the case on the evidence in the record, but will remand for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

Coxe, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Hugo Alberto Thomsen and others against the Union Castle Mail Steamship Company, Limited, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the defendants in error, who were plaintiffs below, in an action for the recovery of treble damages under the federal anti-trust statute. The case was before this court before (166 Fed. 251) upon a writ of error sued out by the plaintiffs because their complaint was dismissed.

J. Parker Kirlin and Thomas Thacher, for plaintiffs in error.

Lorenzo Ullo, for defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial. It is also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law.

In the light of the recent decisions of the Supreme Court in the Standard Oil (221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619) and Tobacco (221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663) Cases, the construction so placed upon the statute by this court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination.

It is, however, on the one hand, impossible for us to hold as a matter of law that the acts of the defendants as disclosed upon the present record amount to a combination in unreasonable restraint of trade. And, on the other hand, we think that it would be unduly prejudicial to the plaintiffs to reverse the judgment with instructions to dismiss the complaint. The plaintiffs presented their case in view of the decision

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of this court that the reasonableness of the restraint imposed was immaterial and it would be most unjust to dismiss the complaint because their proof did not conform to another standard. Upon another trial the plaintiffs may be able to produce additional testimony tending to make out a case within the Supreme Court decisions referred to.

The judgment of the Circuit Court is reversed and a new trial ordered.

COXE, Circuit Judge (dissenting). I am unable to agree with the majority. Courts are organized to reach results within a reasonable time. This action was begun eight years ago, it has been tried twice, the last trial occupying five days; it has been argued twice in this court. In such circumstances it is obvious that the labor of so many years should not be set at naught unless manifest error compels it.

The sole reason assigned for reversal is that this court stated in its former opinion, what was unquestionably the law at that time, that where it was shown that a contract, combination or conspiracy actually restrained trade or commerce, it was immaterial whether such restraint was reasonable or unreasonable. It is asserted that the trial judge followed this view of the law in holding that the combination in question was in violation of the statute and that his ruling in this regard was error. I am unable to discover the ruling, exception or assignment of error which supports this contention or presents this question. As the evidence of the unlawful conspiracy is in writing, there was no controverted fact regarding its terms. Clearly it was the duty of the court and not of the jury to construe this uncontradicted evidence. The only question of fact which it was necessary to determine, in order properly to interpret the agreement between the carriers, was submitted to the jury with clear and careful instructions. The judge charged as follows:

"Now the right of recovery herein depends upon whether the rate charged the plaintiffs was reasonable or unreasonable, and if it was unreasonable, all the defendants, by their unlawful combination in restraint of trade, coerce or compel the plaintiffs to pay a rate greater than a reasonable rate, simply to effectuate the primary purpose of the combination, namely, to prevent competition in the transportation of merchandise. * * * Now, gentlemen, notwithstanding the fact that I have stated to you as matter of law that this was a combination forbidden by the Sherman act, the question submitted to you is whether the rate was reasonable or unreasonable, and that is a question to be determined by you, and it is for you to say whether the 10 per cent. was charged to coerce the plaintiffs to patronize the same ships or not. * * * If, in your judgment, the rate charged by these lines during this period of time was not excessive, if it was reasonable and just, in view of the conditions and circumstances to which I will refer hereafter, then that ends the case, and you will pay no further attention to any of the questions here involved, for in that event, your verdict will be for the defendants."

There is much more to the same effect but the foregoing is sufficient.

The language of the court seems almost prophetic of the rule of the recent decisions of the Supreme Court. If the Standard Oil and Tobacco decisions had been before him while delivering the charge, it is not easy to see how the judge could have followed them more accurately. We have, then, a combination which the jury has found restrained trade by the imposition of excessive and unreasonable charges. In other words, a combination forbidden by the law, whether the "rule of

reason" be or be not applied. No one pretends that any new facts will be presented at a new trial. Should one be ordered, the case will appear for a third time in this court upon the same facts and we will then have to render a decision which should, in my judgment, be rendered now.

In its last analysis, the question, whether the agreement in controversy is within the prohibition of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), is one of law for the court and should be answered without further delay. The alleged error considered by the majority is not presented by the record but, even if it were, the question is one of law which should be disposed of by the court on the present record.

NOBLE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,807.

1. CRIMINAL LAW (§ 302*)—DISMISSAL—SATISFACTION TO PARTY INJURED.

Carter's Ann. Code Cr. Proc. Alaska, § 254, provides that if a party injured appears before the court at which the defendant is bound to appear at any time before trial on an indictment for crime, and acknowledges in writing that he has received satisfaction for the injury, the court, in its discretion, on payment of costs and expenses incurred, may order all proceedings stayed on the prosecution and defendant discharged. *Held*, that where, in a prosecution for assault and battery, the prosecuting witness filed an affidavit by which he petitioned the court to dismiss the prosecution, and alleged that the complaint had been sworn to as a matter of precaution to prevent further trouble, allowing the complainant to continue with his work, the presentation of such paper was not a compliance with the statute, and insufficient to move the court to dismiss.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 302.*]

2. CRIMINAL LAW (§ 302*) — DISMISSAL OF PROSECUTION — SATISFACTION TO COMPLAINING WITNESS—DISCRETION.

Under the express provisions of Alaska Code, § 254, authorizing dismissal of a criminal prosecution on the acknowledgment of the complaining witness that he has received satisfaction for the injury, etc., whether the prosecution should be stayed and the charge dismissed on such acknowledgment is within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 302.*]

3. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a prosecution for assault arising out of a dispute over the products of a mine, evidence of statements made to prosecutor by M. prior to the assault, with reference to the transaction, when sought to be proved by prosecutor, were inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 419, 420.*]

4. CRIMINAL LAW (§ 1166½*)—APPEAL—HARMLESS ERROR—REMARKS BY COURT.

Remarks by the court in the course of a ruling on motion for a directed verdict, in the absence of the jury, are not available as grounds for error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

The court having instructed the jury to pay no attention to anything they might have read about the case, but to base their verdict only on what was produced at the trial, it was not error to refuse to charge that the jury should disregard certain newspaper reports printed during the course of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. ASSAULT AND BATTERY (§ 96*)—INSTRUCTIONS.

In a prosecution for assault and battery resulting from a dispute over the ownership of certain gold dust or royalties, the court properly charged that it was immaterial whether defendant had acquired an interest in the gold extracted from the mine, or whether he had a right to be on the premises to collect royalties, or to make a clean-up.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 96.*]

In Error to the District Court of the United States for the Fourth Division of the District of Alaska.

Jesse Noble was convicted of assault and battery, and he brings error. Affirmed.

F. J. Kierce and H. J. Miller, for plaintiff in error.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged that on June 11, 1908, he "did unlawfully and maliciously assault, strike, beat, and wound one Joseph Richardson, contrary to the form of the statute," etc.

[1] He assigns error to the denial of his motion to discharge and dismiss the indictment against him because of the request of the prosecuting witness, which it is contended was preferred under section 254 of the Alaskan Code, which provides that:

"If the party injured appear before the court at which the defendant is bound to appear, at any time before trial on an indictment for crime, and acknowledge in writing that he has received satisfaction for the injury, the court may, at its discretion, on payment of the costs and expenses incurred, order all further proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom, but the order and the reasons therefor must be entered on the journal."

The prosecuting witness, Richardson, presented an affidavit, which was filed, in which he said:

"I do hereby ask and petition the court to dismiss the said above-entitled case now pending in your court against the said Jesse Noble (the complaint having been sworn to as a matter of precaution to prevent further trouble, allowing the complainant to continue with his work)."

The presentation of this paper was in no respect a compliance with the terms of the statute. It was simply a request that the case be dismissed. It was no acknowledgment that the witness had received satisfaction for the injury.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] Again, the statute leaves it to the discretion of the court to decide upon the presentation of the acknowledgment therein referred to whether prosecution shall be stayed and the charge dismissed, and it is evident that the court below did not deem the case one which called for the exercise of discretion in favor of the plaintiff in error.

[3] Error is assigned to the exclusion of certain testimony which was sought to be elicited on the cross-examination of the prosecuting witness. The assault occurred upon the attempt of the plaintiff in error to take possession of certain gold dust at a mine which had been leased to a firm of which one Maddocks was a member. The plaintiff in error claimed to own the property by virtue of a marshal's sale. The prosecuting witness was asked whether or not Maddocks had said to him that he intended to beat the plaintiff in error on execution, and had asked him if he were a fighter, and had informed him that the plaintiff in error was coming over to receive his share of the royalties, and that he wanted the witness to prevent him from having anything to do with the clean-up, and asked him if he would assist in preventing him, and if he would do the fighting. All these questions might properly have been, as they were, propounded to Maddocks, who was a witness in the case, in order to show his animus toward the plaintiff in error, or for the purpose of impeaching Maddocks, but, when propounded to the prosecuting witness, they were properly excluded. It was clearly incompetent to prove by him what Maddocks had said to him prior to the assault.

[4] It is assigned as error that in the course of the trial the court made certain remarks which tended to prejudice the plaintiff in error. We do not think the remarks so referred to could have had the effect which is attributed to them. No exception was taken to them, and it appears from the record that the language principally complained of was uttered in the course of the court's ruling on the motion for a directed verdict, and in the absence of the jury.

There are other assignments of error in the exclusion of certain testimony. We find them to be absolutely without merit, and it could serve no good purpose to discuss them at length.

[5] Error is assigned to the refusal of the court to instruct the jury to disregard certain newspaper reports printed during the course of the trial, in one of which it was said that the court had remarked: "To hit a man over the head with a hammer is not the lawful way to collect royalties." But the bill of exceptions shows that at the close of the trial the court, at the request of counsel, instructed the jury to pay no attention to anything they might have read about the case, and to base their verdict only on what was produced at the trial.

[6] There was but one exception taken to the instructions to the jury, and that was to the portion thereof in which the court charged that it was immaterial whether the plaintiff in error had acquired an interest in the gold or gold dust extracted from the mine, or whether he had the right to be on the premises to collect royalties, or whether he had the right to go on the premises and make a clean-up. There was no error in so instructing the jury. The issue before the jury was whether the plaintiff in error was guilty of assault and battery upon the prosecuting witness. The question of the right of the plaintiff

in error to be upon the premises where the assault occurred, as well as the question whether he had a right to the gold dust or to royalties therefrom, were entirely aside from and irrelevant to the question of his guilt or innocence of the crime with which he was charged.

Nor was there error in refusing the instruction which was requested by the plaintiff in error. That requested instruction involved a consideration of the matters above referred to, the right of the plaintiff in error to be upon the premises and to receive his portion of the gold dust, and concluded with an instruction as to the right of the plaintiff in error to resort to violence or the use of such force as was necessary for his protection, and to save himself from bodily harm. The court elsewhere gave the jury full instructions as to the right of a person assaulted to use force in repelling the assault, and gave the plaintiff in error the benefit of all the evidence and the law relating to such defense.

We find no error. The judgment is affirmed.

DOANE v. BURKMAN et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,927.

1. ARMY AND NAVY (§ 19*)—ENLISTMENT—MINORS.

Where the mother of a minor was living at the time of his enlistment, and neither she nor the minor's custodian, by articles of agreement, gave written consent to the enlistment, the United States was not entitled to hold the minor as against his parent or guardian under Rev. St. § 1117 (U. S. Comp. St. 1901, p. 813), providing that no person under the age of 21 shall be enlisted or mustered into the military service of the United States without the consent of his parents or guardian, provided the minor has such parents or guardian entitled to his custody or control.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 46, 48; Dec. Dig. § 19.*]

2. ARMY AND NAVY (§ 19*)—ENLISTMENT OF MINORS—RIGHT TO DISCHARGE—FOSTER PARENT.

The mother of a minor, by articles of agreement, gave to petitioners full control, care, and custody and complete management of him when he was two years and four months of age until he should arrive at majority, petitioners agreeing to take and raise the child in all respects as their own, and to give it suitable support and education. The minor having enlisted in the United States army at the age of 18 years and 7 months without the consent of his natural mother or of petitioners, they applied for his discharge on habeas corpus, and, during the pendency thereof, by proceedings in a state court, regularly adopted the minor and showed such fact by an amended petition. *Held*, that petitioners were entitled to maintain the proceedings for the minor's discharge.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 19.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Habeas corpus, on petition of Charles Harris Burkman and others, against W. G. Doane, captain Twenty-Fifth United States Infan-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

try, commanding officer at Ft. Lawton, Seattle, for the United States government. Judgment discharging Charles Harris Burkman from custody of such officer, and he appeals. Affirmed.

Elmer E. Todd, U. S. Atty., and W. G. McLaren, Asst. U. S. Atty., for appellant.

James B. Metcalfe, for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a proceeding by habeas corpus instituted in the district court April 27, 1910, by Annie Burkman Christie to determine her right to the custody of one Charles Harris Burkman, a minor under the age of 21 years. The minor enlisted in the army August 4, 1909, at the age of 18 years and 7 months, for a term of 3 years, but without the written consent of his parents or guardian. He had a mother then living, namely, Mrs. E. L. Harris. Mrs. Harris had, however, on May 17, 1893, by articles of agreement with Annie E. Burkman, given into the hands of the latter the "full control, care and custody and complete management" of her minor child, he then being of the age of 2 years 4 months and 17 days, until he should arrive at the age of majority; that is, until January 1, 1912. By said agreement Mrs. Christie, then Burkman, covenanted to "take and raise said child in all respects as if it were her own, and to give it suitable support and education." These articles of agreement were filed by Mrs. Burkman and recorded in the records of King county, state of Washington, March 31, 1897. By leave of the court, an amended petition for the writ was filed June 10, 1910, by Annie Burkman Christie and Claude H. Christie, her husband, who in the meantime, however, namely, on May 24, 1910, on their petition to the superior court of the state of Washington for King county, and the written consent of the surviving parent, had secured the regular adoption of said minor by order and judgment of that court duly entered of record. By the return of the appellant, he being the commanding officer in charge, it is shown that at the time of the enlistment Richard P. Burkman, claiming to be the brother and guardian of the minor, freely gave his consent to the latter's enlistment. The cause coming on to be heard on the amended petition and the return thereto, the minor was discharged from the custody of the officer. This appeal is from that judgment.

[1] The government does not seem to insist that the enlistment was either regular or legally consummated. The mother of the minor was then living, and neither she nor his custodian, by articles of agreement, gave written consent to the enlistment. Rev. St. § 1117 (U. S. Comp. St. 1901, p. 813), provides:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control."

"But this provision," says the Supreme Court, in Re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, "is for the benefit of the

parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor." So it is said in Re Perrone (D. C.) 89 Fed. 150:

"The sole question is whether this petitioner, who has become the guardian of the minor since his enlistment, is within the provisions of the section above quoted, and so entitled to avoid such enlistment. In my opinion he is not. The guardian whose written consent is required by that section is one who was such at the time of the enlistment, and who was then entitled to the legal custody and control of the minor. This would be the proper construction of the section without its proviso, but the proviso places the matter beyond question."

[2] Based upon these cases, the only contention made is that Mrs. Harris having released her custody of the minor to Annie E. Burkman, now Mrs. Christie, and never having insisted upon her right to such custody, the petitioner cannot now in her stead, or in the capacity as guardian secured by order and judgment of the court after enlistment, assert the right.

This is not a case of an application by the minor for his own release, as was that of In re Morrissey, but by his legal custodians. Mrs. Christie was virtually standing in loco parentis of the child at the time of his enlistment by virtue of the articles of agreement, but legally she could not then maintain suit for his custody. This must be admitted. The fact remains, however, that the consent of the guardian by nature—that is, his mother—was not obtained. Either she or Mrs. Christie was then, and is now, entitled to the custody of the boy. The government has not shown that it is legally entitled to such custody as against the rightful and legal guardian. The simple question, therefore, recurs, Can the petitioner maintain this proceeding?

It seems to us enough that Mrs. Christie at the time of the enlistment was entitled to the custody as against Mrs. Harris by virtue of the articles of agreement, she standing really in loco parentis of the child, and that the court has subsequently confirmed her right by granting a legal adoption. Surely the government would not persist in holding a minor away from his legal and rightful guardian without having itself a just and legal right to the services of such minor by a regular and lawful enlistment. In good morals and sound justice Mrs. Christie was entitled to the custody of Burkman, having reared him from the time he was of the age of two years, and, unless the government can show valid right and title, it ought not to be heard to stand upon a technical objection to the right of petitioners to maintain the writ.

The judgment of the District Court will be affirmed.

UNION PAC. R. CO. v. MITCHELL-CRITTENDEN TIE CO.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1911.)

No. 3,576.

(Syllabus by the Court.)

1. DAMAGES (§ 79*)—LIQUIDATED DAMAGES—CONSTRUCTION OF CONTRACT.
Where the amount of damages for the breach of a contract is uncertain and difficult of ascertainment, and an agreement is made which discloses the intention of the parties that a sum certain shall constitute the amount of the liquidated damages for the breach, the agreement will be enforced.
But where the contract fails to disclose such an intention, or leaves the intention of the parties in doubt, and the amount specified is unreasonable, the agreement will not be construed to be a contract for liquidated damages.
[Ed. Note.—For other cases, see Damages, Dec. Dig. § 79.*]

2. DAMAGES (§ 78*)—LIQUIDATED DAMAGES—CONSTRUCTION OF CONTRACT—FACTS—CONCLUSION.
Parties agreed that the vendor would sell and deliver to the vendee 400,000 cross-ties within an agreed time, that the vendee would pay during the succeeding month 90 per cent. of the value of the ties delivered each month, and that if the vendor failed to deliver the full quantity within the stipulated time the retained 10 per cent. of the contract price of those delivered should be applied in satisfaction of the liquidated damages of the vendee. The vendor delivered 378,392 ties, of the value of $95,606.26, but made default in the delivery of 21,608 ties.
Held, the contract was not that the retained 10 per cent. of the value of the ties delivered should constitute the amount of the liquidated damages of the vendee for the vendor's failure to deliver all the ties within the time agreed, but the agreement was that this 10 per cent. should be retained to secure, and, as soon as these damages were liquidated, should be applied to pay, the vendee's damages on account of the vendor's failure to deliver all the ties.
[Ed. Note.—For other cases, see Damages, Dec. Dig. § 78.*]

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by the Mitchell-Crittenden Tie Company against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

I. N. Watson (R. W. Blair and Douglass & Watson, on the brief), for plaintiff in error.

E. L. Scarritt (W. C. Scarritt and Elliott H. Jones, on the brief), for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This is an action by the Tie Company to recover of the Railroad Company the unpaid balance of the value of 378,392 cross-ties which the plaintiff had sold and delivered to the defendant. At the trial the parties stipulated that the price and value of these ties was $95,606.26, that 90 per cent. of this amount had been paid, and that the remaining $9,560.62 had been retained by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Railroad Company. That company pleaded and claimed that it was not liable to pay this balance, because the ties were sold and delivered under a contract of the parties to the effect that the Tie Company should sell and deliver to the Railroad Company 400,000 cross-ties on or prior to an agreed date, that it failed to deliver 21,608 of these 400,000 ties within the time specified, and that the contract contained stipulations that 90 per cent. of the value of the ties delivered each month should be paid during the succeeding month, that the remaining 10 per cent. should be retained until all the contracted ties were delivered, when it should be paid to the Tie Company, and that:

"In case default is made by the party of the first part in delivery of the full quantity of cross-ties herein contracted for at the time specified, the 10 per cent. of contract price retained shall be applied by party of the second part in satisfaction of its liquidated damages."

No evidence of the actual damages sustained by the Railroad Company on account of the failure to deliver the 21,608 ties was introduced or offered, and the court instructed the jury to return a verdict for the plaintiff for the $9,560.62 and interest.

[1] Counsel for the Railroad Company contend that this ruling was erroneous, because the clause of the contract recited was an agreement that the retained 10 per cent. of the value of the ties delivered should constitute the liquidated damages of that company for the failure of the Tie Company to deliver the 21,608 ties, and because there was no evidence of the value of the ties delivered. They discuss with learning and ability, and review some authorities upon, the question when an agreement that a sum certain shall constitute liquidated damages for the breach of a contract is enforceable and when it is futile. The opinion of this court upon that question may be found in Brooks v. City of Wichita, 114 Fed. 297, 299, 52 C. C. A. 209, 211, Pressed Steel Car Co. v. Eastern Railway Co. of Minnesota, 121 Fed. 608, 619, 57 C. C. A. 635, 646, and Turner v. City of Fremont, 170 Fed. 259, 95 C. C. A. 455, to the effect that where the amount of the damages for the breach of a contract is uncertain and difficult of ascertainment, and the agreement discloses the intention of the parties to fix a sum certain as the liquidated damages, the contract will be enforced. But where the contract discloses no such intention, or leaves the intention of the parties in this regard in doubt, and the amount specified is out of all reasonable proportion to the actual damages sustained, the contract is not an agreement for liquidated damages. Van Buren v. Digges, 11 How. 461, 13 L. Ed. 771; Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; Dakin v. Williams, 17 Wend. (N. Y.) 447; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Wood v. Niagara Falls Paper Co., 121 Fed. 818, 58 C. C. A. 256; Stephens v. Essex County Park Commission, 143 Fed. 844, 75 C. C. A. 60.

[2] The contract in hand contains no agreement that the retained 10 per cent. of the value of the cross-ties delivered should constitute or be considered the liquidated damages for the failure to deliver the entire 400,000 ties as agreed, and if such a stipulation had been made it would have fixed an unjust and unreasonable amount, an amount

smaller the greater the breach and greater the smaller the breach. If the Tie Company had delivered only 1,000, and had defaulted in the delivery of 399,000 ties, the amount stipulated by such an agreement would have been 10 per cent. of the value of 1,000 ties. If the Tie Company had delivered 399,000 ties, and had defaulted in the delivery of 1,000 ties, the amount thus stipulated would have been 10 per cent. of the value of 399,000 ties. It could not have been the intention of the parties to make such an agreement, for the presumption is that they intended to make a reasonable contract. The expressed terms of the agreement sustain this view. They are not that the retained 10 per cent. shall constitute the Railroad Company's liquidated damages in case of the Tie Company's default, but they are that this 10 per cent. shall be applied in satisfaction of that company's liquidated damages; that is to say, that it shall be retained to secure the payment of and when they are liquidated it shall be applied to the payment of the Railroad Company's damages in case of the Tie Company's default. As there was no evidence what damages, if any, the Railroad Company sustained by reason of the default of the Tie Company, the stipulation of the contract regarding the liquidated damages constituted no defense to the Tie Company's claim for the unpaid balance of the value of the ties it delivered. Nor can the contention that there was no evidence of the value of the ties delivered be sustained, because there was a written agreement of the parties introduced in evidence at the trial that their value was $95,606.26.

There was, therefore, no error in the court's direction to the jury to return a verdict for the Tie Company, and the judgment in its favor is affirmed.

GRINSTEAD v. UNION SAVINGS & TRUST CO.

In re ALGONA LUMBER & SHINGLE CO.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,958.

BANKRUPTCY (§ 178*)—MORTGAGE—FRAUDULENT TRANSFER OF PROPERTY.

A bank lent money to an insolvent Washington corporation and took a mortgage on its property as security. The loan was made at the instance of the largest creditor of the corporation, who represented to the bank that the corporation desired to pay up its other debts and have but one creditor, and that the security was ample. Such creditor received payment of the greater part of his debt, and the remainder of the money was applied on other debts. More than four months thereafter the corporation became bankrupt. Under the law of the state a voluntary preference of a creditor by an insolvent corporation is voidable by other creditors. *Held* that, as the bank was not a creditor and gave full consideration for the mortgage, without knowledge of the insolvency so far as appeared, and the money was used for the payment of debts, the mortgage was not impeachable by creditors, and therefore not by the trustee, under Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452), which provides that a trustee may avoid a transfer which any creditor might have avoided.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

In the matter of the Algona Lumber & Shingle Company, bankrupt. Appeal by Loren Grinstead, trustee, from an order allowing the claim of the Union Savings & Trust Company as a secured debt. Affirmed.

Cassius E. Gates, for appellant.

Walter A. McClure, Henry F. McClure, and Wm. E. McClure, for appellee.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. On June 2, 1910, the Algona Lumber & Shingle Company, a corporation, owed the Union Machinery & Supply Company, a corporation, approximately $8,000, the Fremont State Bank about $5,000, Harbold $5,000, and about $3,000 for labor. On that date it borrowed from the Union Savings & Trust Company, the appellee herein, $12,000, and to secure the same executed mortgages upon all its real and personal property. Four months and a few days later it filed a voluntary petition in bankruptcy, and was adjudged a bankrupt. The appellee filed its proof of debt as a secured claim against the estate, the claim was allowed, and the property was sold, and was purchased by the Union Machinery & Supply Company. Objections had been filed to the claim of the appellee, but the objections were overruled by the referee. The trustee petitioned the District Court for a review of the referee's order, asserting that the mortgages were invalid and void as to creditors, for the reason that the bankrupt was insolvent, and was known to be insolvent by the appellee, at the time when they were executed, and that they were executed to give a preference to the Union Machinery & Supply Company over and above all other creditors, which preference was created indirectly through the appellee. The ruling of the referee was sustained by the court, and the claim of the appellee was allowed in full. From that ruling the present appeal is taken.

Of the $12,000 loaned to the bankrupt, $7,000 was immediately paid to the Union Machinery & Supply Company, $1,000 to the Fremont State Bank, $1,000 to Harbold, and the remaining $3,000 was paid for labor. The appellant contends that the loan was not bona fide, but was merely a subterfuge on the part of the Union Machinery & Supply Company to secure its account indirectly through the appellee. The evidence shows that the debt of the bankrupt to that company was long past due, and that the corporation was insolvent at the time when the mortgages were made. Application for the loan was made to the cashier of the appellee by Mr. Farnsworth, the president of the Union Machinery & Supply Company, and upon his representation that the bankrupt was indebted to his company and other creditors, and that it desired to borrow enough money to pay the Union Machinery & Supply Company and other claims, so that thereafter it might owe only the bank. The cashier made no inquiry of others as to the value of the property of the bankrupt. He testified that Farnsworth stated

to him that from his knowledge the loan was a good one, and he (Farnsworth) would have no hesitancy in taking the property over if the bank had to take it; that if the payments were not promptly made by the bankrupt, and the bank should be required to proceed to protect itself,

"that he personally would have no hesitancy in taking the property for the amount of our debt. * * * Q. Then, in other words, Mr. Farnsworth guaranteed this account? A. If that is a guarantee, he did. Q. You didn't rely upon the property of the Algona Lumber & Shingle Company as your sole security? A. Well, yes; we did. Q. As your sole security? A. Of course, we looked to Mr. Farnsworth in case we had any difficulty over the matter."

Upon his cross-examination the cashier stated that the loan was made on the strength of the security, and that Farnsworth did not agree to take the property off his hands in case the bank had to take it; but he testified that Farnsworth said—

"he would be entirely willing to take it, if we had to take it. He said he believed the loan to be a good one; but, if we had to take the property, he would have no hesitancy to take it. * * * Q. So that you were protected from loss in the proposition by Mr. Farnsworth? A. Well, we felt we were; yes."

We may assume from this testimony that the appellee relied, not only upon the value of the mortgaged property, but upon the promise of Mr. Farnsworth to take the property in case foreclosure became necessary, and to protect them from loss. The petition in bankruptcy having been filed more than four months after the date of the execution of the mortgages, the question arises whether under section 70e of the bankruptcy act, which provides that if a creditor could have avoided the transfer under the laws of the state the trustee can do the same, the transfer in this instance was voidable at the instance of the trustee, and whether the referee and the court below erred in sustaining the same.

Section 70e provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. The Supreme Court of the state of Washington has held that the property of a corporation forms a trust fund for the benefit of all its creditors, and that a voluntary preference in case of insolvency is void. Thus a pledge was held void in a case where the bankrupt, after insolvency, borrowed money from the plaintiff with which to resume business, and pledged collaterals as security, and upon maturity of the loan it was again insolvent, and secured extension of time, and paid a small sum, and pledged further collaterals, the plaintiff having constructive notice of its insolvency (Burrell v. Bennett, 20 Wash. 644, 56 Pac. 375), and that a transfer of property by an insolvent corporation, whereby preference is given to one creditor over others, is against equity and good conscience, and, while it is not void, is voidable by creditors (Holbrook v. Peters & Miller Co., 8 Wash. 344, 36 Pac. 256). But in the present case the appellee took no unlawful preference. It was not a creditor of the bankrupt, and it does not appear from the evidence

that it ever had any dealings with the bankrupt prior to June 2, 1910, the date when it loaned the bankrupt $12,000 and received security therefor. There is nothing to show that it then had any notice of the bankrupt's insolvency. It had notice that the bankrupt was in debt, that its principal creditor was the company from which the application for the loan was made, and that it was the intention of the borrower to pay that creditor and others with the money.

There is no proof in the evidence that the appellee participated in any design to hinder, delay, or defraud creditors, or to give a preference to one creditor over others. So far as the appellee was informed as to the purpose of the borrower, it was that the latter intended to pay up its debts, and thereafter owe but one creditor, and the appellee was further informed that the property which was turned over to it as security was of the value of $30,000 or $40,000. The act of the appellee was not of itself calculated to diminish the fund which the bankrupt held in trust for its creditors. We may assume that Farnsworth knew that the bankrupt was insolvent at the time when the loan was made, and that he and the bankrupt entered into a scheme whereby the money was to be borrowed, and the greater portion thereof applied to the payment of his debt, and that thereby he was to obtain an inequitable preference over the other creditors; but the facts must be viewed in the light of the question under consideration here, and that is whether the appellee loaned the money in good faith for a valuable consideration. There can be no question that there was a valuable consideration. As impugning the good faith there may be suspicion, but there is nothing tangible in the way of testimony. The referee and the court below would not have been justified in sustaining the objections on that ground. In Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396, it was held that where a corporation which had been indebted gave a mortgage for money to pay the purchase price of property mortgaged, and to secure the legal title to the same and to place itself in a better position for business, the mortgage was not an illegal transaction, nor given to hinder, delay, or defraud creditors.

The judgment is affirmed.

WILLISON et al. v. RINGWOOD.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,961.

1. EVIDENCE (§ 274*)—DECLARATIONS AS TO BOUNDARIES.

Testimony as to declarations of a third person that he made location of a mining claim for another and set the boundary stakes, which he pointed out to the witness, made long after the claimed location, was inadmissible in evidence, where such person was living and within the jurisdiction of the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121–1134; Dec. Dig. § 274;* Boundaries, Cent. Dig. § 156.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MINES AND MINERALS (§ 38*)—CLAIMS—BURDEN OF PROOF.

Where, in an action in ejectment to recover possession of a mining claim, plaintiff pleaded and proved a location made by him, and defendants relied upon a subsequent location, and pleaded as an affirmative defense that a third person had made a location prior to plaintiff's, which had not been abandoned, and was in force when plaintiff made his location, but subsequently became forfeited, the burden rested on defendants to prove such allegations.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska.

Action at law by Swan Ringwood against Fred Willison, R. W. Dodds, Charles Hull, and Fred Labelle. Judgment for plaintiff, and defendants bring error. Affirmed.

T. C. West, Fernand De Journel, Wickersham, Heilig & Roden, and West & De Journel, for plaintiffs in error.

John L. McGinn, Metson, Drew & Mackenzie, and E. H. Ryan, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. The defendant in error brought ejectment against the plaintiffs in error to recover possession of a placer mining claim described as No. 8 "A" above Discovery on Yankee Creek, in the territory of Alaska, alleging his right to the same by reason of a location which he made on April 26, 1908. The plaintiffs in error Willison and Dodds answered the complaint, denying the plaintiff's location, and setting up as an affirmative defense that his location was of no force or effect, for the reason that one Arthur Berry had, on March 15, 1907, made a valid location of the same ground as a placer mining claim, and that he thereby acquired the exclusive right to the possession of the same during the year 1908, and further alleged that Berry never abandoned the claim, but that on January 1, 1909, the claim became open to entry by reason of his failure to perform the annual labor thereon, and that on the following day Willison made a valid location thereof, and that since that date he and Dodds have been the owners in possession and entitled to the possession of the claim. The defendant in error replied, denying that Berry located the claim, or that he made a discovery, or marked the boundaries, so that they could be readily traced. The case was tried before a jury, and a verdict was returned in favor of the defendant in error.

[1] Error is assigned to the rulings of the trial court in excluding certain proffered testimony of a witness for the plaintiffs in error, the purport of which was said to be that on March 29, 1910, J. L. Berry, who as agent for Arthur Berry made the Berry location, went with the witness to each of the corner stakes of the claim and pointed out to him each of the stakes which had already been testified to by the witness as the stakes of the four corners thereof, and identified the same as the stakes marked by him as the corner stakes of the Berry loca-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion as originally made, and that Berry at that time stated to the witness that the writing upon each of those four stakes was written by himself at the time when he set the corners. J. L. Berry at the time of the trial was still living and was within the jurisdiction of the court; but he was not called as a witness, nor was his deposition taken. In view of those facts there was no error in excluding the testimony as to his declarations. In most of the states the rule of the English courts against the admission of hearsay evidence as to boundaries of lands of private persons has been relaxed, but only so far as to admit evidence of the declarations of deceased persons, who, at the time of making the declarations, had no interest in the subject-matter in controversy. Boardman v. Lessees of Reed, 6 Pet. 328, 8 L. Ed. 415; Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721; Robinson v. Dewhurst, 68 Fed. 336, 15 C. C. A. 466; Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 C. C. A. 47; Tracy v. Eggleston, 108 Fed. 324, 47 C. C. A. 357. The plaintiffs in error contend that the declarations of Berry were admissible as res gestæ, but the proposition is untenable. The declarations were made long after Berry's interest in the claim ceased, and after the present action had been begun.

[2] The principal contention of the plaintiffs in error is that the court erred in giving and refusing instructions concerning the burden of proof. The court instructed the jury that, before they could find for the defendants on their affirmative defense in the case, they must find that the defendants had established the location and nonabandonment of Berry at the date of the plaintiff's location "by the weight or preponderance of the evidence." The court had already instructed the jury that if they found that the plaintiff located the premises in April, 1908, and that the same claim had been located in 1907 by Berry, and had not been abandoned by Berry prior to the plaintiff's location, then the fact that Berry thereafter failed to perform the annual labor required by law for the year 1908 did not validate the location of the plaintiff in April, 1908, and that if they found from the evidence that Berry in the year 1907 made a valid placer mining location of the premises, that the location had the effect to segregate the land as marked upon the ground from the unappropriated public land of the United States, and gave to Berry the exclusive right to the possession thereof from that time to the end of the year 1908, and that during that time no other valid location of the premises could be made by any other person, unless Berry abandoned the same before such location was made. The plaintiffs in error contend that it was error to place the burden of proving nonabandonment of the Berry location on them, and they invoke the rule that, where either abandonment or forfeiture is relied upon, the burden rests upon the party asserting it.

In discussing this assignment of error, it is important to bear in mind the issues in the case. The plaintiff relied upon his location made in the year 1908. The defendants relied upon their location made in the year 1909. If the allegations of the pleadings had gone no further than to assert these two locations, it is clear that all that the plaintiff would have been required to prove was that he had made a location.

But the defendants, in order to show the validity of their location, notwithstanding that it was subsequent in date to that of the plaintiff, proceeded to allege a location made prior to both; not a location under which they claimed any right, but a location which they asserted would serve to establish the fact that when the plaintiff made his location the land was not open to entry. So they alleged the location of Berry, and they alleged that he had not abandoned his claim. Relying, as they did, upon a location made at a date subsequent to that of the plaintiff, the burden was upon them to show the facts which they set up as sufficient to defeat his location. It is true that, where either abandonment or forfeiture is relied upon, the burden of proof rests with the party asserting it; but the defendant in error did not rely upon abandonment or forfeiture of any prior location. He made his location, according to his pleadings and his testimony, relying upon the fact that the land was unoccupied public land, open to location, and he produced testimony tending to show that there were no posts or marks on the ground to indicate that a prior location had been made. It was the defendants who relied on the prior location of Berry. They alleged it, and they alleged that it had not been abandoned when the defendant in error made his location; and it was for them to prove their allegations. Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

Conceding that, upon proof that Berry made a valid prior location, a prima facie presumption would arise that the claim still subsisted and had not been abandoned, the difficulty in the way of the plaintiffs in error's contention is that their exception was taken to a charge, a portion of which was clearly not subject to objection, namely, that the burden of proof was upon the defendants in the action to establish their allegation that a prior location was made by Berry. It is obvious that the ground of the exception which the defendants in the action took to the instruction was that in their view the burden of proof was upon the plaintiff in the action to establish affirmatively that the ground upon which he located was public land subject to location, and that there was no existing prior location. This is made evident by the instructions which they requested on that branch of the case. They asked no instruction, and took no exception, on the theory that, after the introduction of evidence by the defendants sufficient to establish a location prior to that of the plaintiff, the burden of proof would shift to the plaintiff to show that such location had been abandoned. It is obvious from the evidence in the record that the question of abandonment was not considered by the jury in arriving at their verdict, but that their conclusion was reached solely from a consideration of the evidence upon the issue whether or not the Berry claim had ever been marked upon the ground.

We find no error, therefore, for which the judgment should be reversed. It is accordingly affirmed.

COLT'S PATENT FIREARMS MFG. CO. et al. v. NEW YORK SPORTING GOODS CO.

(Circuit Court of Appeals, Second Circuit. September 5, 1911.)

No. 251.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMATIC PISTOL.

The Browning patent, No. 580,924, for a firearm, dealing specifically with an automatic pistol, is valid, but is an improvement patent only, and cannot be given a broad construction, but must be limited strictly to the elements as described and shown in the specification and drawings, one of which is a barrel mounted on a frame and having a limited double movement—longitudinal and vertical. As so construed and limited, it is not infringed by the device of the Searle patent, No. 804,985, in which the barrel is not mounted on the frame and has no movement.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Colt's Patent Firearms Manufacturing Company and John M. Browning against the New York Sporting Goods Company. Decree for defendant, and complainants appeal. Affirmed.

This cause comes here upon appeal from a decree dismissing the bill of complaint in an action for infringement of patent. The patent is No. 580,924, issued April 20, 1897, to John M. Browning for a "firearm." The alleged infringing pistol is manufactured by the Savage Arms Company, of Utica, by which company the suit is defended; sale by defendant being admitted.

See, also, 190 Fed. 563.

The following is the opinion of the Circuit Court by Platt, District Judge, in this case and the case reported in 190 Fed. 563:

These are two suits, based upon different patents touching the same subject-matter, viz., pistols of the gas-operated automatic recoil type. The patent in suit 3–191 is No. 580,924, granted to Browning April 20, 1897. The patent in suit 3–192 is No. 747,585, granted to Browning December 22, 1903. The claims at issue under the first patent are Nos. 7 and 13. The claim at issue under the second patent is No. 10. Claim 2 of the first patent and 22 of the second patent were in the original issue, but are now eliminated from the contention. For convenience the claims are now stated:

First Patent, Suit 3–191.

"7. In a firearm, the combination with a frame of a breech block or bolt carrier sliding on said frame, said breech block or bolt carrier comprising a breech-bolt and a forward extension embracing said frame, and a barrel mounted upon said frame within said forward extension and having a limited movement upon said frame to move with and to lock and unlock said breech block or bolt carrier."

"13. In a firearm, the combination with a frame and a barrel mounted on said frame, of a breech block or bolt carrier sliding on said frame, said breech block or bolt carrier comprising a breech-bolt and a forward, semi-tubular extension to cover the barrel, and having an opening forward of the breech-bolt to permit the ejection of the shell."

Second Patent, Suit 3–192.

"10. In a firearm, the combination of a frame, a rotatable barrel having on its under side segmental ribs at right angles to the axis of the barrel in engagement with grooves in the upper side of the open frame, and a breech-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

slide comprising a cover holding the barrel in engagement with the frame and a breech-bolt in rear of the barrel."

Our attention must be centered for some time upon the first patent in suit, because the decision in that case will have great, and perhaps controlling, importance in the decision of the other.

The combination of claim 7 reduced to its lowest terms is: (1) A frame. (2) A breech-bolt carrier sliding on the frame, which is made up of a breech-bolt and a forward extension embracing the frame. (3) A barrel mounted upon the frame within the forward extension, which must have a limited movement upon the frame, so as to be capable of locking and unlocking the breech-bolt carrier.

The combination of claim 13, although put together differently, is pretty much the same as that of claim 7, except that an ejection opening to be located forward of the breech-bolt is added. I have said "pretty much the same," but, to be exact, it is in some respects more restricted, because it defines the forward extension of the earlier claim as a semi-tubular one, covering the barrel and mounted on the frame.

The defense in the case we are now considering, as well as in the later one, is noninfringement. To one conversant with its details there must come a conviction that in the ultimate analysis the question is really one of law. The claims must be construed so as to learn what the exact contract between the government and the patentee was. Having determined that, the burden of proof rests upon the complainants to show that the defendant has trespassed upon their reserved rights, and the lines in that respect must be tightly drawn, because the Patent Office has already passed upon it in granting a later patent to defendant's licensor, Mr. Searle. That action, of course, is not binding upon the court; but it must have more or less persuasive force, dependent upon the extent of the knowledge which the office had of the facts pertinent to that issue.

The patentee selects a pistol as the kind of firearm to which he proposes to apply his combination, and exhibits one wherein the various parts are operated by the rearward acting force of the gases produced by the explosion of the cartridge when the pistol is fired. He presented to the office a creditable and commercially satisfactory pistol by the definite structural and operative relation of the elements of claims 7 and 13, but did not proclaim that he had discovered a virgin field. In fact, he practically announced himself as an improver upon what had gone before. He bound himself hand and foot with definite limitations upon his operative disclosure, and seems to have been particularly exultant over his discovery that in his pistol the barrel has a double movement at one and the same time; "that is to say," to quote him exactly, "a movement in the direction of its length and simultaneously therewith another movement." The other movement is manifestly the swinging up and down movement of the barrel, which permits the bolt-carrier to be locked or unlocked. Since the two movements are going on together, the advantage is attained of permitting the barrel to move a little way in the same direction that the bolt-carrier moves, so that the explosive gases can have full effect upon the bullet before the breech is unlocked and opened. It is manifest that to carry his combination into operative effect the barrel must move longitudinally with the bolt-carrier for a limited distance before it performs the additional function of helping to unlock the bolt-carrier.

Nearly ten years later Mr. Searle went to the Patent Office with his claims of invention in the same class of firearms, using a pistol as his example. His inventive thought was clothed in terms of a combination which he insisted was different, independent of, and beyond the improvement which Browning had added to the art so many years before. He obtained his patent, and the defendants have applied it to their pistols with commercial success.

The complainant, having lawfully obtained the benefit of Browning's invention, now comes to court and says that Searle misled the experts at the Patent Office into adopting a theory, instead of a condition, and that in plain practice it is clear that he has stepped squarely upon the rights preserved to the complainant. Thus the issue is squarely joined. It is fair to assume that both parties are equally sincere, but it must be obvious that the complainants must present a very plain case to entitle them to equitable relief. Complain-

ants naturally dislike the palpable invasion of their trade, and hope to prevent, with the help of the court, the invasion of their monopoly. So far as the mind of the court which is now guiding the hand which writes is concerned, it ought to be well known to the patent bar that it has never hesitated to sustain a complainant who comes forward with plain equities to favor its contention. Whenever a case is evenly balanced, or of great doubt, such relief can hardly be expected.

The patent in suit has been examined with care to find what the patentee thought that he had invented and secured the right to control when he applied for his patent, nearly 10 years prior to this contention. The specifications in a patent show in detail what the inventor did with the prior art before him. The claims show what he asks the government to grant him the usual monopoly upon. Specifications may explain an ambiguous claim, and they may limit a claim which would otherwise appear to be broad; but they can never be used to expand a claim which is clear-cut, plain, and unambiguous. The reason for the rule is too obvious to need explanation.

The patentee only gets what he claims, no matter what he may have invented. If it shall happen that, 10 years after the patentee makes his bargain, it shall become evident to the expert that, in the light of what has since been learned, it was within the inventor's grasp to have made a broader claim, it would be unfair to the public for the court to so interpret his claim as to give him the benefit of the broader monopoly. He must be held to exactly what he disclosed and demanded at the time of the grant. He wrote the contract and must abide by it.

I do not intend to say that the thoughts which the experts in this case now think that the patentee had and expressed as the substance of his invention might not verge on the limited class of epoch-making thoughts which have now and then emerged above the patent horizon, and if they could be found plainly set forth in the claim, they might form a basis for liberal treatment and broad thoughts on the part of the court. Those thoughts, as I understand it, are found in the very tag end of the specifications, where he added incidentally a statement that by the arrangement and construction of the parts which he had disclosed he was able to make the frame and barrel so light in weight that the breech-bolt carrier might be of considerable weight, whereby the momentum of the heavy carrier enabled it to continue the opening movement after the gas pressure in the barrel had been released and the barrel stopped, storing energy in the reaction spring.

Whether on such a statement as that he could have worked out a broad claim of invention is problematical. That he did not is so manifest as to make further discussion unwarranted. If he had tried to do so, we should find his effort in the forefront of his claim, and not obscurely tucked away in No. 7, which has to do with the limited movement already referred to, or in 13, which was apparently intended to take care of his ejection opening. The patentee was a mere improver—a commercially fortunate improver, it is granted; but from the standpoint of inventive thought, purely and simply an improver, in the way touched upon at the beginning. Whether Mr. Searle is a pioneer or simply an improver himself makes no difference in this contest. His thought was based upon an investigation of the effect of the bullet in its progress through the rifling of the barrel upon the breech-block, and differentiates his monopoly from that granted to Browning.

The study of the case in detail has been a pleasant and, it is hoped, a profitable one, and it is irksome to refrain from stating seriatim the various inferences and subordinate conclusions which have brought me up to my final conclusion; but to do so would clog and hinder other pressing matters which must soon have the benefit of study and decisions. Brevity has therefore been my watchword, and what has been hurriedly jotted down will serve, I hope, to explain the frame of mind which has forced me to my decision.

We go straight back to the "double movement" of the barrel, which Mr. Browning emphasized in his patent. The defendants say, and I agree with them, that the barrel of their pistol has no such double movement; that their barrel does not slide back and forth at all; that the unlocking is due to the action of the bullet; that the only movement of the barrel is a slight rotation upon its own axis, incident to the lateral displacement of the lock-

ing lug when the breech-slide itself recoils. There are many other differences, all due to the inherent difference in the mode of operation adopted by the two inventors.

The defendant insists that its pistol has a barrel without longitudinal motion, which is firmly locked against the breech-bolt until the bullet leaves the pistol; that in fact the rifling of the bore of the barrel tends to strengthen the locking force while the bullet is leaving the pistol; that, on the other hand, the complainants' pistol has a barrel which is locked against a yielding breech-bolt, which, retaining its embrace with the breech-bolt, retreats for a limited time after the explosion until the peculiar swinging motion of the barrel takes place and the unlocking occurs.

The complainants' pistol surely acts in the manner indicated, and they are bound by a preponderance of testimony to show that defendant's pistol operates in the same way. It is not enough to show that defendant's pistol does not act as defendant says it does, but beyond that the complainants must show that it operates in the way the patent in suit teaches. I do not think they have succeeded in either respect, but in the latter they have certainly lamentably failed.

After going up and down and across the record in this case, we come at the end to where we started. In a firearm, the combination of frame, barrel, and breech-slide, with some locking and interlocking arrangement between barrel and breech-slide, as the principal co-operating elements, to perform automatically by the aid of the gases from the exploded cartridge the ejection of spent cartridges and the introduction of fresh ones, was old when Browning entered the field. His advance was in showing a specific arrangement for accomplishing the well-known result. He went at it in one way, and much later Searle went at it in another. The latter is entitled to the benefit of his invention without paying tribute to Browning.

The decision of the issues raised in the first suit seems to settle the dispute upon claim 10 of the later patent. Complainants have not shown that defendant's pistol contains the underlying spirit and purpose of the patent in suit, No. 747,585, in the operative relations of its frame, barrel, and breech-slide, and beyond all that, have not presented a case which makes it possible to read claim 10 upon defendant's pistol.

Defendant's has no rotatable barrel, in the sense which the words must bear in the claim. It has no segmental ribs, but merely a single anchoring lug. The latter is not an equivalent of the former, for obvious reasons. The invention of the patent in suit needed a plurality of ribs for firm seating of the barrel. It needed segmental ribs, so that they could be rotated out of engagement with the grooves. Defendant's barrel is otherwise fully supported, and the locking lug simply prevents longitudinal movement of the barrel. Complainants' ribs must be at right angles to the axis of the barrel. Defendant's lug need not be at right angles. It can do its work quite as well at some other angle. Defendant's pistol has not the kind of "cover holding the barrel in engagement with the frame" which patentee had in mind when he formulated the claim which offers the issue in this suit.

The bills in both cases must be dismissed for want of equity. So ordered.

W. K. Richardson and A. D. Salinger, for appellants.
Edmund Wetmore and H. S. Knight, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM: Although the patentee states that his improvement is not restricted to any particular kind of firearm, the specifications deal with a pistol; and, since defendant's device is also a pistol, it will be convenient to refer to pistols in this discussion.

The specification states that the invention relates to automatic breech-loading firearms "in which the several operations—such as the unlocking and opening of the breech after firing a shot, the ejection of the empty cartridge shell, the cocking of the hammer, the presenta-

tion and introduction of a new cartridge to the chamber of the barrel, and the closing and locking of the breech—are automatically effected by or through the energy of the recoil of * * * that part which at the time of firing the shot closes the breech or rear end of the cartridge-chamber of the barrel and of the parts connected therewith after each discharge." This concedes, as the record clearly indicates, that Browning was not a pioneer in the art of automatic firearms. Complainants do not contend that he was, but merely an improver in details of construction. Nevertheless, if some of his improvements are novel and useful, that circumstance will not deprive him of the right to such improvement if properly claimed. The patent deals with an automatic pistol complete in all its parts. In consequence the specifications refer to the combinations of many different parts and the claims (there are 18 of them) relate to various separate combinations. The objects of invention are stated to be practicability, efficiency, safety in use, simplicity, inexpansiveness, security against release of the hammer until all parts are locked in proper position for discharge, against release of hammer after discharge until the trigger is in proper position, and automatic locking and unlocking the breech-block by means of the hammer. All the parts of the complete pistol, "lock, stock, and barrel," breech-block, magazine, ejector, etc., are fully and carefully described, and their interrelations pointed out. As might be expected, the defendant's complete pistol has many points of difference from the weapon of the patent, and therefore infringement is charged of 2 claims only of the 18.

There were patents for various forms of automatic pistol before Browning, but the one which best illustrates the prior art was apparently the Borchardt pistol (No. 571,260, November 10, 1896). In this weapon the barrel is screwed at its rear end into a rearwardly-projecting extension *h*, movably engaging with and sliding in the frame *a*. At the rear end of *h* there is pivoted a spindle on which turns the rear link of a heavy toggle-joint. The forward link of this toggle-joint presses against the rear of the breech-bolt *c*, holding it firmly against the breech of the barrel. Upon discharge the breech-bolt is forced back by recoil, and, while the toggle-joint holds it in place it pulls the barrel back with it, by the spindle and extension *h*. But by an arrangement of parts which need not be described, after a very short movement rearward, the toggle-joint is broken (thrown up); and thereupon the breech-bolt is drawn back away from the barrel, which ceases its rearward motion, and the parts which eject the old shell, introduce a new cartridge, cock and restore to firing position, come into action. The defects charged against the Borchardt pistol in complainants' brief are these: It is a long, heavy, complicated affair, with plenty of projections and exposed mechanism. One of the witnesses says:

"It is entirely too heavy for a pistol of the small caliber which it is, and is complicated, cumbersome, and awkward to hold in the firing position. (Its handle is in the middle.) On account of the heavy rearward extension beyond the grip of the pistol, it was almost impossible to shoot it accurately. It has the other great fault, due to its form, that it cannot be carried in any pocket

or holster without surely getting caught at the time when one attempts quickly to withdraw it for use."

It is also pointed out that the barrel and rearward extension therefrom are very heavy, much heavier than the breech-piece itself, which, it is said, gives great momentum to the wrong part, viz., to the barrel, which must be stopped after a short movement, instead of to the breech-piece, which must move a long distance against the stress of the reaction spring and perform its several functions. The testimony seems quite clearly to sustain these criticisms, and we are satisfied that the complete pistols, both of complainants and defendant, are distinct improvements upon the Borchardt.

It will be necessary to quote from the specifications so much only as will disclose such parts of the complete organism as the two claims in controversy are concerned with. In pistols of this type it seems necessary that immediately upon discharge the breech-bolt should remain against the breech long enough for the gases of explosion to give proper impulse to the bullet. Thereafter the breech-bolt separates from the barrel to allow ejection, insertion, etc. The temporary clasping of the bolt against the breech is secured in Borchardt by the extension, spindle, and toggle-joint, as we have seen. In complainants' patent the arrangement of parts is as follows: The barrel is provided with two lugs, projecting from its under side, one near the muzzle, the other at the breech, corresponding recesses being formed in the frame. Links are secured in slots in said lugs and between the walls of said recesses by transverse pivot-pins, so that said links swing freely in the plane of the axis of the barrel. The links are of such length and so attached that the axis of the barrel remains always parallel to its normal position, while as the barrel is moved forward or back it swings bodily from and towards the frame. As the specification states, the barrel is attached to the frame in such a manner "as to be capable of limited movement only, but of a double movement within its limits—that is to say, the barrel is free to move to and fro in the direction of its length, and also to have another movement at the same time, such other movement being, in the construction represented in the drawings, a bodily movement toward and from the frame."

The breech-bolt has a long forward extension (in which is cut a slot for the ejectment of the empty shells), which incloses substantially the whole barrel. It is semi-tubular or U-shaped, and has longitudinal ribs and grooves to engage corresponding ribs and grooves formed on the frame to be thereby held to the frame and guided thereon in its reciprocation. This extension is called in the patent "the breech block or bolt carrier." Just forward of the slot for empty shells this carrier is provided with one or more recesses to receive corresponding transverse ribs or projections on the barrel, said ribs or projections being caused to enter and occupy said recesses by the movement in the transverse or vertical plane which the barrel has at the same time that it is moved forward in a longitudinal direction by the breech block or bolt carrier during the last of the forward movement of the latter, whereby the breech block or bolt carrier is securely locked to the barrel and the breech-bolt is held rigidly against the end

of the barrel, closing the breech. In this closed position, therefore, the breech block or bolt carrier and the barrel are securely interlocked, and neither one can move independently of the other. When, however, the breech block or bolt carrier is moved rearwardly under the influence of the recoil, the barrel moves for some distance with it until the rocking movement of the barrel on the links heretofore explained lowers the barrel until it rests upon the frame, and thereby withdraws the ribs from the recesses in the breech block or bolt carrier and releases the carrier from the barrel. The frame prevents further rearward motion of the barrel, which is left with its breech in proper position to receive a fresh cartridge. The continued rearward movement of the breech block or bolt carrier opens the breech by moving the breech-bolt away from the barrel. During the return or forward movement of the breech block or bolt carrier the barrel is kept from moving forward with it by the top of the breech block or bolt carrier, which slides over the ribs and prevents the barrel from rising from its frame; but as the last of the closing movement brings the face of the breech-bolt against the breech, the recesses arrive above the ribs, permitting the barrel to rise as the ribs enter the recesses, and at the same time to be pushed forward by the breech block or bolt carrier, so that when the latter and the barrel arrive at their forward or closed position they are again securely locked, as before. There is described an arrangement of the links, pivots, etc., intended "to delay somewhat the unlocking of the barrel and breech block or bolt carrier, so as to insure the exit of the projectile from the muzzle and the consequent relief of the pressure of the powder gases in the barrel before the carrier is unlocked and the breech opened."

That the firearm thus described was sufficiently novel and useful to warrant the issue of a patent seems quite plain upon the record of the prior art; indeed, it is not understood that this proposition is seriously disputed.

The first claim relied upon is:

"7. In a firearm, the combination with a frame of a breech block or bolt carrier sliding on a frame, said breech block or bolt carrier comprising a breech-bolt and a forward extension embracing said frame, and a barrel mounted upon said frame within said forward extension, and having a limited movement upon said frame to move with and to lock and unlock said breech block or bolt carrier."

The defendant's weapon, which closely resembles complainants' is said to embody a wholly novel principle discovered by one Searle, defendant's assignor, and covered by patents issued to him. It is contended that in defendant's pistol the breech-slide is absolutely locked against the recoil motion until the bullet has left the barrel. This happens, as Searle states in his patent, 804,985, because "the inertia of the projectile or its resistance to rotation as it takes into the rifling of the barrel amounts to a very considerable force, that can be utilized to perform work without materially detracting from the effect of the rifling on the projectile."

There is much testimony in the record for and against this theory. Experiments have been made and criticised, and the experts are at

variance. It will not be necessary to go into that branch of the case, nor to express any opinion as to the weight of conflicting evidence. It is conceded that defendant's barrel has one movement only. It rotates, but does not move forward and back. It cannot so move, because it is anchored against fore and aft movement (patent 936,369) "by a lug on the under side of the barrel inserted between two shoulders integral with the frame; the shoulders permitting the barrel to rotate, but holding it against movement in the direction of its bore." Rotation is effected by engagement between a lug on the top of the barrel and a slot in the breech bolt or block carrier, called in the Searle patents the "breech-slide." The relation of parts is so arranged that for a moment bolt and breech are held together, and thereafter the bolt moves away from the breech. The details of the structure need not be discussed. The question is: What does the seventh claim mean when it says, of the barrel, "having a limited movement upon said frame to move with and to lock and to unlock said breech block or bolt carrier"? Complainants would have it construed so that the word "with" should mean only "synchronously," making it read "a limited movement to lock and unlock, which movement takes place at the same time that the carrier is itself moving." This seems to us a very strained construction, and we concur with Judge Platt in the conclusion that the double movement described in the specifications is expressed in this claim. The barrel is to have a limited movement "with * * * said breech block or bolt carrier," locked to it by ribs and recesses, and therefore moving "with" it; and the barrel is also to have another movement of its own to make or break such lock. The whole language of the patent plainly calls for such a construction of this claim, and, as thus construed, there is no pretense of infringement.

The other claim relied upon is:

"13. In a firearm, the combination with a frame and a barrel mounted on said frame, of a breech block or bolt carrier, comprising a breech-bolt and a forward semi-tubular extension to cover the barrel, and having an opening forward of the breech-bolt to permit the ejection of the shell."

In the opinion of a majority of the court it cannot be successfully contended that the Browning patent, No. 580,924, covers a generic invention. Automatic firearms, embodying the general principles of the Browning device, had long been known, and are shown and described in numerous prior patents heretofore referred to, notably the patent to Borchardt.

As time progressed defects were discovered, and, as usually happens in so promising a field, many skilled workers in the art entered upon the task of remedying these defects; the result being the compact and effective arm of the present day. Some of these men were inventors, others were skilled mechanics, and frequently the changes, even when made by men possessing the inventive faculty, required only the skill of the calling. The finished product of to-day is to a large extent the evolution of successive improvements developed as experience demonstrated their necessity. Browning does not assume to be a pioneer. He distinctly says that his additions and changes are but

improvements upon existing structures. It is not pretended that Browning was the first to construct an automatic recoil-operated firearm containing as essential elements the frame, the barrel, and the breech-slide. He has made certain definite and meritorious improvements upon this firearm, consisting, as the complainants' expert states, "in a definite structural and operative relation of these three elements to one another in the organization of the pistol."

It is manifest, therefore, that though he is entitled to the rewards of his contribution to the art, and to a reasonable range of equivalents, he is not entitled to the fruits of the labor of others who have endeavored to reach the same result by improvements along different lines. Other inventors have the same right as Browning to improve the combination of the frame, barrel, and breech-slide, and, if the result be accomplished by elements differing from his to the extent that they cannot be regarded as clear equivalents, these inventors cannot be held as infringers. In other words, the claim cannot be given a broad construction. It must be confined strictly to the elements as shown and described.

The combination of claim 13 contains the following elements: First, a frame; second, a barrel mounted on said frame; third, a breech block or bolt carrier sliding on said frame, said breech block or bolt carrier comprising a breech-bolt and a forward semi-tubular extension to cover the barrel, and having an opening forward of the breech-bolt to permit the ejection of the shell.

In order to construe the claim properly, recourse must be had to the specification and the prior art. We cannot permit speculation and guesswork to guide us as to the character and structure of the elements of this claim. What kind of a frame is referred to? What are the dimensions of the barrel, and how is it mounted on the frame? What is the form of the breech-block and its semi-tubular extension, how does the latter cover the barrel, and what is the character of the opening forward of the breech-bolt?

The answers to these questions are made clear by an examination of the specification and drawings and the proceedings in the Patent Office. "The frame *a* is extended forward for the attachment thereto of the barrel *b* and for the reception and support of the reaction spring," and is constructed so as to form a seat for the barrel when it is in its rearmost position. The barrel must be mounted on the frame "in such a manner as to be capable of limited movement only, but of double movement within its limits—that is to say, the barrel is free to move to and fro in the direction of its length, and also to have another movement at the same time; such other movement being, in the construction represented in the drawing, a bodily movement toward and from the frame."

The breech-block is sufficiently described in the claim. It must, however, be connected with a transverse key near its forward end, which is inserted through rectangular recesses cut therefor in its sides. It is also provided, just forward of the ejection opening, with one or more openings with recesses to receive corresponding ribs on the barrel,

which are caused to enter the recesses "by the movement in the transverse or vertical plane which the barrel has at the same time that it is moved forward in a longitudinal direction."

The patentee says that he does not restrict his invention "to a magazine-pistol nor any other particular kind of firearm." How, then, is this claim to be construed? Is it to be given a broad construction commensurate with its language, or is it to be confined to the firearm actually produced by Browning?

We are convinced that we must follow the familiar rule and interpret the claim in the light of the specification, conceding to Browning all that he has accomplished, but not permitting him to collect tribute from an independent inventor, who has made other improvements in an already crowded art. The three elements of the claim—the frame, the barrel and the breech-block—are not any frame, barrel, and breech-block, but Browning's frame, barrel, and breech-block, as described and shown in his specification and drawings. It is not enough that the defendant has these three elements, unless they are found in the environment and operating in the manner described by Browning. They cannot so operate and accomplish the result sought by him unless they have the characteristics and perform the functions pointed out in the patent. His combination will not operate unless its members are assembled as he directs. The frame and the barrel must be so constructed as to permit the "limited double movement" which is so clearly emphasized. Without this the combination is inoperative.

The barrel of the patent must have a longitudinal and also a vertical movement. The bolt-carrier comprises the bolt as an integral part thereof. In the defendant's pistol the barrel is not mounted on the frame, but is mounted on the bolt-carrier. It has no longitudinal or vertical movement, but is fixed against both. The "double limited movement" of the patent is therefore wholly absent. In the defendant's structure the breech-bolt is separate from the bolt-carrier; in the patented structure the carrier comprises the bolt as an integral part thereof.

Many other differences between the two structures could be pointed out, but sufficient has been said to indicate our views. It is enough that the defendant's pistol does not have one of the elements of the combination of the claim, namely, a barrel mounted on a frame. Neither does it have the "limited double movement" which is an essential ingredient of the combination of the claim.

The complainant advances the ingenious argument that the defendant's barrel is mounted upon the frame, because the breech bolt carrier, upon which it is *actually* mounted, is slidingly mounted on the frame. In support of this contention it is asserted that "the barrel is mounted upon the frame just as truly as a rider is mounted upon a horse, in spite of the use of a saddle."

Undoubtedly a rider is mounted upon a horse, even though he wears breeches and has a saddle under him; but the illustration, though specious, fails, we think, for lack of resemblance. We might suggest another and, perhaps, a more relevant simile. Would it be accurate to

assert that the locomotive engineer seated in his cab is mounted on the rails, because his engine is so mounted?

In the most favorable view for the complainants, which can be taken of the evidence, infringement of the thirteenth claim is involved in doubt.

It follows that the decree of the Circuit Court must be affirmed, with costs.

COLT'S PATENT FIREARMS MFG. CO. et al. v. NEW YORK SPORTING GOODS CO.

(Circuit Court of Appeals, Second Circuit. September 5, 1911.)

No. 252.

PATENTS (§ 328*)—INFRINGEMENT—AUTOMATIC FIREARM.

The Browning patent, No. 747,585, for an automatic firearm, construed, and *held* not infringed by the device of the Searle patent, No. 804,985.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Colt's Patent Firearms Manufacturing Company and John M. Browning against the New York Sporting Goods Company. Decree for defendant, and complainants appeal. Affirmed.

This cause comes here upon appeal from a decree dismissing bill of complaint. The suit is for alleged infringement of United States patent 747,585, issued December 22, 1903, to John M. Browning, for an "automatic firearm." This suit and the one in patent 580,924 between the same parties were argued together, both in the Circuit Court and here. Our opinion in the other suit (190 Fed. 553) is handed down herewith, and may be consulted for a discussion of what is common to both patents.

W. K. Richardson and A. D. Salinger, for appellants.

Edmund Wetmore and H. S. Knight, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This patent, like the other, relates to firearms of the automatic type—a pistol being selected for description—and the specifications cover the entire structure, going at considerable detail into all its parts, frame, barrel, breech-bolt, breech-slide (the "breech-block or bolt-carrier" of the first patent), lock, trigger, hammer, firing pin, magazine, and ejector. The "objects of the invention" set forth by the patentee are multitudinous. There are at least nine of them, and the particular devices securing some one of these objects may evidently be used in weapons which do not present all the specific details of Browning's complete pistol. As to some of these devices the patentee supposed he had found some novel and useful subcombination, and undertook to cover all of them. In consequence there are 31 claims, but we are concerned here solely with the tenth, which is the only one sued on. It reads:

"10. In a firearm, the combination of a frame, a rotatable barrel having on its under side segmental ribs at right angles to the axis of the barrel in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

engagement with grooves in the upper side of the open frame, and a breech-slide comprising a cover holding the barrel in engagement with the frame and a breech-bolt in rear of the barrel."

The breech-slide, like the "carrier" of the first patent, comprises the breech-bolt and the forward extension. Unlike the first patent, however, the barrel has no "double movement." It rotates on the axis of the bore, but does not move forward or back, being securely anchored to the top of the frame by the ribs and grooves aforesaid. This anchoring is effected merely by the insertion of the ribs in the grooves. The barrel is not attached to the frame by any fastening devices whatever (such as the rocking links of the first patent). It simply lies on the frame, but stays there unmoved by discharge of a cartridge, because the breech-slide which encircles the barrel holds its ribs down into engagement with the grooves.

The barrel, however, is capable of rotation, and if rotated when the breech-slide is in a certain position the ribs will pass into a recess in the interior walls of the breech-slide. A quarter rotation will bring them into the recess. Being then disengaged from the grooves on the frame, the barrel may be removed forwardly from the breech-slide. In this arrangement merely by the combination and interrelation of the frame, barrel and breech-slide in the assembled pistol, and without any fastening or securing means whatever, the loose barrel is secured in place upon the frame. The specification refers to this combination as producing a "firearm of this class (automatic) in which the barrel, to insure accuracy of firing, shall be rigidly held upon, but located entirely above, the frame, near the sighting-line of the arm, and in which the attachment of the barrel to the frame shall support the barrel rigidly, but shall allow the barrel at will and readily to be detached and removed, and to be replaced and attached, without requiring the use of any tool whatever."

It is shown by the testimony that ordnance boards consider it a desirable thing to have firearms "capable of being readily dismounted and assembled, using as few tools as practicable." This rotary motion of the barrel has no purpose in complainant's pistol, except to permit disassembling. The expert for complainant so concedes, and, since he further concedes that in defendant's pistol rotation of the barrel plays no part in disassembling, we do not deem it necessary to enter into any discussion of the prior art, or to consider at length the other propositions upon which it is sought to avoid infringement. We are not to be understood as holding that there is merit in any of these other propositions.

The decree is affirmed, with costs of this appeal.

KREPLIK v. COUCH PATENTS CO.

(Circuit Court of Appeals, First Circuit. October 3, 1911.)

No. 930.

1. PATENTS (§ 255*)—INFRINGEMENT—COMBINATIONS.
The inventive act in a combination patent is the making of the component parts, capable of combination and fit to be united to constitute the combination, and infringement of such a patent is complete when the component parts of the combination are made or sold fitted to be put together, and intended to be put together.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 397-399; Dec. Dig. § 255.*]

2. PATENTS (§ 328*)—INFRINGEMENT—COMBINATION.
A permanent injunction was granted restraining defendant from directly or indirectly infringing the De Piniec-Mallet patent, No. 712,718, for a sliding bed or couch, comprising two separable metal sections, each having four legs which may be slid together, the smaller under and within the other, forming, when closed, a single, and, when open, a double, bed. *Held*, that the sale by defendant to dealers of an equal number of larger and smaller sections or cots, unconnected, but adapted and intended by both defendant and the purchasers to be combined into an infringing structure, constituted a direct infringement of the patent, and a violation of the injunction.

3. INJUNCTION (§ 232*)—VIOLATION—PUNISHMENT—NATURE OF PROCEEDINGS—JUDGMENT.
In a proceeding against the defendant in an equity case for contempt for violation of an injunction, the court may properly impose a fine for the benefit of the complainant, measured in some degree by the pecuniary injury caused him. Such fine is remedial, and not punitive, and does not exclude punishment of the defendant where the contempt also has a criminal aspect; and where the proceeding was by petition, separate and distinct from the original suit, and was treated by the court and both parties as a criminal proceeding, in which proof of the offense beyond a reasonable doubt was required, as well as a civil proceeding, both aspects being considered, the court may in the same proceeding impose such compensatory fine, and also a sentence of imprisonment as a punishment.
[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 232.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Proceeding for contempt by the Couch Patents Company against Samuel Kreplik. From the judgment, defendant brings error. Affirmed.

Francis J. V. Dakin, for plaintiff in error.

Odin Roberts (Charles D. Woodberry and Roberts, Roberts & Cushman, on the brief), for defendant in error.

Before ALDRICH, BROWN, and HALE, District Judges.

HALE, District Judge. On February 20, 1909, a final injunction was issued by the Circuit Court for the District of Massachusetts, whereby the plaintiff in error (of whom for convenience we shall hereafter speak as the defendant) was enjoined from directly or indirectly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

making, constructing, using, or vending bedsteads, couches, or other devices embodying the invention of United States letters patent No. 712,718, granted November 4, 1902, to Adrian De Piniec-Mallet, and especially referred to in claims 1, 2, 3, 4, 5, 6, 7, and 12 thereof. From the specifications the scope and purpose of the invention appear to be:

"To provide an improved bed comprising a main section and a sliding or extensible section, each having a metallic fabric rigid therewith, the structure being so organized that the metallic fabric of one section will slide transversely or crosswise between a side bar and the metallic fabric of the other section, whereby the two sections are nested, and the two fabrics are in such close relation that they are nearly level when extended, the distance between the two being sufficient to permit the proper sliding of one under the other without interfering with such movement, and such sections comprising, when closed, a single, and, when open, a full-sized double bed."

The thing produced in commerce as the result of this invention is an extensible bedstead or couch, consisting of two separable bed sections or frames, which, when placed upon the market, as the case shows, are of metallic formation, each with four legs, end bars and side rails, with wire fabric attached to the end bars and stretched from end to end of each of said frames; one of the frames being a little shorter and a little lower than the other, the structural elements of each so arranged that the two sections may be nested or slid together, the smaller section under and within the larger, with its wire fabric close under the wire fabric and over the side rail of the larger. The case shows that these bedsteads are sometimes delivered by the manufacturers, nested, namely, with the two sections slid together, and the legs wired or tied to prevent them from sliding apart in transportation; and sometimes in unnested relation, leaving the purchaser to nest and slide the two sections together; that the patented couch is called in the trade a "sliding couch."

The case came before the Circuit Court upon petition by the defendant in error (hereinafter for convenience to be called the petitioner) for an attachment for contempt to be issued against the defendant. The alleged contemptuous act is substantially stated by the Circuit Court, namely, that the defendant sold and delivered to one Williams twelve single cots, and to one Meserve four single cots, unconnected and uncombined; and did not nest or combine any two of the cots sold and delivered so as to form an extensible sliding couch; and, though it does not appear that any two of said cots have been so nested or combined, it is left undisputed that six larger and six smaller single cots were sold and delivered to Williams, and two larger and two smaller single cots to Meserve; that the cots sold to Williams were capable of being at once combined into six sliding couches, and those sold and delivered to Meserve into two sliding couches; and that the larger and smaller cots referred to were in all material respects like the two sections, one larger and one smaller. Upon these facts the Circuit Court found that the sale to Meserve was of four cots in pairs, the cots of each pair adjustable as one nested sliding couch, in accordance with the first claim of the patent; that each pair was sold for use as one sliding couch; that this was known

to the defendant and Meserve; and that both of them intended this use; that the sale to Williams was of twelve cots in pairs, the cots of each pair adjustable as one nested sliding couch in accordance with the first claim of the patent; that each pair was sold for use as one sliding couch; that this was known to the defendant and Williams; that both of them intended this use; that on May 24, 1910, upon a petition similar to the one before us, the defendant was adjudged in contempt for violating the same injunction, and was fined $100. After a full hearing, the Circuit Court found that the defendant had knowingly and willfully violated the injunction; that the pretense of selling single cots, and not "sliding couches," was a mere colorable attempt at evasion on his part. The court therefore adjudged the defendant to be in contempt; and, in view of his former contempt of the same injunction, the court imposed upon the defendant a fine of $500 for the use of the petitioner, and ordered the defendant to be imprisoned for ten days. To review this judgment of the Circuit Court, the defendant has brought his writ of error. And upon this writ of error the case now comes before this court.

1. Did the Circuit Court err in adjudging the defendant to be in contempt?

The defendant says that the cot beds which he sold were ordinary articles of commerce; that he had a perfect right to sell them, although certain of them might be combined and made to infringe the patent; that there is nothing in the patent to prevent him from selling single cot beds of any form; that the cot beds sold by him to Meserve and to Williams were not arranged in a nested condition; that, unnested, they did not constitute an infringing device, but that some act was necessary to be performed to change the beds so sold from noninfringing articles to infringing articles; that the act of infringement is not performed until the two cot beds are actually assembled and nested together; that their adaptation for nesting together does not make them an infringing structure; and that, even though the cot beds sold to Meserve and Williams were sold in response to orders for "sliding couches," this fact should not induce this court to hold that a sale of single cots in an unnested condition constitutes an infringement. The defendant further says that, even if the sales to Meserve and Williams may be held to be an infringement of the patent, neither of such sales was a direct, but merely a contributory, infringement; and that the only issue raised by the pleadings was that of direct infringement.

[1, 2]. The evidence clearly shows that two furniture dealers, Meserve and Williams, ordered of the defendant "sliding couches"; that the couches were delivered to them by the defendant in unassembled pairs. The Circuit Court properly found that each of these pairs of cots was sold for use as one sliding cot, and that this was known to the defendant and to the purchaser, and that both intended such use. We must hold that this constitutes an infringement of the patent. The inventive act in a combination patent is the making of the component parts, capable of combination, and fit to be united to constitute the combination. The physical putting together of the two parts is

no part of the invention. The infringement of a patented combination is complete when the component parts of the combination are made or sold, fitted to be put together and intended to be put together. The infringement in this case was clearly a direct infringement. The facts do not show a partial infringement in aid of a complete infringement. The defendant did not merely aid or contribute in effecting an infringement. He sold both parts of the combination, in a condition ready to be put together to make a completed structure. His offense contained all the elements of a direct infringement. In this circuit, in Goodyear Shoe Machinery Co. v. Jackson, 112 Fed. 148, 50 C. C. A. 159, 55 L. R. A. 692, in speaking for the Circuit Court of Appeals, Judge Colt has clearly shown the distinction between a direct and a contributory infringement. The learned counsel for the defendant has himself cited a case in which Judge Lurton has quoted the analytic definition by Judge Taft in Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., 129 Fed. 105, 111, 63 C. C. A. 607. This statement is in exact accord with the law of this Circuit announced by Judge Colt in the Goodyear Case.

It may further be said that the injunction against which the offense was committed in the case at bar was an injunction against "directly or indirectly" infringing the patent. The learned judge who sat in the Circuit Court adjudged that the defendant violated the injunction. We find this judgment free from error, whether the defendant is held to be guilty of a direct or of a merely contributory infringement. Upon the evidence in the case, however, we have no difficulty in coming to the conclusion that the defendant was clearly guilty of a direct violation of the injunction.

2. Did the Circuit Court err in imposing a fine upon the defendant for the use of the petitioner?

[3] The defendant says that, having adjudged him guilty of contempt, the Circuit Court had no jurisdiction to order him to pay a fine for use of the petitioner; but that its action was in excess of its jurisdiction, and void.

Let us look at the precise action which is brought before us. The final decree shows that the Circuit Court did three distinct things: First, the court found that the defendant, Samuel Kreplik, had violated the injunction of the court; second, the court ordered Samuel Kreplik to pay a fine of $500 to the clerk of the court for the use of the petitioner within 10 days from the date of the decree; third, the court ordered Samuel Kreplik to be imprisoned for 10 days. The court further provided for necessary process to enforce its order.

It appears, then, that the Circuit Court provided compensation to the petitioner for the losses it had suffered by reason of Kreplik's act of contempt. This court is not called upon to pass upon the question whether or not the compensation so awarded is excessive. Questions as to the amount of compensation to the petitioner are not properly raised. While the defendant assigned as error that the Circuit Court imposed a fine in the absence of evidence showing the expenses incurred by the petitioner, he did not rely upon such assignment in his exceptions. He did not make them a part of his exceptions. Thus

the question of the reasonableness of compensation is not before us. In Merchants' Stock & Grain Company v. Chicago Board of Trade, 187 Fed. 398, 109 C. C. A. 230, the Circuit Court of the Eighth Circuit has recently considered the question in relation to what matters may be passed upon under a writ of error, and what questions may be reviewed only by appeal.

The courts of the United States recognize that the process of contempt has two distinct aspects—one criminal, to punish disobedience; and the other remedial and civil to enforce a decree of the court, and to compensate private persons. In Re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, it was held by the Supreme Court that, where the fine for violation of an injunction is to reimburse the party injured by the disobedience, it has not a punitive character; but, where the fine is payable to the United States, it is clearly punitive and in vindication of the authority of the court. Bessette v. Conkey, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. In Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, the Supreme Court has lately passed upon this question. The court clearly draws the vital distinction between proceedings for civil contempt, which are between the original parties, and proceedings at law for criminal contempt, which are between the public and the defendant. The court holds that the proper remedial relief for a disobedience of an injunction in the equity cause before it would have been to have imposed a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the act of disobedience.

The two aspects of contempt proceedings have often been before the Circuit Court in this circuit, where it has been clearly recognized that in an equity cause a fine for contempt imposed for the use of the petitioner is not a punitive fine, but merely indemnity to the petitioner for the loss occasioned to him by the offensive acts of the defendant. In the case at bar the Circuit Court, under the third paragraph of its decree, gave suitable compensation to petitioner; and, while the compensation is spoken of as a fine, it clearly is not such a fine as can be held to be punitive within the meaning of the law.

We have now considered only the question whether the Circuit Court could properly, under the circumstances of the case, impose a fine upon the defendant for the use of the petitioner, without regard to the form of proceeding. We shall later in this opinion consider the question whether the Circuit Court could properly pass upon the punitive and remedial elements in one and the same proceeding.

We have no doubt that the action of the Circuit Court in giving its remedial relief was free from error. The action of the Circuit Court in giving compensation to the petitioner was in our opinion lawful in accordance with the practice of the court in this circuit, and with the rule of the Supreme Court.

3. Did the Circuit Court err in ordering the defendant to be imprisoned for 10 days?

In the Gompers Case the Supreme Court has exhaustively considered the whole subject of contempt. The court there points out that

contempts are neither wholly civil nor altogether criminal; and that it is not always easy to classify a particular act as belonging to either of these two classes. The court there had to determine whether the case before it was one of criminal contempt; and it was compelled to give a critical examination to the pleadings, the procedure, the attitude of the parties to the case, and to all the special facts in the proceeding. The case arose upon an appeal which presented everything in the record. The court found that it was a case of purely civil contempt; but that the court below had undertaken to proceed as in a criminal case, had found guilt, and imposed sentence, without having made it clear to the defendants that they were being tried upon a criminal charge, that the defendants had been forced to testify without knowing that they were being heard upon a charge and not upon a suit. From the special circumstances of the case the court clearly showed that the defendants were not given the protection to which respondents are entitled in a case where guilt or innocence are brought in question, and where the liberty of the citizen is involved. The court showed that both parties to the controversy treated the proceeding as purely and solely civil, and not involving a criminal charge. The court clearly pointed out that in a case of doubt the mutual understanding of the parties is of controlling force, and often determines the question of whether the civil or the criminal element dominates the proceeding.

The case at bar comes before us upon a writ of error, and presents only such questions as arise under the exceptions and are stated in the assignment of errors. This contempt proceeding was distinct and separate from the original equity cause. It arose upon a petition for contempt in which the petitioners stated facts sufficient to bring before the court both the civil and criminal elements of contempt, and in which the aid of the court was invoked, both to compensate the complainant and also to vindicate its authority. The case clearly shows that the defendant had a fair and full trial on the question of criminal contempt. At the special request of the defendant himself, the Circuit Court ruled that:

"This proceeding is a criminal proceeding, reviewable in error; and the rule of evidence as to the proof of the offense beyond a reasonable doubt, including the element of criminal contempt, is applicable."

This ruling gave the defendant the clear, specific safeguard of a trial upon a criminal charge. There was a common understanding of all parties that he was having such trial. He has had his day in court at a hearing in which the criminal element dominated the proceeding; and he himself admits that he has been tried and sentenced upon a criminal proceeding, where the rule of evidence as to the proof of the offense beyond a reasonable doubt was made to apply. It is not, then, necessary to critically consider the forms of the proceeding, to find out that the defendant had the proper protection to which he was entitled in a case where a criminal charge was made against him. It is true that in the case at bar many of the different forms were present which in the Gompers Case induced the Supreme Court to hold that proceeding to be solely a civil one; but the court was pro-

viding for the ample protection of the citizen where a criminal charge is made against him. It was not undertaking to enumerate the different things which must be present in order to make a criminal proceeding. The case now before us was, in its dominant element, confessedly and unquestionably a criminal proceeding. We are not obliged to examine the mere forms, to find its character.

In our opinion the sentence of 10 days imprisonment was properly and lawfully imposed.

4. Was it error for the Circuit Court to pass upon both the punitive and remedial elements in one proceeding?

The Circuit Court imposed a punitive sentence. By its ruling it allowed the criminal element to dominate the proceeding. It also made an award of compensation for the complainant. Of this latter action the defendant complains, and says that it was error for the court to take such action. We have already discussed the award of compensation, standing by itself, and have found it to be free from error. It is our duty now to briefly consider the question presented by the Circuit Court having taken action upon both the punitive and civil aspects of the case in one proceeding, although there may be doubt whether this question fairly arises upon this writ of error.

In discussing the action of the court upon the criminal side we have found that the mutual understanding of the parties was of great and, perhaps, determining force. Here again, upon the remedial side, the understanding of the parties is of great moment. The record shows that, while the defendant requested the court to rule that the case was a criminal one, the defendant also requested rulings which pertained simply and only to the civil side of the case. It appears then that both parties assumed that, while the civil rights of the parties were involved, the court was asked to proceed further to vindicate its authority. The Circuit Court made its two awards, its compensatory award and its punitive award, in one proceeding. In doing so it followed the practice of the courts in this circuit and in other circuits. This practice had no less a sanction than that of Judge John Lowell, and of Judge Nelson in Hendryx v. Fitzpatrick (C. C.) 19 Fed. 810, 813, where the court in this circuit held that the process of contempt had two distinct functions, one criminal to punish disobedience, and the other civil and remedial; that in patent causes the practice has been to combine the two under a proper proceeding, and to order punishment if it is thought proper, and to indemnify the plaintiff if it is thought proper, or to do both if justice requires; that in patent causes it has been usual to embrace the public and the private remedy in one proceeding. This has been held to be the proper practice by Mr. Justice Miller in Re Chiles, 22 Wall. 157, 168, 22 L. Ed. 819.

In the Gompers Case the court has nowhere said that this practice of the several circuits in patent causes is improper or illegal. Under the principles announced in that case, it must, of course, appear in a cause in equity that, before imposing a sentence for criminal contempt, the court distinctly gave the defendant his day in court and allowed him a full and fair hearing upon a criminal charge. In that case the Supreme Court recognizes that the practice with reference

to contempt proceedings has been unsettled. It does not condemn the practice of the Circuit Court in the several circuits in equity causes in passing upon the punitive and civil aspect of the case in one proceeding. It does, however, hold with great force and clearness that a citizen should not be compelled to face a criminal charge without being fully advised that he is facing such charge. We do not find that the Supreme Court has ever said that any particular form of proceeding is required, providing the defendant is left in no doubt as to what charge is made against him. In the Gompers Case the court further points out that, in United States Revised Statutes, § 725 (U. S. Comp. St. 1901, p. 583), Congress has declared the power which already inhered in courts to punish contempts of their authority. It seems clear that by that statute the Congress did not undertake to limit the courts in the rights which they already possessed to act promptly and independently in any competent proceeding for the purpose of enforcing their judgments and punishing disobedience. The Supreme Court has long since taken the view that such statutes as the one in question are legislative assertions of this right of courts; that this right is incidental to the grant of judicial power, and could have been exercised without the aid of the statute; that such legislative grant of power can be considered either as an instance of abundant caution or a legislative declaration that the power of punishing for contempt shall not extend beyond its acknowledged limits of fine and imprisonment. Anderson v. Dunn, 6 Wheat. 204, 227, 5 L. Ed. 242; Bessette v. Conkey, 194 U. S. 327, 24 Sup. Ct. 665, 48 L. Ed. 997. In Re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, the Supreme Court further said that, where a court is proceeding in vindication of its authority, this element dominates the proceeding, and is reviewable by the Circuit Court of Appeals on writ of error. It is clear, then, that in a proceeding where both the remedial and punitive elements are brought before the court the criminal element must control. But in saying that the criminal element dominates the proceeding the Supreme Court does not say that such domination excludes the remedial element from being considered, or prevents a judge in a case like the one before us from vindicating the court's authority by punitive action, and at the same time applying remedial relief.

In the case at bar the Circuit Court gave the defendant a full hearing upon all the civil and remedial aspects of the case at the same time that it gave him a trial upon the charge for criminal contempt. The defendant fully understood that he was being tried upon the remedial aspects of the case as well as upon a criminal charge. He asked for rulings touching both aspects of the cause. There was no necessity for the Circuit Court to delay the administration of justice by dividing the two elements, and insisting upon separate proceedings in each element. If there had been such necessity, the court might have proceeded with the remedial side of the case, and have then granted a motion to show cause at a further hearing why the defendant should not be tried upon the charge for criminal contempt. But in the proceeding before it the Circuit Court found that, upon a proper petition,

upon ample notice, and with a full understanding, the parties might properly be heard upon both elements, and it allowed the criminal element to dominate the proceeding. Under the principles of the Gompers Case, and under the prevailing practice of this Circuit, we find no error in the action of the Circuit Court.

The judgment of the Circuit Court is affirmed.

MODEL BOTTLING MACHINERY CO. v. ANHEUSER-BUSCH BREWING ASS'N.†

(Circuit Court of Appeals, Eighth Circuit. September 18, 1911.)

No. 2,831.

1. PATENTS (§ 328*)—ANTICIPATION—APPARATUS FOR PASTEURIZING BEER.
The Wagner patent, No. 607,304, for an apparatus for pasteurizing beer, which consists of endless chains having receptacles for conveying bottles of beer through a tank with compartments containing water of different temperatures, is void for anticipation by the apparatus of the Leach British patent, No. 5,065, of November 19, 1881, for curing fish, which employs the same mechanical combination for a similar purpose in an analogous act.

2. PATENTS (§ 61*)—ANTICIPATION—DATE OF APPLICATION FOR PATENT.
An application for a patent for a process cannot be considered, for the purpose of the question of anticipation, a continuation of a prior application for a patent for a machine for carrying out such process, which, although disclosing the process, did not claim it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 77; Dec. Dig. § 61.*]

3. PATENTS (§ 328*)—ANTICIPATION—PROCESS FOR PASTEURIZING BEER.
The Wagner patent, No. 768,550, for a process for pasteurizing beer, is void for anticipation by the Pindstofte German patent, No. 89,691, of December 9, 1896.

4. PATENTS (§ 72*)—ANTICIPATION—PROCESS.
It is not necessary, to constitute an anticipation of a process patent, that the two processes should be identical in all particulars; but it is sufficient if in general aspects they are the same, and the difference in minor matters is only such as would suggest itself to a person possessing ordinary skill in the art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86–91; Dec. Dig. § 72.*]

5. PATENTS (§ 64*)—ANTICIPATION—PROCESS.
A patent for a process may be anticipated by a prior patent for a machine which fully discloses such process.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 64.*]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Suit in equity by the Model Bottling Machinery Company against the Anheuser-Busch Brewing Association. Decree for defendant, and complainant appeals. Affirmed.

Hugh K. Wagner, for appellant.

George H. Knight and C. C. Linthicum (Howard G. Cook and Nagel & Kirby, on the brief), for appellee.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied December 11, 1911.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This action is based upon an alleged infringement by defendant of letters patent No. 607,304, pertaining to a mechanical apparatus for pasteurizing beer, and for the infringement of a process for pasteurizing beer covered by letters patent No. 768,550; said patents issued to E. Wagner, and complainant being assignee of the patents. Patent No. 607,304 was issued July 12, 1898. The claims in this patent are as follows:

"1. In an apparatus of the character described, the combination of a tank, a pair of endless chains, sprocket-wheels in engagement with which said chains are adapted to travel, bottle-receiving receptacles pivoted to said chains, and means for driving said chains, substantially as described.

"2. In an apparatus of the character described, the combination of a tank, a pair of endless chains, sprocket-wheels in engagement with which said chains are adapted to travel, bottle-receiving receptacles pivoted to said chains, said receptacles comprising U-shaped bars and cross-bars arranged on corresponding sides of said U-shaped bars, and means for driving said chains, substantially as described.

"3. In an apparatus of the character described, the combination of a tank, divided into three compartments for warm, hot, and cold water, a conveyer arranged to travel through said compartments, said conveyer comprising a pair of endless chains, and bottle-receiving receptacles pivoted to said chains, sprocket-wheels in engagement with which said chains are adapted to travel, means for driving said chains, and a spray-pipe arranged to direct a spray of water onto the bottles in the conveyer after they leave the hot-water compartment of said tank, substantially as described."

In the specifications it is stated that the apparatus is designed to pasteurize beer, by placing the bottles containing the beer into the bottle-receiving receptacles, thence carried continuously through the tank containing three compartments, the first of which contains warm water, the second compartment water of sufficient temperature to pasteurize the beer, the third containing cold water for the purpose of cooling the bottles. The patent is for an apparatus or machine to effectuate the pasteurizing process, and nothing more.

The first specification, the only one claimed to be infringed, is a combination of old and well-known devices, consisting of a tank, a pair of endless chains used in connection with sprocket-wheels, adapting said chains to travel, bottle-receiving receptacles pivoted to said chains, and means for driving said chains.

[1] One of the defenses interposed is that this patent is void because of prior anticipation. Numerous patents are cited and have been introduced in evidence to support such defense. We regard it, however, as unnecessary to review but one—British patent No. 5065, issued to one George Leach, under date of November 19, 1881.

The Leach apparatus, designed for the curing of fish, was a combination of the same mechanical elements as complainant's, namely, a tank divided into three compartments, a pair of endless chains in connection with sprocket-wheels by which said chains were moved, carrying receptacles attached to the chains, and means for driving the chains. The operation of Leach's apparatus was by placing the fish to be cured in the receiving receptacle attached to the chains, and

by the movement of the chains they were first immersed and cleansed in the first compartment in the tank, which contained water, then transferred to the second compartment, containing hot water, and from thence into the third compartment, containing oil.

We can perceive of no difference in the machine or apparatus of complainant and that of Leach, or in their operation, excepting that the receiving receptacle in Leach's is in form tubular, in which bottles would have to be placed horizontally, while in the complainant's apparatus the bottles can be placed perpendicularly. But such a change in form of the receptacle in these respects is one which would readily suggest itself to a person of ordinary mechanical skill.

The art of curing fish and pasteurizing beer to preserve it are analogous. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267. Hence complainant's apparatus for pasteurizing beer is but a double use of Leach's apparatus for curing fish. For such reason, the first claim of complainant's patent No. 607,304, alleged to be infringed, is void. Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 Sup. Ct. 83, 32 L. Ed. 390; Aron v. Manhattan Ry. Co. 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; Thomson-Houston Electric Co. v. Rahway Electric L. & P. Co. (C. C.) 95 Fed. 660; W. F. Burns Co. v. Mills, 143 Fed. 325, 74 C. C. A. 525; American Brake Shoe & Foundry Co. v. Railway Materials Co. (C. C.) 143 Fed. 540.

The process patent is also alleged to be void because of prior anticipation. In determining this defense it becomes important to ascertain the date from which complainant is entitled to have the application for such patent considered as having been first made, as the state of the prior art is to be considered from the date of the application. The chronological order in which applications were made for the several patents of complainant, and the proceedings connected therewith, in the Patent Office, appear to be as follows:

Application for patent No. 607,304 was filed January 3, 1898, and patent issued July 12, 1898. The application was entitled "For the Improvement in Beer Pasteurizing Apparatuses," and was for the machine or apparatus before considered. June 30, 1899, an application was filed in the Patent Office for an improvement to said machine and for the process of pasteurizing beer. This application was ordered divided by the Patent Office, and the application proceeded as one for an improvement in the machine mentioned, which resulted in a patent for such improvement being granted of date July 24, 1900. The date when the order of division was made does not appear, but on June 2, 1900, an application for the process patent was filed. After rejection was made by the examiner on the ground of anticipation, an appeal was taken from the examiner to the board of examiners, and from that board to the commissioner; each sustaining the decision of the examiner. An appeal was then taken to the Court of Appeals for the District of Columbia, which reversed the decision of the Commissioner and sustained the application; the process patent being thereafter issued under date of August 24, 1904.

[2] Complainant contends that it is entitled to have the application

for the process patent treated and held as a continuation of the application for the machine patent filed January 3, 1898, and its validity determined from the state of the art at that date. That one application for a patent may be a continuation of a prior application for the same thing under certain circumstances is unquestioned.

In Hayes-Young Tie Plate Co. v. St. Louis Transit Co. 137 Fed. 80, 70 C. C. A. 1, this court had for consideration the question as to when one application for a patent might be considered a continuation of a former application for the same thing. It was said:

"There is a wide difference between the abandonment of an invention and the abandonment of an application for it. An abandonment of an application is not necessarily an abandonment of the invention, and after the application has been abandoned a valid patent for the invention may nevertheless be secured upon a new application, provided the invention has not gone into public use or been upon sale for more than two years prior to the filing of the latter. In cases in which the first application has not been abandoned, subsequent applications and amendments constitute a continuance of the original proceeding, and the two years' public use or sale which may avoid the patent must be reckoned from the presentation of the first application, and not from the filing of subsequent applications or amendments [citing cases]. But the abandonment of an application destroys the continuity of the solicitation of the patent. After abandonment, a subsequent application institutes a new and independent proceeding, and the two years' public use or sale which may invalidate the patent issued upon it must be counted from the filing of the latter application [citing cases]."

The case before us does not involve the question of abandonment of the application filed January 3, 1898, for the reason, as before stated, that that application was for a machine pure and simple, and in no respect for the process. True it is that the process was disclosed in the specifications, but such is always required in machine applications. If, as stated in the foregoing case, the abandonment of an application destroys the continuity, and a subsequent application must be treated as a new and independent proceeding, how can it be said that there is any continuity between an application which did not make claim to the process, but only to the machine, and a subsequent application for the process.

Among the numerous cases cited by appellant in support of the claim of continuity, we find none where it has been held that, when a patent has been issued to a party for all he claimed in his application, the party may subsequently make a new application for a new patent upon omitted matters, and that such new application was a continuation of the first or original application, without surrendering the first patent and obtaining a reissue of the first for the unexpired term of the first patent, as provided in section 4916 of the Revised Statutes (Act July 8, 1870, c. 230, § 53, 16 Stat. 205 [U. S. Comp. St. 1901, p. 3393]).

In this case Wagner did not surrender the original patent and apply for a reissue for the unexpired period, but applied for and obtained an entirely new patent, the life and monopoly of which extended over a period of more than six years longer than the first patent. Patent No. 607,304 was a mechanical invention, the process one of art, and complainant could not, under an application for a reissue, have in-

cluded the process claim, as the machine and the process are separate inventions. Powder Co. v. Powder Works, 98 U. S. 126, 25 L. Ed. 77; Eachus v. Broomall, 115 U. S. 429, 6 Sup. Ct. 229, 29 L. Ed. 419. So the process patent cannot be held to be a continuation of the original application of January 3, 1898, but at best can only date from June 30, 1899. Therefore, in considering the validity of the process patent as having been anticipated, we shall consider the state of the art as it existed June 30, 1899.

[3] Under the provisions of section 4886 of the Revised Statutes, as amended in 1897 (Act March 3, 1897, c. 391, § 1, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382]), to entitle a party to a patent for a new invention or discovery in art, machine manufacture, or compound, etc., his application must be made within two years of any foreign patent or being described in any printed publication in this or any foreign country, or within two years from public use or sale in this country.

Among the various patents in evidence to establish anticipation are those of the Swiss, No. 11,321, of date October 10, 1895, to Gasquet, and the German patent, No. 89,691, of date December 9, 1896, to Pindstofte. In determining whether these patents may properly be said to anticipate Wagner's process, it becomes necessary to briefly consider the description and claims of each.

Wagner, in his specifications, stated:

"This invention relates to an improved process for pasteurizing beer, the object being to destroy the yeast molecules and germs contained in the beer, in order to prevent further fermentation, in a simple, cheap, and convenient manner."

"For the sake of convenience in describing the process, a drawing is filed herewith; it being understood, of course, that I do not limit myself to this form of apparatus for the practice of my improved process, but that the essential characteristics of said process are set forth in the claims."

The claims are stated as follows:

"1. The improved method of pasteurizing beer, consisting in continuously moving the receptacles containing the beer through a pasteurizing agent.

"2. The improved method of pasteurizing beer, consisting in continuously moving the receptacles containing the beer at a uniform speed through a pasteurizing agent.

"3. The improved method of pasteurizing beer, consisting in continuously moving the receptacles containing the beer through a preparatory heating medium, then continuously moving the same through a warming-chamber, then continuously moving the same through a pasteurizing agent, and then gradually cooling the same.

"4. The improved method of pasteurizing beer, consisting in continuously moving the receptacles containing the beer through a pasteurizing agent and then reducing the temperature thereof by cooling-currents falling thereon.

"5. The improved method of pasteurizing beer, consisting in continuously moving the receptacles containing the beer through a pasteurizing agent, and then reducing the temperature thereof by means of cooling-sprays.

"6. The herein-described process of pasteurizing beer, consisting of continuously moving the receptacles containing the beer through a warming medium, then continuously moving said receptacles through a pasteurizing agent, and then continuously moving said receptacles through cooling media."

Thus it would seem that Wagner's process consists in the continuous moving of the receptacles containing the bottles of beer through

a warming, pasteurizing, and cooling medium, the mode of so doing being any appropriate form of apparatus.

Gasquet's Swiss patent he described as:

"An apparatus serving for heating or cooling by the method of exchange of temperature of all liquids in bottles, in view of the pasteurizing of wines, beers, ciders, milk, vinegar, various syrups, as well as the betterment of brandies and liquors."

His process consisted of a vat containing compartments in which were placed the receptacles containing the liquors to be pasteurized, then subjecting them to the effect of warming, pasteurizing, and cooling water, which was caused to flow alternately through the vat; the only substantial difference between the two processes being that in Wagner's the water was statia in the compartment, and the receptacles moved continuously through it, while in Gasquet's the receptacles were at rest and the water flowed through the vats. The evidence shows that by Wagner's process the movement of the receptacles containing the bottles was at the rate of one foot every two minutes, and it was not thought by the Patent Office that such slow movement had any material effect in the uniformity of the pasteurizing action, but that was "due to the uniform heating of all portions of the bath before the carrier mechanism was brought into operation."

The Court of Appeals thought otherwise, saying:

"Disregarding elaborate description of either process, we find the Gasquet process to involve the moving of heated water around stationary bottles containing the liquor to be pasteurized, while in the process of the present application the heated water is stationary and the bottles containing the liquor are moved through it. This to our mind very greatly differentiates the two processes. * * * The effect of heat in moving water is different from that of stationary water; and the results in one case are shown to be different from those in the other. Heat is evolved in both cases; but the heat in one case may be better conserved, as well as made more effective, than in the other."

While the decision of the Court of Appeals is not conclusive as to the validity of the patent in this action (Rev. Stat. § 4914 [U. S. Comp. St. 1901, p. 3392]; Butterworth v. Hoe, 112 U. S. 50–60, 5 Sup. Ct. 25, 28 L. Ed. 656; U. S. v. Duell, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 559), and the question as to whether the Wagner process was anticipated by that of Gasquet is open for our consideration, we regard it unnecessary so to do, in view of the process shown in the German patent to Pindstofte. The latter, not then being in evidence, was not considered by the Court of Appeals. Pindstofte's apparatus he describes as a water bath, containing three spaces, "whose length sides carry rails for the wheels on whose shafts there are suspended the baskets. Into these baskets the goods are placed that are to be pasteurized, and the baskets are introduced into the water bath." After being introduced into the bath, the baskets move slowly along the rails through the bath. His claim is as follows:

"A pasteurizing apparatus, consisting of a receiver serving to take up a water bath, which is divided into spaces *(A, B, C)* following each other in series and connected with each other, in which case the middle part *(C)* of the water bath is heated to the desired maximum temperature, while the part *(A)* into which the not yet heated goods are set is cooled and the part lying

at the delivery end *(B)* is kept cooled by this, that cold air is fed to the bath, and in which case the goods to be pasteurized pass slowly through the water bath from one end to the other of the apparatus, in such manner, that they are gradually heated to the temperature necessary for pasteurization and thereupon are cooled off in a similar manner."

Thus it is shown that Pindstofte's process is identical with that of Wagner; the only observable difference being that Wagner describes the movement of the receptacles containing the beer as "continuous," while Pindstofte describes the movement of the receivers by his process as passing slowly through the water bath from one end to the other.

[4] It is, however, insisted upon the part of complainant that this difference is material; that slowly passing through the water bath does not imply a continuous movement. Be that as it may, it is not necessary, in determining the question of anticipation, that the process should be identical in all particulars. It is sufficient if in general aspects the two processes are the same and the difference in minor matters is only such as would suggest themselves to a person possessing ordinary skill in the art. We have no doubt that a process whereby the thing to be pasteurized slowly passed through the agency would be very suggestive of a continuous movement.

[5] But it is said that these patents to Gasquet and Pindstofte were machine patents, and, being such, are impertinent as evidence of anticipation. A full and complete answer to this is that, though these patents were each for an apparatus, they fully disclosed the process, and upon the issue of the patents such process was published.

The decree is affirmed.

INDIANA MFG. CO. v. NICHOLS & SHEPARD CO.

(Circuit Court, E. D. Michigan, S. D. November 14, 1910. On Exceptions to Answer and Motion to Strike out Cross-Bill, May 26, 1911.)

1. PATENTS (§ 212*)—RIGHTS OF LICENSEE—SALE IN VIOLATION OF CONDITIONS.

Where a licensee under a patent entitling him to use a patented machine under certain conditions only, undertakes to use the machine otherwise than in conformity with such conditions, he loses the protection of his license, and is liable as an infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 312–314; Dec. Dig. § 212.*]

2. PATENTS (§ 211*)—LICENSE—CONDITIONS.

Where a license, authorizing defendant to use certain patents, provided that defendant should maintain specified prices and should place certain trade-mark plates on each machine containing any of the patented improvements, that it should also make reports of sales and pay money for royalties, the provisions as to the maintenance of prices and the application of trade-marks operated as conditions to defendant's right to use the patent, though not so as to the provisions for reports of sales and for payment of royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304–311; Dec. Dig. § 211.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 209*)—LICENSES—VALIDITY—CONDITIONS—PRICE RESTRICTION.
A price restriction in a patent license is a valid condition.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 209.*]

4. SPECIFIC PERFORMANCE (§ 71*)—PATENT LICENSE—CONDITIONS.
Where a license to manufacture and use patents in the construction of certain machines, contained conditions that certain sets of labels, furnished by the licensor, and embodying his trade-mark, should be affixed to every machine made under the license, and that the licensee should maintain a specified schedule of prices, such covenants were affirmative in character and proper subjects of a bill for specific performance.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 204; Dec. Dig. § 71.*]

5. PATENTS (§ 212*)—LICENSES—VIOLATION—ELECTION OF REMEDIES.
Where a patent licensor conceives that the licensee is operating outside the agreed field, the licensor may elect to disregard the license and sue for infringement, or, if he can show that he has no sufficient legal remedy, he may sue in equity for specific performance.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 312–314; Dec. Dig. § 212.*]

6. COURTS (§§ 290, 307*)—FEDERAL COURTS—JURISDICTION.
A bill for infringement of a patent presents a controversy under the laws of the United States within the jurisdiction of the federal courts, regardless of citizenship, while a bill for specific performance of a patent license can only be maintained in a federal court in case the requisite diversity of citizenship appears.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 832, 850–854; Dec. Dig. §§ 290, 307.*
Jurisdiction of federal courts, in suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

7. PATENTS (§ 129*)—LICENSE—ESTOPPEL.
Where a patentee licenses the use of the invention, the patentee may not deny the licensee's right to act under the patent, nor may the licensee dispute the validity of the patent within the scope of the license, but the patentee cannot sue the licensee for infringement on the ground that he is operating outside the conditions of the license and at the same time claim that the licensee, by reason of the license, is estopped to dispute the validity or effect of the patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. § 129.*]

8. SPECIFIC PERFORMANCE (§ 5*)—PATENT LICENSE—ADEQUATE REMEDY AT LAW.
Where a license to embody patents in certain machines provided that the licensee should maintain a specified schedule of prices and that none of the machines containing the inventions should go into the market unless branded with the patentee's trade-marks, etc., the patentee had no adequate remedy at law for a violation of such conditions, and was therefore entitled to sue for specific performance.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*]

9. SPECIFIC PERFORMANCE (§ 5*)—ADEQUATE REMEDY—DAMAGES—PENALTY.
A license to use patents in certain machines contained conditions as to the manner of use, and declared that, on the licensee's failure to attach the patentee's labels to machines containing the inventions, it should pay the licensor $100 as liquidated damages "now estimated, determined, and agreed upon." *Held*, that such clause provided for a penalty and not for liquidated damages, and that its presence in the contract did not conclu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sively establish that the patentee had an adequate remedy at law sufficient to preclude specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*]

On Exceptions to Answer and Motion to Strike Cross-Bill.

10. EQUITY (§ 249*)—ANSWER UNDER OATH—WAIVER—EXCEPTIONS.
Exceptions for insufficiency will not lie to an answer to a bill which is not essentially one for discovery, and which expressly waives an answer under oath.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 521; Dec. Dig. § 249.*]

11. EQUITY (§ 140*)—DISCOVERY—ANSWER UNDER OATH—WAIVER.
Where a bill was not essentially one for discovery and expressly waived answer under oath, complainant was not entitled to have defendant answer under oath a list of interrogatories attached to the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 317, 318; Dec. Dig. § 140.*]

12. EQUITY (§ 198*)—CROSS-BILL—LEAVE.
A cross-bill in equity cannot properly be filed without leave of court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 460–462; Dec. Dig. § 198.*]

13. EQUITY (§ 197*)—CROSS-BILL—ACCOUNTING.
Where, in a suit in the nature of a bill for specific performance, complainant prayed for an accounting under a patent license, defendant was not for that reason precluded from filing a cross-bill against complainant for an accounting of matters arising out of the contract in order to save such right in case complainant elected to dismiss before hearing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 455–459; Dec. Dig. § 197.*]

In Equity. Bill by the Indiana Manufacturing Company against the Nichols & Shepard Company. On demurrer to complaint, on exceptions to answer, and on motion to strike out cross-bill. Demurrer to complaint, and exceptions to answer overruled. Motion to dismiss cross-bill denied.

The defendant demurs to a bill of complaint which seeks to enforce rights dependent on or connected with a "license and agreement" of June 10, 1902, between complainant, as licensor and the defendant as licensee. This agreement recited that the licensor was the owner of various letters patent pertaining to pneumatic stackers, and that among such letters patent are those enumerated in a list of patents, identifying by number and date, fifty-five such patents, with issue dates running from 1892 to 1901. It also recites that the licensor "by means of exclusive license contracts, and otherwise, controls various other inventions and improvements." Thereupon, a license, not exclusive, was granted to the licensee under any and all the patents, such license being upon the conditions that a license fee be paid upon each machine embodying any of the inventions; that settlements of accounts would be rendered and made at stated periods; that certain sets of labels be furnished by the licensor, each set "composed of one label bearing a list of patent dates and two medallions embodying the trade-mark of" the licensor to be affixed to every machine made under the license, it being recited that this requirement is "one of the conditions of granting the license"; that for each failure so to attach such labels to any machine embodying any such inventions the licensee should pay to the licensor "the sum of one hundred dollars as liquidated damages now estimated, determined and agreed upon"; that the schedule of selling prices should be maintained; that the licensee should

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have the right to use all improvements made or required hereafter by the licensor, and that all the terms and conditions of this agreement should apply to all such newly obtained or acquired patents and inventions; that the licensee should be entitled to as favorable terms as may be accorded to any other licensee; and that the agreement should continue to the end of the term of each patent owned by the licensor.

The bill is, in its general frame, a patent infringement bill, but also sets up at length the license agreement, and alleges that defendant, after continuing under and recognizing the agreement for some years, is now refusing to recognize it, and although manufacturing the identical machine which it manufactured under the license, is declining to pay license fees, attach the agreed labels, or otherwise recognize the agreement.

The main grounds of demurrer are that the validity of and title to the patents are not sufficiently averred for an infringement bill; that the contract is not such a one as a court of equity can enforce, and that complainant has a complete and adequate remedy at law. In this connection, it appears that substantially the same contract was involved in the cases reported in Indiana Mfg. Co. v. Case Mach. Co. (C. C.) 148 Fed. 21, and Id. 154 Fed. 365, 83 C. C. A. 343, but that the patents which were in those decisions chiefly considered have now expired.

Harold A. Taylor and C. C. Linthicum, for complainant.
Williams & Lewis and Parkinson & Lane, for defendant.

DENISON, District Judge (sitting by designation, after stating the facts as above). [1] Whatever doubts may have been suggested by the Supreme Court (Cortelyou v. Johnson, 207 U. S. 200, 28 Sup. Ct. 105, 52 L. Ed. 167; Bobbs-Merrill Co. v. Straus, 210 U. S. 345, 28 Sup. Ct. 722, 52 L. Ed. 1086) or intimated in the Second Circuit (by the action of the Court of Appeals [1] on the appeal from Crown Cork & Seal Co. v. Stopper Co. [C. C.] 172 Fed. 225), it is undoubtedly the established rule of patent law in this circuit that when a licensee, who is entitled to use a patented machine under certain conditions only, undertakes to use the machine otherwise than in conformity with those conditions, he loses the protection of his license and he becomes an infringer (Button Fastener Cases, 77 Fed. 294, 25 C. C. A. 267, 35 L. R. A. 728; Rupp & Wittgenfeld Co. v. Elliott, 131 Fed. 730, 65 C. C. A. 544). The principle seems to be that the license is limited in its operation, and that, since in the case of a territorial limit the license has no existence in the exempted territory, so in case of other limitations the license has no existence in the exempted field.

I see no distinction in principle between the decided cases in this circuit and the present case, in so far as concerns the nature of the limitation placed upon the license. It cannot be controlling whether or not the license uses the word "condition"; and if that word is used, the exact and technical, grammatical construction of the sentence in which it is found will not settle the question whether it refers to a condition precedent or condition subsequent.

[2] The substantial intent of this contract was that the condition should be one accompanying the exercise of the rights granted by the license, and that unless such exercise was accompanied by the performance of such condition, the exercise itself was not to be permitted. Obviously this comment does not apply to the agreements to make reports and to pay money—things which cannot be done until after the sale is made, and, therefore, cannot be steps upon which the right to

[1] 175 Fed. 1019, 99 C. C. A. 664.

sell is dependent; but does have reference to the trade-mark and price restriction provisions.

[3] The price restriction, as a license condition, has been often sustained, but does not seem to be counted upon in this bill; and a condition that the license shall not attach to any machines except those of a certain quality of material or those painted a certain color or those bearing certain distinguishing marks would seem to be well within the patentee's right of total exclusion. I think, therefore, that the bill states a case of infringement of the patents or of some of them; but it seems clear that it cannot be sustained as merely an infringement bill; and this for the reason that it omits several allegations bearing upon the validity of and the title to the patents, which allegations are well understood to be essential to such a bill.

[4] The bill also has the aspect of one for specific performance. Although Judge Baker, in Indiana Mfg. Co. v. Case Mfg. Co., 154 Fed. 366, 83 C. C. A. 343, said that a similar bill was not one for specific performance, I doubt whether this passing remark was carefully considered. The bill states a contract between complainant and defendant that, if defendant manufactured and sold certain machines, it would do so only upon certain conditions, and it would not violate those conditions. This may be considered as an affirmative covenant by defendant that, if the subject-matter thereafter comes into concrete existence, the defendant will observe and keep certain promises and agreements, or it may be considered, from the negative standpoint, as a negative agreement that defendant will not, under any circumstances which may arise, do certain things. In either aspect, it is distinctly within the recognized definition of bills for specific performance, and comes within that head of equity jurisdiction. Pomeroy's Equitable Remedies, §§ 271, 288. A covenant not to maintain, on granted real estate, any building in which liquor is sold is a familiar example of this class of contract. The grantee cannot be compelled to maintain any building at all, but, if he does, then this agreement not to sell liquor can be specifically enforced by injunction. If, then, we adopt this name for this bill, there remains, on that subject, only the question always presented by a bill for specific performance, viz., is there no adequate remedy at law?

[5] I do not understand that an insufficient bill, for the infringement of a patent, can be united with a bill of complaint good under some other ground of equity jurisdiction, and so become itself sufficient as an infringement bill. I think the patent lessor who conceives that the lessee is operating outside of the agreed field has his election. He may disregard the license and proceed as for infringement; or he may, if he can show that he has no sufficient legal remedy, demand from a court of equity a decree for specific performance. He cannot do both, because the two are distinctly inconsistent.

[6] One bill would present a controversy under the laws of the United States, and this court would have jurisdiction regardless of citizenship; the other would show no jurisdiction, unless on the ground of citizenship. One would not be dependent in any degree upon the existence of the license; the other would depend wholly upon such license.

The rule announced in the first Button Fastener Case was merely what was thought to be the necessary, logical application of the then well-established territorial rule; and we may well treat the present question by analogy to that territorial rule. If the complainant had licensed defendant to manufacture and sell machines in Indiana, but not elsewhere, and had then learned that the defendant was manufacturing and selling in Michigan, it might, and probably would, file an ordinary, plain infringement bill. Such a license could not then be urged by defendant as any defense, because it would not be pertinent to the act complained of; and so it would seem that, in such a bill, complainant could take nothing whatever from the existence of the license. It would be substantially accurate to say that the license did not exist in Michigan.

[7] The estoppel must be mutual. The licensee may not deny the patentee's title to the monopoly; the patentee may not deny the licensee's right to act under that monopoly. It is difficult to see how, when the act involved is the manufacture of a certain machine, at a specified place or in a specified way, and both complainant and defendant agree that there is no contract in existence permitting the act in controversy, either party can be estopped by a contract relating to something else.

We may apply, further, by analogy, the rule of landlord and tenant, which is the basis of estoppel by a patent licensee. If the landlord claims title to lots 1, 2, and 3, and leases to the tenant lots 1 and 2, and the tenant then undertakes to occupy lot 3, the lease would not be a bar to ejectment by the landlord for lot 3, nor would the lessee be estopped to deny the landlord's title to lot 3. It seems to me quite clear that the complaining patentee cannot, at the same time, maintain the position that the act of the defendant licensee, manufacturing what is said to be the patented article, is outside the conditions of the license, and, therefore, not authorized by the license, and also the position that his title to the monopoly is conceded by the license and, therefore, cannot be disputed. The Button Fastener Cases in this circuit were, in form, complete and perfect infringement bills, alleging everything necessary in such a bill, and proceeding upon the theory that the act of the defendants was contributory infringement. The allegations regarding the existing license system and its conditions and the transgression of those conditions were necessary in describing and making out the act of infringement, but they did not transform the infringement bill, pure and simple, into anything else. So far as I can judge from the reports, all the other cited cases of this class were of the same character.

[8] There remains the question whether the bill, considered as one for specific performance, is good; and, after what has been said, this depends upon whether there is an adequate remedy at law. The remedy at law is clear, and is, I think, adequate, so far as concerns the nonpayment of royalties (Washburn, etc., Co. v. Cincinnati Wire Co., (C. C.) 42 Fed. 675) and very probably so far as concerns the nonmaking of reports; but it seems to me otherwise as to the covenant to mark the machines with a distinguishing trade-mark. Complainant insisted that no machines, embodying any one of its patents, should go

on the market unless they were branded accordingly, and thus their merits would serve to advertise and enhance the public estimation of complainant's patents and complainant's general license system. The right to have this agreement carried out may be a very valuable right, as alleged, and it is not easy to see how, as a primary question, its breach could be adequately measured in damages. Like all contracts pertaining to good will, it is impossible to formulate any sure measure of damages; but such an agreement can be enforced, indirectly, by injunction, or, perhaps directly, by affixing the marks under the supervision of the court. Concluding, as I do, that the injury alleged is irreparable in damages, it is not necessary to inquire whether the bill shows equity jurisdiction on the ground of avoiding multiplicity of suits, other than those to collect royalties.

[9] We come, then, to the secondary question whether, if there otherwise had been no adequate remedy, such remedy is given by the penalty clause. I do not think it is. This clause seems to me obviously a penalty only, in spite of the form in which it is clothed. It provides for the same amount under all circumstances, whether for the omission of one, two, or three of the prescribed marks, and even in a case where the full object of the marking might be accomplished in some other way. It is doubtful whether this provision would be enforced by any court of law or equity, and it seems to me it does not constitute an adequate legal remedy. Defendant suggests that the patent mark label cannot be applied as required because it states untruths regarding the patents embodied in the machines. If so, this is an additional reason why the penalty clause remedy is not adequate. The defendant would not be, by law, permitted to attach one of the three labels, and yet its absence would call for the full penalty. I conclude that the demurrer, so far as it is directed against the bill as one for infringement merely, should be sustained, and should, otherwise, be overruled. It is true that in one sense the issue of infringement is fully presented by the specific performance aspect of the bill, because it may be necessary for the court to determine whether defendant's structures do or do not "embody any of the above-mentioned inventions or improvements"; but the necessity of determining this question does not classify the bill as one for infringement. Such questions are frequently passed upon by state courts in accounting proceedings under licenses, and even if they do not involve the construction of the patent far enough to raise a federal question, still, in this case, there is ample jurisdiction by diverse citizenship.

The clauses of the demurrer, challenging the validity of the license contract upon the grounds of public policy, have not been considered because their consideration was, upon the argument, postponed until final hearing; and so far as these same clauses raise the question of equity jurisdiction, are distinguished from the question of validity, I do not think the allegations of the bill make a case obnoxious to the rule of Pope Mfg. Co. v. Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. Ed. 414.

On Exceptions to Answer and Motion to Strike Out Cross-Bill.

Complainant files 29 exceptions. They can be sufficiently considered in groups.

[10] The exceptions for insufficiency must be overruled. The bill is not, essentially, one for discovery, and it expressly waives answer under oath. It is the settled rule that exceptions for insufficiency will not lie to an answer to such a bill: McFarlane v. State Savings Bank (C. C.) 132 Fed. 399. Judge Hunt's statements and conclusions are in accordance with what has always been my understanding of the equity practice.

[11] In spite of the general waiver of oath, complainant attached to the bill a list of interrogatories which it demanded should be answered specifically under the oath of an officer of the defendant corporation. It seems doubtful whether such an oath could ever be demanded, and in the absence of an effective demand for answer under oath, the general rule above stated would apply to these interrogatories as well, and exceptions for failure to answer the same would not be good. However that may be, I think these exceptions must be overruled on broader grounds. The amendment to General Equity Rule 41, on which complainant depends to support this practice, was adopted 40 years ago, and in the particular in which it seems to permit a general waiver of oath and yet a demand for oath in the answer to special interrogatories, it was an attempt to provide for the situation which would arise from the then recent statute making a party a competent witness. The full effect of this statute, in the substantial abolishing of bills of discovery, was not then understood. I do not find cases in which this portion of this amendment has been applied, and I have never been familiar with its application in the way now sought. Such practice has never, to my knowledge, existed in this district, but the general rule that waiver of oath invalidated exceptions for insufficiency has been frequently applied. It is to be presumed, from the existence of this clause of this rule, that there are cases to which it may apply; but in the present case, the interrogatories either propounded questions which the defendant, in advance of an interlocutory decree for complainant, ought not to answer, or else propounded, in another form, the same issues which had been tendered by the general body of the bill to which answer under oath has been waived. Whatever might be the rule in some cases, I am satisfied that, under these circumstances, exceptions for failure to answer the interrogatories to which sworn answer was requested, should not be sustained.

Other exceptions are upon special grounds of alleged impertinence and irrelevance, with reference to what may be classed as minor detail. The exceptions of this class should be overruled, either because the matter involved is not important enough to justify the machinery of exceptions for its elimination, or because its impropriety is not clear enough to support excluding it from the pleadings in this preliminary way.

What appeal to me as the important exceptions, raise, in one form or another, one of the underlying questions—perhaps the main one—

in the case. This, as has been decided, is not a bill for infringement, but one in analogy to, if not in very form, a bill for specific performance. The license contract purports to rest upon and grant licenses under patents which defendant now classifies as (1) one or more primary patents; (2) a large number of secondary patents of narrow scope and little or no validity, and covering details, many of which were never used by any one; (3) an indefinite mass of future and unknown patents which might be acquired, and inventions which might be made. If I understand defendant's substantial position, it is that so far as the contract was one under the primary patents (but which have now expired), it was valid under the patent law, and is so recognized by defendant, but that so far as the contract pertains to the second and third classes above cited, or, in other words, after the expiration of the primary patents, the contract was invalid as amounting to a subterfuge to evade the anti-trust law; and that, in any event, defendant can show that its product is not within any of these two later classes of patents, and, therefore, may show the scope of such patents.

I do not think the questions presented along these lines should be decided on exception. The scope and bearing of the questions can be more safely determined from the proofs than from uncertain and arbitrary constructions to be placed upon the language of the pleader. I am not willing to say, now, that the proffered issues of scope and even of validity may not have a bearing either on what structures the contract covers or on the intent to make in good faith a contract permitted by the patent law rather than one prohibited by the anti-trust law. Every question suggested can be, without prejudice, saved for final hearing; and, while so doing may lead to the taking of some testimony which would not be taken if these exceptions were sustained, yet that is a less evil than if the case were eventually to be sent back by the Court of Appeals for further testimony because exceptions had been erroneously sustained.

The validity, or applicability, of the Indiana statute, pleaded by defendant (requiring the record of certain patent contracts), is challenged by some of the exceptions. So far as I now see, this question is presented by the pleadings as perfectly as it will be on final hearing, yet it is not impossible that the circumstances attending the execution of the contract, and the system of contracts to which it may appear to belong, may have some bearing on whether it comes within the lawful scope of the Indiana statute. A decision, now, on this point, either way, could not finally dispose of the case, and passing the question until final hearing will tend to simplicity in the ultimate result.

There are also exceptions to the alleged defense that complainant has fraudulently violated the "better terms" provision of the license. I think the terms of the answer are sufficient to support proofs of the transactions complained of. Whether they make out a good defense or counterclaim can then be determined.

It may be that some of the exceptions do not clearly fall into any of the groups which have been mentioned, but I think they are all suffi-

ciently covered by what has been said; and they will all be overruled. I see no occasion for encouraging the practice of exceptions. It often leads us, as in this case, into a maze of refinements of pleading, that serves, generally, no good purpose; although there are cases where an issue tendered is so clearly and certainly foreign that it should be stricken out on exceptions.

[12] The cross-bill was filed without leave, and is irregular in that respect; but an order may now be entered granting, nunc pro tunc, leave to file the same.

[13] The substantial criticism on the cross-bill is that it claims an accounting and a balance of indebtedness against the complainant in the matter of the contract involved; and it is said that, without the cross-bill, the accounting prayed for by complainant will give to the defendant this same relief, and so the cross-bill should not be maintained.

It may be that in the accounting to be had under the bill there could be an affirmative decree in favor of the defendant (though this seems contrary to the familiar rule); but there would be nothing to prevent the complainant from dismissing the bill at any time before the case was brought on for hearing. In such a situation, the defendant has a right to file a cross-bill for the sake of holding on to the case, in order to obtain such affirmative relief.

The motion to dismiss the cross-bill will be denied.

VANDERBILT v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court, D. New Jersey. June 30, 1911.)

1. PATENTS (§ 328*)—INVENTION—TANK CAR.
The Vanderbilt patent, No. 678,597, for a tank car, claim 54, which covers a tank car having a running board along the top of the tank, with a stair leading from such board to the platform of the car, is void for lack of patentable invention.

2. PATENTS (§ 328*)—INVENTION—TANK CAR.
The Vanderbilt patent, No. 747,278, for a tank car, claims 1, 2, 3, 12, 13, 14, 15, 18, 19, and 20 are void for lack of patentable invention; also *held* not infringed if conceded invention.

In Equity. Suit by Cornelius Vanderbilt against the American Car & Foundry Company. On final hearing. Decree for defendant.

Betts, Sheffield, Bentley & Betts, for complainant.
Charles J. Hardy and F. H. Gibbs, for defendant.

BRADFORD, District Judge. [1] This is a bill for an injunction and account brought by Cornelius Vanderbilt against the American Car & Foundry Company. The complainant who is the owner and holder of and patentee in three United States patents, No. 678,597, dated July 16, 1901, and Nos. 747,278 and 747,279, both dated December 15, 1903, originally charged the defendant with infringement of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all the above patents. The charge of infringement has since been restricted to patents Nos. 678,597 and 747,278, and with respect to these two patents the charge is pressed only as to claim 54 of No. 678,597 and claims 1, 3, 12, 13, 14, 15, 18, 19 and 20 of No. 747,278. In the description of No. 678,597 the patentee states:

"My invention has relation to the construction of cars adapted to carry tanks for the transportation of oil, grain, coal, or the like, although many of the improvements hereinafter recited can be advantageously employed in cars used for other purposes. My improvements having been applied to a car especially adapted for the transportation of oil or grain and technically termed a 'tank-car,' the description of the same will be had in connection with a car of this class."

After referring to a running-board located on top of the tank the description proceeds:

"In order to allow of ready access to the running-board, I have provided a stairway of suitable construction leading from the running-board extension 6 to the platform 59 below, the stairway taking the form of a ladder 137, comprising parallel side bars 138, and connecting-rungs 139, all preferably made of strap-iron, the upper ends of the side bars being bent at 140 and secured to the running-board, as shown in Fig. 3, the lower ends being likewise disposed and riveted to the platform, as shown at 141, Fig. 5."

Claim 54 is as follows:

"54. A car having a frame and an end platform, a tank on the frame between the platform's ends, a running-board on top of the tank having a ledge projecting over the platform, and a stair leading from the platform to said ledge."

The stairway or ladder is shown in several of the drawings of the patent including Figs. 1, 2 and 5. I do not find a vestige of invention in the combination of claim 54 and cannot conceive why it was allowed by the patent office in view of the prior art as disclosed in the record.

[2] Patent No. 747,278 relates to alleged "Improvements in Tank-Car and Metallic-Car Construction." In the description the patentee says:

"My invention has reference to the improvements in the construction of railroad-cars, and more specifically to that class of cars wherein a cylindrical (or other appropriately-formed) tank is employed for the transportation of oil, grain, etc., which improvements may also have beneficial application to railroad-car construction wherein the cars are employed for other purposes and which may be in whole or in part built up of metal. The object of my invention is to provide a structure having a maximum of carrying capacity and strength with a minimum amount of weight in the volume of material utilized; and to this end I have in devising the structure hereinafter described paid special reference to its organization, to the end that commercial forms of iron may be largely, if not wholly, employed."

The claims in issue are as follows:

"1. In a tank-car, the combination with a frame comprising the juxtaposed and continuous longitudinal sills, cross-sills secured to the longitudinal sills at their ends, the curved and upwardly-extending body-bolsters secured to the longitudinal sills adjacent the end sills and extending beyond the longitudinal sills, and a tank or body secured to the body-bolsters.

3. A car comprising a tank, a frame consisting of a plurality of closely-juxtaposed longitudinal sills, end sills connecting the longitudinal sills, and bolsters secured to the longitudinal sills through which the latter extend,

the bolsters extending outwardly from the longitudinal sills and constituting cradles for receiving the tank, and means for tying the extended end of the bolster and end sills together.

12. In a tank-car, the combination with the end sills, the central longitudinal sills secured to the end sills, bolsters through which the longitudinal sills extend, the bolsters extending outwardly from the longitudinal sills, and a circular tank, the upper section of the bolsters being disposed concentrically with the tank to receive the same, the end sills and bolster extensions being secured together outside of the longitudinal sills.

13. In a car-frame, the combination with the longitudinal sills, of the bolster comprising a base or bed member, and an interposed chair forming a support for said sills, vertical plates secured to the said base member and to the sills, and segmental cradle-pieces secured to the upper edges of the bolsters.

14. In a tank-car, the combination with the tank, of the sills, a sill-chair, a bolster comprising a bed-plate, plates or wings extending upwardly therefrom, and lateral extensions from the upper edges of said plates overlapping said edges, and receiving the tank.

15. In a tank-car the combination with the tank, of the sills, a sill-chair, a bolster comprising a bed-plate, plates or wings extending upwardly therefrom, the upper edges of which are downwardly curved, and downwardly-curved lateral enlargements secured to the curved edges of said plates or wings, the tank being secured to the said enlargements.

18. In a tank-car, the combination with the tank, the longitudinal sills, a sill-chair, and a bolster comprising a base-plate, vertically-disposed wings having laterally-disposed flanges, segmental cradle-pieces secured to the wings, and the tank being secured to the said cradle-pieces.

19. In a tank-car, the combination of the bolster comprising the base-plate having the central flat portion and upwardly-inclined extensions therefrom, the vertical plates secured to the sides of the base-plate, segmental cradle-pieces secured to the upper edges of the vertical plates, the central sills secured to the said plates over the central flat portion of the base-plate, and a tank secured to said cradle-pieces.

20. In a tank-car, the combination with the sills, of the bolster comprising the base-plate having a central flat portion and outwardly and upwardly inclined ends, vertical plates or wings secured to said inclined ends, the segmental cradle-pieces secured to the upper edges of said wings, and a tank secured to the said cradle-pieces."

Illness and other circumstances wholly beyond my control have rendered impossible any present elaboration of opinion touching these claims, and I shall, therefore, confine myself to a statement of conclusions reached. In my judgment all of the above claims are invalid for want of patentable novelty, invention or utility; and further, even on the assumption that one or more of them can be sustained the defendant has not infringed it or them.

The bill must be dismissed with costs.

ATCHISON, T. & S. F. RY. CO. et al. v. INTERSTATE COMMERCE COMMISSION (UNITED STATES & A. H. FRUIT CO. et al., Interveners).

(Commerce Court. October 5, 1911.)

No. 7.

1. CARRIERS (§ 26*)—INTERSTATE COMMERCE—POWER OF COMMISSION TO FIX RATES—SCOPE.

The authority granted to the Interstate Commerce Commission by section 15 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), to prescribe just and reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable, is not an absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier, but its orders must be based on transportation considerations, and, while it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67–82; Dec. Dig. § 26.*]

2. CARRIERS (§ 26*)—ORDER OF INTERSTATE COMMERCE COMMISSION—VALIDITY—FIXING LEMON RATES FROM PACIFIC COAST.

The order of the Interstate Commerce Commission reducing the blanket rate charged by railroad companies for the carriage of lemons from California and other Pacific Coast points to points east of the Rocky Mountains from $1.15 to $1 per 100 pounds (19 Interst. Com. Comm. R. 148), is void as beyond the powers of the commission, because based primarily on the assumed authority to protect the lemon industry against foreign competition, and not on traffic considerations.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.*]

On petition of the Atchison, Topeka & Santa Fé Railway Company and others to enjoin enforcement of an order of the Interstate Commerce Commission, the United States & Arlington Heights Fruit Company and others, interveners. Injunction granted.

See, also, 182 Fed. 189.

For opinion and order of the Interstate Commerce Commission, see 19 Interst. Com. Comm. R. 148.

Robert Dunlap, C. W. Durbrow, and H. A. Scandrett (Gardiner Lathrop and T. J. Norton, on the brief), for petitioners.

Blackburn Esterline, Sp. Asst. Atty. Gen. (James A. Fowler, Asst. Atty. Gen., on the brief), for United States.

William E. Lamb, for Interstate Commerce Commission.

Asa F. Call, for interveners.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MACK, Judge. The complaint made to the Interstate Commerce Commission by shippers that the car load rate of $1.15 per 100 pounds for oranges and lemons from California and other western points to the East prescribed by the railroads was unreasonably high was dismissed by the commission as to oranges, but sustained as to lemons. These rates are so-called "blanket rates," covering transportation to practically the entire territory east of the Rocky Mountains, including New England. The rate for oranges had originally been $1.25 per hundred but had been voluntarily reduced by the railroads in 1907 to $1.15, the present rate; while the rate for lemons from 1902 on had fluctuated between $1.25 and $1 per hundred, having been several times reduced to the latter figure and again advanced to the former. Except for a brief interval, it was allowed to stand at $1 per hundred from January, 1904, to November, 1909, when it was advanced to $1.15, the same as on oranges. This is the rate now complained of. By the action of the commission, the $1.15 rate on oranges was left undisturbed, but the rate on lemons was reduced to $1, the rate so fixed being conditioned on the same requirements with regard to minimum weights that had theretofore prevailed, and being extended without change to the same territory blanketed. So much of the complaint as had reference to the additional precooling and refrigerating charges was held by the commission for further advisement, and is not included in this proceeding. This case to enjoin the enforcement of the order prescribing the $1 lemon rate was begun by bill filed in the Circuit Court of the United States for the District of Kansas. It was subsequently transferred to this court, and is now up for final disposition on the bill, answers, and testimony taken.

The first and decisive ground of attack is that the order "is without the scope of the delegated authority under which it purports to have been made" (I. C. C. v. Ill. Centr. R. R. Co., 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed 280), in this: that, while in form holding the $1.15 rate unreasonable and prescribing the $1 rate as reasonable, in substance the commission did not determine the intrinsic reasonableness of either rate, but reduced the rate prescribed by the railroads in order that, and to a point at which, in its judgment, the California growers might successfully compete with their Sicilian competitors in a broader market than would otherwise be possible; in other words, that the commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition.

If complainants are right in their contention, the invalidity of the order necessarily follows. This has been clearly established by the decision rendered since the order herein was made, in Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283, reversing the decree of the Circuit Court and annulling an order of the commission, which had reduced a $5 lumber rate advanced from $3.10, the rate in force for over 10 years, to $3.40 and $3.65, respectively.

Chief Justice White, voicing the unanimous opinion of the Supreme Court, thus enunciated the principles which it is urged are controlling in the present case:

"The contention is that although the order made by the commission may have been couched in form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the commission was not the exercise of such an authority, but based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that both in form and in substance the order of the commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for services rendered. On the other hand, the commission in the argument at bar does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say was exerted. * * * While it is not denied on behalf of the commission that that body may have considered the prior rate prevailing in the Willamette Valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things, it is insisted, were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

"It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is, What was the nature and character of the order made by the commission? That is, What, in substance, was the power which the commission exerted in making the order?

"Coming to the consideration of that subject, we are of the opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

After reviewing some of the testimony taken before the commission and its report, he concluded as follows:

"While it is true that the opinion of the commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it deemed would arise from a change of the rate, even if that change was from

an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the services rendered for the future."

As early as 1896, when the commission had no power to prescribe future rates, the Supreme Court said in T. & P. Ry. Co. v. I. C. C., 162, U. S. 197, at page 221, 16 Sup. Ct. 666, at page 676, 40 L. Ed. 940:

"Our reading of the act does not disclose any purpose or intention on the part of Congress to thereby re-enforce the provisions of the tariff laws. These laws differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government, and those of their provisions whereby Congress seeks to so adjust rates as to protect American manufacturers and producers from competition by foreign low-priced labor operate equally in all parts of the country."

Whatever, therefore, the rights of the carriers may be to give reduced rates for the purpose of fostering a new or an established industry or for granting to it a higher measure of protection against foreign competition than Congress, through the revenue laws, has given it, no such power can lawfully be exercised by the commission.

[1] The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.

[2] An examination of the report of the commission, reproduced so far as it bears on the lemon rate, in its entirety,[1] demonstrates that

[1] "The world's supply of lemons is mainly produced in two localities, Sicily and southern California. In the year 1909 Sicily shipped 69,000 car loads, southern California 6,000 car loads. The United States consumed approximately 12,000 car loads, of which one-half were of foreign growth.

"The cost of producing lemons in Sicily is much less than in California. Labor enters largely into the cost of production. The laborer in the Sicilian grove receives from 40 to 60 cents per day, while in California he is paid from $1.75 to $2 per day, and the difference in wage is even greater in case of the laborer employed about the packing houses.

"A box of lemons weighs 84 pounds. To transport that box from the Sicilian grove to the dock in New York costs from 30 to 35 cents. From New York to Chicago the rate is now 40 cents per 100 pounds, or 33.6 cents per box, and this is substantially the rate which has prevailed in the past. In 1901 the rate from California to all eastern points was $1.25 per 100 pounds, or $1.05 per box. It will be seen, therefore, that both in cost of production and in cost of transportation the Sicilian grower had a great advantage in all territory east of the Missouri river, which was the main consuming territory of the United States. A protective duty of $1 per 100 pounds had been fixed upon the Sicilian lemon, but even with that assistance the American

except for two brief paragraphs suggesting grounds for lowering the lemon while maintaining the orange rate, it deals entirely with matters tending to show the need in this industry of a high-protective tariff against Sicily and, not on traffic considerations, but to compensate for the tariff insufficiencies, a low transportation rate especially to eastern territory.

grower was unable to successfully compete. In the years 1901 and 1902 California supplied but about one-fifth of the demand in the United States.

"The growers in California applied to the carriers for a rate of transportation which would enable them to meet the Sicilian lemon in eastern markets. They asked for a rate of $1 to the Middle West and of 75 cents to the Atlantic seaboard; the rate then being $1.25 to all this territory. The carriers conceded in the winter of 1902 what was termed a 'relief' rate of $1 per 100 pounds to all territory, and that rate was renewed in the winter of 1903.

"In 1903 the general freight agent of the Santa Fé lines upon the Pacific Coast wrote to his superior traffic officer upon this subject as follows: 'There is no doubt in my mind that if the California lemon growers do not see more encouragement in the future they are going to—a good many of them—let their orchards go back. It seems to me that we will have to make the rate $1 per 100 pounds apply all the year, and give the lemon growers to understand that we will continue it in effect until they secure United States markets. * * * I think we can defend the lower rate on lemons on account of the competition of foreign lemons. * * * It is up to us now to give the lemon grower a definite answer as to what he may expect for years to come.'

"In fact, in 1904 the $1 rate was made applicable for the entire year, and was continued in effect until November and December, 1909, when tariffs were filed advancing the rate to $1.15.

"The testimony in this case indicates and fairly shows that the cost of placing lemons upon the cars in California is no less, but is rather greater, to-day than in 1904. The lemon growers assert that the increase in their production has been due mainly to the lower rate of freight under which they were better able to meet Sicilian competition.

"But even with the $1 rate California has been unable to compete with Sicily upon the Atlantic seaboard. The average price received by California growers east of the Allegheny Mountains is $1 per box less than the price obtained west of the Missouri river.

"The last tariff act increased the duty on lemons from $1 to $1.50 per 100 pounds. The complainants assert and the defendants deny that this was the occasion for the increase in the freight rate.

"The average cost to the defendant of handling lemons is somewhat less than with oranges, for the reason that the average haul is shorter. As just noted, few lemons from California find a market upon the Atlantic seaboard, while practically the entire supply in territory west of the Missouri river is from that source. Oranges, upon the other hand, move in large quantities to these far eastern markets. The complainants insisted that the average haul in case of oranges was 500 miles greater than in case of lemons, and manifestly it is considerably in excess.

"The expense of moving citrus fruit under refrigeration is greater than under ventilation, since the weight of the ice is added to the load of the car, and the proportion of oranges moving under refrigeration is greater than of lemons.

"Upon the other hand, oranges load somewhat heavier than lemons, the present minimum being 27,600 pounds in case of oranges and 27,200 pounds in case of lemons.

"Upon full consideration we are of the opinion that the present lemon rate of $1.15 is unreasonable, and that the rate ought not to exceed $1 per 100 pounds, with the present minimum weight, said rate to apply to all territory to which the rate of $1.15 is made applicable by the tariff of the defendants on file."

The only transportation considerations stated by the commission as a justification for their order reducing the lemon, while refusing to reduce the orange, rate from $1.15 to $1, are: First, that the average length of haul, and therefore the average cost, is less for lemons than for oranges; and, second, that lemons are ordinarily carried under ventilation, while oranges are ordinarily carried under the more expensive refrigeration. As an offset, in part at least, the minimum car load weight prescribed for oranges is, as stated, higher than for lemons.

Inasmuch, however, as any additional cost due to refrigeration is the subject of a special refrigeration charge, it is obvious that this cannot be considered as an element in the transportation rate.

While the difference of less than 500 miles in the length of the average haul of lemons and oranges is a fair transportation factor to be considered in prescribing blanket rates for both products, it is apparent from the report that this was but a small, if not an entirely insignificant, factor in this case, especially as the increase of 50 per cent. in the protective tariff on lemons was expected by all the parties to widen the market for the California lemon growers and thus to increase the average length of the lemon haul.

As in our judgment the order is based primarily on the assumed authority to protect the industry against foreign competition, it must be held void as beyond the powers delegated to the commission. This conclusion renders it unnecessary to determine whether, under the evidence, the rate of $1 is confiscatory, or whether the commission is empowered to prescribe blanket rates either generally or subject to the limitation that the rate between the most distant points must be at least nonconfiscatory.

A permanent injunction will be granted restraining the enforcement of the order as to the rate on lemons, without prejudice to a reopening and reconsideration by the commission of the original proceedings before it or of any further complaint in respect to the $1.15 rate, now disposed of.

THE GOOD HOPE (three cases).

(District Court, S. D. New York. May 26, 1911.)

1. SHIPPING (§ 132*)—DAMAGE TO CARGO—LIABILITY OF VESSEL—LIMITATIONS IN BILLS OF LADING.

Under the Harter act (Act Feb. 13, 1893, c. 105, §§ 1, 2, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), which makes it unlawful for any vessel transporting goods between ports of the United States and foreign ports or her owners to limit their liability for loss through their fault or negligence, or to lessen the obligation of the master or officers to properly handle and stow the cargo, in order for a vessel to avail herself of a provision of bills of lading exempting her from liability for damage to cargo from heating, she has the burden of proof to show that the heating which caused damage to her cargo was not due to improper or negligent handling or storage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*

Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

2. SHIPPING (§ 132*)—DAMAGE TO CARGO—LIABILITY OF VESSEL—IMPROPER HANDLING AND STOWAGE.

Damage to a portion of a cargo of jute on a voyage from Calcutta to New York *held* on the evidence to have been caused by heating due to rainwater which entered the hatchway, which was negligently left open while the ship was being loaded, from liability for which she was not exonerated by a clause in the bills of lading exempting her from liability for damage by heating.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*

Liabilities of vessel owners for loss or injury from improper stowage, see note to The Gualala, 102 C. C. A. 553.]

3. SHIPPING (§ 131*)—LIABILITY OF VESSEL—SHORT DELIVERY OF CARGO.

The rule that a vessel is liable for cargo received, but not delivered, does not apply to a case where all the cargo received was carried to the port of delivery, but a portion of it had been so damaged on the voyage that it could not be identified.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 467; Dec. Dig. § 131.*]

In Admiralty. Suits by the Chelsea Fibre Mills, Robert Balfour, and others, and Henry P. Winter and others, respectively, against the steamship Good Hope. Decrees for libelants.

Campbell, Harding & Pratt (Douglas Campbell, of counsel), for libelant Chelsea Fibre Mills.

Taft & Sherman (Theodore M. Taft, of counsel), for libelants Balfour, Williamson & Co.

Hunt, Hill & Betts (George Whitefield Betts, Jr., and Robert McLeod Jackson, of counsel), for libelants Winter & Smillie.

Convers & Kirlin (J. Parker Kirlin and Russell T. Mount, of counsel), for claimants.

HOLT, District Judge. These are three actions brought against the steamer Good Hope to recover for damage to certain bales of jute consigned to the different libelants, occurring on a voyage from Calcutta to New York. The Good Hope is a steamer of the turret

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

type. She had five hatches. The damage occurred to the jute under No. 2 hatch. There was no substantial damage in any other part of the ship. In No. 2 hatch, after about six tiers of jute which were not damaged had been taken out, there was found a mass of damaged jute constituting a cube of about 12 to 15 feet in height, width and length, directly under the hatch. Some of this portion of the cargo had become so disintegrated that the bales were one mass of decayed matter, the identity or ownership of which it was impossible to determine. Others of the bales were partially injured, but their identity could be determined. The bills of lading issued for this cargo provided that the steamer was not liable for loss or damage from heat, sweat, rain, heating, or decay.

[1] In order to have the exceptions in the bills of lading available for the claimants, it must be shown that any damage from those causes was not caused by fault on the part of the ship. The libelants claim that the ship was not seaworthy, on the ground, in the first place, that the turret type of ship is not fit to carry jute. I think the evidence preponderates that that type of ship is frequently used for that purpose, and is a proper vessel for such a cargo. The libelants also claim that the ship was not seaworthy because it was not furnished with adequate ventilating apparatus. But I think that the evidence shows that the ventilating apparatus on this ship was adequate, and, if anything, was rather better than usual on other ships of the same class. It is my opinion, therefore, that the claim that the ship was not seaworthy is not sustained by the evidence.

[2] The claimants rely upon the exceptions in the bills of lading. The evidence establishes in my opinion that the damage in question was caused by heating, the result of excessive moisture in the part of the hold where the heating occurred. The burden of proof is upon the claimants on the question whether such moisture and heating was due to the fault of the ship. In my opinion they have not established freedom from fault in that respect. It is impossible to be sure from the evidence what the cause of the heating was, but in my opinion the proof tends to show that an excessive amount of rain-water got into the portion of the jute that was injured, probably from No. 2 hatch being open, leaving the jute exposed to the rain while loading. The claimants assert that the whole of the jute shipped was unusually moist, and that the portion damaged, being farthest away from the air passing into the hold through the ventilating apparatus, heated from the moisture in the bales. I do not think that the cause of the damage can be attributed to the inherently moist condition of the cargo. If it had been, in my opinion, the same damage would have exhibited itself in the jute similarly situated in the other hatches. The fact that the evidence does not affirmatively establish exactly what was the cause of the damage is not decisive. The consignees of goods which are damaged in the course of a long voyage very rarely can furnish evidence as to the manner in which the damage is caused. The second section of the Harter act declares that it is unlawful for the owner of any vessel transporting merchandise between the United States and foreign ports to insert in any bill

of lading any agreement whereby the obligations of the master, officers, agents, or servants to carefully handle and stow the cargo shall in any wise be lessened. The evidence in my opinion does not establish that the obligation of this vessel to properly stow the cargo was performed, and therefore the exceptions in the bills of lading in my opinion do not exonerate the vessel.

[3] The claim is made in respect to the bales which could not be identified that compensation can be had for them on the fundamental principle that they were receipted for on the bills of lading, and not delivered. I think the proof shows that all the jute mentioned in the bills of lading was transported to New York, and that the reason why certain bales could not be identified was that their identity was lost by the decay and degeneration of that portion which was injured in No. 2 hatch. I do not think, therefore, that the general rule applies that the ship was liable because certain bales enumerated in the bills of lading were not found when the voyage was over, but on the grounds already stated I think that the libelants are entitled to recover for the goods which were lost as well as for the damage to the bales which were capable of identification.

In the case of Winter and Others against The Good Hope, the sole claim is for 55 bales of jute and 1 bale of jute cuttings lost. I think that the libelants are entitled in the case of those bales to recover their value, which has been computed to be $369.66 for the consignment to Winter & Smillie, and $332.64 for the consignment to Smith & Fox, assigned to Winter & Smillie, making a total of $702.30, for which, with interest and costs, I direct judgment.

In the two other cases, there should be a reference to ascertain the damage, unless counsel agree on the amount.

COMSTOCK et al. v. LOPOKOWA.

SAME v. VOLONINE.

(Circuit Court, S. D. New York. October 9, 1911.)

1. INJUNCTION (§ 60*)—ACTOR'S CONTRACT—PERSONAL SERVICES FOR OTHERS—REMEDY—ADEQUATE REMEDY AT LAW.

Where defendants, who were Russian dancers of a very high order and possessed of unusual personal attractions, contracted their services to complainants for a specified period in return for a weekly salary, defendants were of such unusual attainments and personal characteristics and of such special value to complainants as to fall with the class of employés whose negative covenants not to enter into the employment of others may be enforced in equity; it not being necessary to such relief that defendants were the stars or only stars of complainants' performances, or that the performances would be brought to a standstill because of their withdrawal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117–119; Dec. Dig. § 60.*

Restraining breach of contract of employé not to engage in competing business, see note to Harrison v. Glucose Sugar Refining Co., 53 C. C. A. 492.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONTRACTS (§ 208*)—CONSTRUCTION—BREACH.

Defendants, who were Russian dancers, contracted to perform under complainants' direction at first-class theaters in the United States and Canada for regular performances ("not vaudeville") as complainants might require for the season of 1911–12. *Held*, that the words "not vaudeville" meant that complainants would not require defendants to dance at vaudeville theaters or in vaudeville performances; and hence the mere fact that complainants put on the stage in a regular theater where defendants were performing a vaudeville act by one of the dancers did not make the theater or the performance vaudeville and did not constitute a breach of defendants' contract, authorizing them to terminate the same.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 208.*]

3. CONTRACTS (§ 303*)—PERSONAL SERVICES—BREACH.

Where a contract for personal services of theatrical artists provided that they should only be required to perform at first-class theaters for regular performances (not vaudeville), the fact that it was distinctly understood when the contract was made that no vaudeville of any kind was to be interjected into the performances at which defendants were to appear, and that complainants did not comply with such understanding, was insufficient to justify defendants in leaving an unfinished engagement without at least a genuine attempt to have the vaudeville eliminated and the contract complied with.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 303.*]

In Equity. Bills by F. Ray Comstock and another against Lydia Lopokowa and against Alexander Volonine for preliminary injunction.

Sondheim & Sondheim, for complainants.

Blumenstiel & Blumenstiel, for defendants.

WARD, Circuit Judge. These two cases arise out of the same state of facts and will be disposed of together. They are bills in equity praying for a preliminary, and upon final hearing a permanent, injunction. Restraining orders were issued ex parte, and the motions now to be decided require the defendants to show cause why the restraining orders should not be continued. The complainants are theatrical managers now engaged in representing three Russian ballets called Cleopatra, Les Sylphides, and Scheherazade. The defendants are Russian dancers of a very high order and possessing unusual personal attractions.

The material provisions of the contracts are as follows:

"That the said party of the second part in consideration of the payment to be made her by the party of the first part, at the time and in the manner hereinafter specified and also in consideration of the sum of one dollar to her in hand paid, as an advance on salary (receipt whereof is hereby acknowledged) has engaged and does hereby engage herself to the party of the first part, to perform for the party of the first part, at first class theatres in the United States and Canada, for regular performances (not vaudeville) as the said party of the first part may require for the season of 1911 and 1912, of forty weeks, commencing on or about June fifth.

"And it is further agreed to and understood that the number of performances given each week shall not be more than eight.

"Said party of the first part is to pay said party of the second part for her services as a prima ballerina each and every week for forty weeks, the sum of four hundred ($400) dollars. * * *

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"It is also understood between party of the first part and party of the second part, the party of the second part will not appear during the period of this contract, in private or public, without the written consent of the party of the first part."

The defendant Volonine was to receive $300 a week.

The complainants began presenting the Russian ballets about July 11th and booked them for September 17th, 18th, and 19th at Minneapolis. On the morning of the 19th the defendants withdrew from the company, returned to New York, and September 23d entered into engagements with the "Enterprises of Max Rabinoff," a rival organization which was also preparing to produce and is this evening to give Russian ballets at Hartford, Conn.

[1] The first objection to the motion is that the complainants have an adequate remedy at law because the services of the defendants are not unique and can be replaced. But I am satisfied that the defendants are of such unusual attainments and personal characteristics and of such especial value to the complainants as to fall within the class of employés whose negative covenants not to enter into the employment of others may be and should be enforced in equity. It is not a necessary condition of granting such relief that the employés should be the stars or the only stars of the complainant's performances, or that the performances should be brought to a standstill because of their withdrawal.

[2] Next the defendants say that the complainants themselves violated the contracts by interjecting a vaudeville act of Gertrude Hoffman, one of the dancers, between two of the ballets on the evening of September 18th at Minneapolis. I think this was not a violation of the contract. The words "not vaudeville" in parenthesis mean that the complainants cannot require the defendants to dance at vaudeville theaters or in vaudeville performances. There is no allegation that the theater at Minneapolis was a vaudeville theater, nor that the Russian ballets in which the defendants danced were vaudeville performances, nor that the defendants danced in any such performance.

Conceding the act of Miss Hoffman to be a vaudeville act, it did not make the theater nor the whole performance vaudeville.

[3] The defendants, however, submit the affidavit of one Mandelkern, who was managing the defendants at the time the contracts were made, and who drew the contracts, to the effect that before they were signed it was distinctly understood between him and Gest, one of the complainants, that no vaudeville of any kind was to be interjected into the performances at which the defendants were to appear. If this be true, the defendants would be entitled to insist that such practice be discontinued; but they had no right to leave an unfinished engagement without the least genuine attempt to settle this question with the complainants. Non constat but the act complained of would never be introduced again. Even if this required them to continue to dance for a reasonable time under protest, they would not have prejudiced their rights by so doing.

It is true that Mandelkern says he expressed his surprise to Haskell, who was, I understand, road manager, and that he replied that he was surprised, too. But this answer shows what I believe to be the fact

that Haskell had not introduced the act, and indeed had no authority to do so. Something of the same inconclusive kind took place with the complainant's musical manager. The conduct of the defendants was most unreasonable and unfair in any aspect of the case.

Finally, Rabinoff, the president of the rival organization which has employed the defendants, says that Gest, one of the complainants, after negotiations for taking over the complainants' entire organization had fallen through, said that he might employ the defendants, as he (Gest) did not want them and it would be a saving to him. Rabinoff is corroborated in this by Atwater, the secretary, Von Kivaly, the orchestra manager, and Elsen, Jr., the press agent of the company. But this is denied by Gest, by Belasco, his father-in-law, and by Comstock, who were present at some of the interviews, and is inconsistent with the conduct both of the defendants and of the complainants. The defendants at the time justified their withdrawal on account of the complainants' alleged violation of the contracts, while the complainants have always treated this conduct of the defendants as a justiciable breach of their contracts. It is also to be noted that the contracts required the defendants to have the complainants' written consent before engaging with any one else.

Whoever comes into equity must come in with clean hands, and, if the complainants or either of them contributed by their conduct to the making of the contracts performance of which they now seek to enjoin, equity would lend them no aid.

In actions by managers against theatrical artists, relief to be of any avail must generally be given in the first instance because such artists are usually of doubtful financial responsibility, and the season for which they engage is over before the cause can be reached for final hearing. As, on the whole case, I do not feel sufficient doubt to deny relief in the first instance, the restraining orders heretofore given will be continued until the expiration of the terms of the defendants' contracts.

An order may be submitted at 2 p. m.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. July 31, 1911.)

Nos. 2-9, 2-33, 2-149, 3-37.

EQUITY (§ 288*)—PLEADING—AMENDMENT.

A court of equity always has the power to conform the pleadings to the evidence by allowing amendments after the proofs have been taken and are before it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 547; Dec. Dig. § 288.*]

In Equity. Suits by the Pennsylvania Steel Company and others against the New York City Railway Company and others; Morton Trust Company against the Metropolitan Street Railway Company and others; Guaranty Trust Company of New York against Metropolitan Street Railway Company and others; and the Morton Trust Company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the Metropolitan Street Railway Company and others. On application by receivers of the Metropolitan Street Railway Company to amend a petition and a claim. Motion denied.

LACOMBE, Circuit Judge. The petition sought to be amended is the one verified October 10, 1910, upon which (with others) the special master was instructed to pass upon certain questions arising on a branch of the case, known as the "appropriation of payment" proceeding, in the answers to which would determine how certain moneys paid in settlement of litigations prosecuted by the receiver of the New York City Railway Company should be apportioned between the litigations which were terminated by such payment; and also some questions of lien or rights to share in the moneys so apportioned.

The theory of the application is that there is an apparent discrepancy between the proofs and the averments of the petition as to the amount of the balance of account between the two estates (New York City Railway and Metropolitan Street Railway). Such an application is unnecessary. The court always has the power to conform pleadings to proof. Whether there is such a discrepancy between the two as requires such an amendment can be intelligently decided only by the tribunal which is fully informed as to the proofs. In the first instance such tribunal is the special master. It is stated in argument that, although he received all the proof offered, he expressed some doubt as to his power to allow the amendment prayed for. It is not necessary to determine whether or not, under the terms of the order which sent the controversy to him, he had such power. An exception to his refusal to allow the amendment will bring the matter before the circuit judge when the report comes up for confirmation and, having indisputably the power to conform pleadings to proof, the judge can administer full relief, if any be required.

The claim which petitioners ask to amend is the one filed February, 1910, by receivers of the Metropolitan Street Railway Company against New York City Railway Company for moneys alleged to be due by reason of the breach of the agreement of May 22, 1907, between the two companies. The proposed amendment would increase the claim against the New York City Company about $1,500,000. It was conceded upon the argument that if the proceeding now under advisement before the special master—the "appropriation of payment proceeding"—is decided one way, it would be wholly unnecessary to amend the claim. The application would therefore seem to be premature. It is contended that the claim as it stands is relied upon by other parties as an admission of the condition of the mutual accounts between the two companies which may operate to the disadvantage of petitioners. The contention is not persuasive. All that the "claim" evidences is that on the day it was filed the receivers of the Metropolitan were satisfied, upon such investigation as they had then made, that the accounts between the two roads showed the balance which they stated. No amount of amendment can change the effect of that admission, viz., that such was their understanding at that time of the state of the account. If the proofs should show that they were mistaken,

their "admission" evidenced by filing the claim would not control, the decision would be conformed to the facts, not to their past conception of what they were. Of course, the question would then remain whether they should be allowed to amend the claim by asking for this large additional sum, so long after the date fixed for filing claims; but that is a distinct question, which need not be decided now, since the decision of the special master in the proceeding now submitted to him may make it academic.

Motion denied.

BERNSTEIN v. DANWITZ.

(Circuit Court, S. D. New York. October 4, 1911.)

1. COURTS (§ 292*)—FEDERAL COURTS—JURISDICTION—TRADE-MARKS—UNLAWFUL COMPETITION.

Where both parties to a suit for infringement of a registered trade-mark and for unfair competition were citizens of the same state, federal jurisdiction would not obtain, in the absence of provisions in the bill or decree confining the relief prayed for or granted to commerce with foreign nations, among the several states, or with the Indian tribes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.*]

2. COURTS (§ 292*)—FEDERAL COURTS—JURISDICTION—TRADE-MARKS—UNLAWFUL COMPETITION.

Where a trade-mark is invalid or not infringed, and the parties are citizens of the same state, the federal court has no jurisdiction of a suit to prevent unlawful competition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 20 C. C. A. 376.]

In Equity. Suit by Samuel Bernstein against August Danwitz. On motion to punish defendant for contempt. Denied.

Wise & Lichtenstein, for complainant.
Samuel Bitterman, for defendant.

WARD, Circuit Judge. A motion was made in this cause some time since for a preliminary injunction. When it was reached on the calendar the defendant's counsel arose and presented the court the packages of both parties and said he would submit to any decree which the court recommended. The defendant's package was an obvious imitation of the complainant's, and I then required certain changes to be made, which the defendant has carried out in his present package. The parties agreed upon a form of decree, which the complainant says is violated by the defendant's present package. This may perhaps be so in respect of features of imitation other than the registered trade-mark.

[1] Upon reading the bill I find that the complainant relies both upon his registered trade-mark and upon unfair competition; that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the parties are both citizens of this state; and that there is nothing either in the bill or in the decree confining the relief prayed for or granted to commerce carried on with foreign nations or among the several states or with the Indian tribes. In the absence of proof of this the court would be without jurisdiction. Warner v. Searle & Hereth Co., 101 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145. But, assuming that there was such evidence, the defendant's package does not, in my opinion, imitate the complainant's registered trade-mark at all.

The complainant's registered trade-mark is a rectangle with a heavy black band at the top and the picture of an old woman wearing spectacles and with a sadiron in her hand, accompanied by a broad red band; the respective positions not being defined.

The defendant, on the other hand, has a rectangle representing an Indian drawing a bow inserted in a yellow arrow on the face of the package. The question, therefore, is, assuming the complainant's registered trade-mark to be valid and not infringed, has this court jurisdiction to pass upon the general question of unfair competition?

[2] The Supreme Court has held that where a trade-mark is invalid, and the parties are citizens of the same state, the Circuit Court cannot consider the question of unfair competition. Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Leschen Rope Co. v. Broderick, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710.

Where the trade-mark has been found valid but not infringed, the Circuit Court of Appeals of this circuit has held that the Circuit Court has no jurisdiction of the question of unfair competition. Burt v. Smith, 71 Fed. 161, 17 C. C. A. 573; Hutchinson v. Loewy, 163 Fed. 42, 90 C. C. A. 1.

In the remaining category—that is where the trade-mark is found valid and infringed—there is a difference of opinion among the courts whether the Circuit Court has also jurisdiction of the other claim of unfair competition. Such jurisdiction was denied in patent suits in King v. Inlander (C. C.) 133 Fed. 416, and Cushman v. Fountain Pen Co. (C. C.) 164 Fed. 94. Judge Archbald in the Third circuit with some hesitation held to the contrary in T. B. Woods Sons Co. v. Valley Iron Works (C. C.) 166 Fed. 770, but he was not followed in the same circuit by Judge Holland in the subsequent trade-mark case of Mecky v. Grabowski (C. C.) 177 Fed. 591.

The case under consideration falling within the second of the above categories, the motion is denied.

HOLEPROOF HOSIERY CO. v. WALLACH BROS.

(Circuit Court, S. D. New York. January 14, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 3*) — DESCRIPTIVE TERMS — "HOLEPROOF" HOSIERY.

The word "Holeproof," as a trade-mark for hosiery, is not invalid as descriptive where it has been used and advertised for such length of time as to have acquired a secondary meaning as designating the product of a particular maker.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. § 3.*

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.]

2. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT.

The arbitrary name "Knotair," as applied to a make of hosiery, is not in itself an infringement of the trade-mark "Holeproof," previously adopted by another manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68–72; Dec. Dig. § 59.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION.

Complainant made and sold hosiery under the trade-mark "Holeproof" in specially designed and colored boxes, each containing six pairs, and, when sold by the box, with a guaranty of replacement if holes appeared therein within six months, which was novel and widely advertised. Defendant, which as a dealer had been selling complainant's product, became agent for a different make sold under the name of "Knotair," which it had put up in boxes and with a dress closely resembling those of complainant, and advertised and sold with a similar guaranty, and to customers who called for "Holeproof," although not actually representing it to be such. *Held*, that such acts evidenced an intention to obtain an advantage from the advertising and popularity of complainant's goods, and constituted unfair competition, which would be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Suit by the Holeproof Hosiery Company against Wallach Bros. On final hearing. Decree for complainant.

See, also, 167 Fed. 373, and 172 Fed. 859, 97 C. C. A. 263.

Walter C. Booth, Frank F. Reed, and Edward S. Rogers, for complainant.

Gardenhire & Jetmore and Aaron P. Jetmore, for defendant.

HAZEL, District Judge. The bill of complaint alleges unfair competition in trade and infringement of complainant's trade-name "Holeproof" as applied to hosiery. The hosiery sold by the defendant is advertised and sold under the name "Knotair" and is manufactured by the Knotair Hosiery Company. The questions to be considered are, first, whether the complainant's trade-mark or device is descriptive merely and as applied to hosiery not the subject of a valid trademark, and, second, whether the defendant by its trademark, packages and accessories infringes those of complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep r Indexes

[1] The facts are not thought essentially different from those presented on the motion for preliminary injunction herein. Judge Hough in his decision and as an introductory thereto so fully and concisely detailed them that their extended recital is unnecessary here. Holeproof Hosiery Co. v. Wallach Bros. (C. C.) 167 Fed. 373. On appeal from said decision the Circuit Court of Appeals for this court held that the word "Holeproof" was not descriptive, and that by extensive advertising and large sales it has acquired a secondary meaning "indicating to the prospective purchaser, not that the socks sold under it are indestructible, but that they are those which complainant has been making and supplying to consumers, apparently to their entire satisfaction." Holeproof Hosiery Co. v. Wallach Bros., 172 Fed. 859, 97 C. C. A. 263. Such holding as to the asserted descriptiveness of the trade-name or design is the law of this case, which this court is bound to follow.

[2] In my judgment the arbitrary name "Knotair," used in connection with the sale of hosiery without the similarities in dress of the defendant's package to that of complainant, would not delude the unwary buyer. The defendant corporation has shown that "Knotair" hosiery is the distinctive trade-name or device by which its socks are placed on the market, and that such socks have become known to the public by such designation. The word "Knotair" differs in appearance and pronounciation from the word "Holeproof," and it cannot be presumed that the defendant simply in using its trade-mark or device practiced a fraud on the public or on complainant's customers. Certainly "Knotair" printed on packages containing hosiery and upon slips or coupons colored or printed in a different manner from those used by complainant could not be held to resemble the trade-mark or design or dress of complainant's product. The trade-marks "Holeproof" and "Knotair" doubtless convey the same idea or purpose, namely, that holes or tears will not readily appear in the socks from wear, but this resemblance, standing alone, is without controlling significance in view of the fact that the word "Holeproof" is not strictly imitated by the word "Knotair" in such manner as to deceive the unwary purchaser who wishes to buy socks of complainant's manufacture and guaranty.

[3] Proceeding to a discussion of the question of unfair competition, does the trade-mark or design "Knotair," used in connection with the style or color of package, printing, type, and coupon tickets, resemble the complainant's package of guaranteed socks so as to enable the defendant to palm off its goods on intending purchasers of the complainant's product? The evidence shows in my estimation that the defendant in adopting its packages and coupon slips together with the collocated elements, the color of the package, flaps and the phrasing of the guaranty tickets, intended to deceive the unwary buyer into believing that he was purchasing the guaranteed hose of complainant. It appears that in 1898 complainant originated a novel system by which its socks were sold in six pair lots, under a printed guaranty stating that, if holes appeared in the socks within six months of the time of purchase, another pair would be given gratis to the

buyer. On each box the trade-mark "Holeproof" was printed prominently and the guaranty tickets inclosed therein. Afterwards, in 1904, the manufacturer of complainant's hosiery devised a special package for its product, consisting of an oblong box of bright yellow color, with printed end and side flaps. Upon the cover of the box there is placed a circular trade-mark device containing the words "Holeproof Hosiery," and underneath the monogram, "H. H. C." Around each pair of socks a paper band was placed with the trade-mark device printed thereon, and inclosed in the box were duplicate guaranty slips printed on a strip and so perforated as to enable tearing off each slip when necessary. Printed instructions advising purchasers how the guaranty strips were to be used were also inclosed in the box containing the hose. The garb and dress for its hosiery were unusual and distinctive, and complainant expended large sums in advertising "Holeproof" socks and the adopted form of guaranty and dress for its commodity. The trade-name or design "Knotair" was adopted by the manufacturers of the hose sold by the defendants in 1906, and the packages containing them were of red color, or such color as the dealer or jobber might designate. Subsequently, in 1908, the defendant who was in business in the city of New York, and had been dealing in "Holeproof" socks, buying them from complainant, accepted the agency of the "Knotair" hosiery, and immediately it began advertising the sale by it of "Knotair" hosiery under the guaranty plan. The red packages or boxes were abandoned, and in their place yellow packages with lettering in prominent black and red type and white label was adopted. Flaps were put inside the boxes to resemble complainant's arrangement, the trade-mark "Knotair" printed in red, the duplicate coupon slips printed and colored as in complainants. In this situation it is not thought enough to avoid infringement that the defendant admonished its employés not to substitute "Knotair" socks for "Holeproof." The evidence indicates that by mere silence in answer to the request of the unwary purchaser for "Holeproof" socks and by simply placing before him a package of "Knotair" socks he is liable to be deceived; and, indeed, by innuendo or indefiniteness of language, a clever salesman may easily palm off "Knotair" socks for those of complainant if such were his intention. Such in my estimation is the resemblance in dress of the defendant's hosiery to that of complainant. The intention of the defendant to reap a gain from the popularity of complainant's goods or from their extensive advertising or the novelty of its plan is clearly perceivable. It is well settled in this country and in England that a man who wants to sell or advertise his goods, if they have not been sold or advertised before, must distinguish them from those of other manufacturers and dealers in a like commodity. The situation in the present case peculiarly required that the defendant with honest intention should place its goods upon the market by distinctive marks and packages, and such as would not render it open to the charge of deceiving the ordinary purchaser who may desire to purchase the product of complainant, and who, it is quite likely, may merely look at the oblong yellow package, the printed

matter, and the yellow guaranty slips by which the hosiery of the complainant became known to him and the public.

There is no force in the defendant's contention that complainant's witnesses who were its employés and made purchases of defendant's socks while asking for "Holeproof" socks were not deceived, and therefore it is not affirmatively shown that there was a probability of purchasers being defrauded or that the defendant intended to mislead. The manner in which the sales in most instances were consummated, together with the adopted dress in resemblance of complainant's dress, warrants the inference that fraudulent sales were intentionally made. Fairbank Co. v. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Delong Hook & Eye Co. v. Francis Co. (C. C.) 139 Fed. 146.

It is true the complainant can have no monopoly of guaranteed hosiery or of slips containing a guaranty to replace socks that become torn within six months, nor can the defendant be concluded to use the words "Guaranteed Hosiery," but the adoption of complainant's colored package, the color and arrangement of its coupons, and printed matter, the style of printing, in short, the peculiar appearance, dress, or combination of elements used by the complainant, is a wrongful act, and preventable by a court of equity.

The complainant may have a permanent injunction and decree in conformity with this decision, with costs.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

FARMERS' LOAN & TRUST CO. v. METROPOLITAN ST. RY. CO. et al. (two cases).

GUARANTY TRUST CO. OF NEW YORK v. SAME.

(Circuit Court, S. D. New York. August 29, 1911.)

Nos. 2-9, 2-23, 2-149, and 3-37.

1. RECEIVERS (§ 91*)—RECEIVERS FOR LEASED PROPERTY—ADOPTION OF LEASE.
A court in possession, through its receivers of property demised by a lease, is not, prior to its adoption, express or implied, bound by any of its terms.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 167, 168; Dec. Dig. § 91.*]

2. RECEIVERS (§ 155*)—CLAIMS—PRIORITIES—EXPENDITURES—RIGHTS OF MORTGAGEES.
Purchasers of the securities of a railroad company must be held to have bought with the fact in view that its property is devoted to a public use, that the demands of the public are first to be considered, and that expenditures made by a receiver necessary to render service safe and efficient may be preferred to the mortgage liens.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 155.*]

3. RECEIVERS (§ 155*)—CLAIMS—PRIORITIES—EXPENSES OF CONTINUANCE OF BUSINESS.
Receivers were appointed for an insolvent street railroad company at suit of general creditors, the company having at the time cash and other assets constituting a substantial fund for the payment of creditors,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and its remaining asset consisting of a lease of a street railroad system which was being operated at a loss after payment of the rentals reserved. A week later the same receivership was, on its application, extended to the interest of the lessor in the demised property, with directions to the receivers to operate the property for the benefit of the public, and to conserve the same for the benefit of whoever might be entitled. The receivers were not directed to and did not adopt the lease, but, in fact, ceased to make payments thereunder, but they used whatever funds came into their hands from either estate in maintaining and operating the property and improving the same so as to render the service more safe and efficient. After several months a separate receiver was appointed for the lessee. *Held*, that the expenditures made for such operation, maintenance, and improvements after the receivership was extended to the lessor were not chargeable to the estate of the lessee, which received no benefit therefrom, and that its receiver was entitled in equity to recover such of its funds as were used for such purposes from the receivers for the lessor in preference to the claims of the mortgagees of the latter.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 155.*]

In Equity. Suits by the Pennsylvania Steel Company and others against the New York City Railway Company and others, by the Farmers' Loan & Trust Company against the Metropolitan Street Railway Company and others, and by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company and others. In the matter of the petitions of the Pennsylvania Steel Company and others, creditors of the New York City Railway Company. On exceptions to report of special master. Exceptions overruled, and report modified and affirmed.

See, also, 165 Fed. 467; 190 Fed. 623.

Following is the report of the special master:

As the answers to all of the other questions propounded by the court depend upon the answer to the question as to the incidence of expenditures made and obligations incurred by the receivers as its officers with respect to the property demised by the lease from the Metropolitan to the City Company during the period from September 24, 1907, to August 1, 1908, or any part of that period, it has been agreed that the liability of two general classes of expenditures shall be decided, viz.: (1) Clearly operating expenses, of which conductors' wages are a type, and (2) betterments and improvements, of which it is agreed that certain scraper cars and feeders are types. It is admitted that the conductors' wages were paid for the operation of some of the roads demised which were subject to both the general and refunding mortgages made by the Metropolitan Street Railway Company and included in the two foreclosure decrees, and that the scraper cars and feeders are subject to one or the other of these mortgages and are included in the property to be sold under such decrees.

When the court on the 24th day of September, 1907, at the instance of the two plaintiffs, the petitioning contract creditors of the New York City Railway Company acting on behalf of all others, took under its control practically the entire system of street surface railways in the boroughs of Manhattan and the Bronx demised to that company by the Metropolitan Company, it also took over assets of the City Company consisting of $683,898 in cash; materials and supplies $1,116,792; accounts receivable to the extent of several hundred thousand dollars, certain choses in action since reduced to possession by its receiver amounting to some millions of dollars a large part of which is, however, claimed by Metropolitan receivers, and two miles of railway track in Mt. Vernon which was all the railway track it owned. This last-named asset has since been sold for $500, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the proceeds of the choses in action is in possession of the receiver of the City Company, but the other assets enumerated are in the possession of the receivers of the Metropolitan Company, not having been turned over by them on August 1, 1908, when the appointment of the separate receiver of the estate of the City Company as such in place of Messrs. Joline and Robinson, who had prior to that acted in both capacities, went into effect. These other assets amounting in value to over $2,000,000 constituted a substantial fund for the payment of creditors of the City Company, both contract creditors, preferred or general, and tort creditors as well, but they have not been surrendered, as the administration of the railroad properties from September 24, 1907, to August 1, 1908, resulted in an operating deficit of over $1,000,000 which is increased by nearly $2,000,000 for expenditures actually incurred and met from sources other than earnings during the period in question for improvements and betterments, exclusive of several millions in addition for obligations for similar betterments and improvements incurred but not met during such period. If this deficit is to be borne by the estate of the City Company, and the equivalent in value of its assets above described is not to be accounted for to its receiver by the Metropolitan receivers, the fund for the payment of its creditors will be depleted and the Metropolitan bondholders whose security has been preserved and improved by the court's operation will presumptively reap a benefit from the expenditures mentioned for which they have not paid. The object of this proceeding instituted on petitions of committees of the contract and tort creditors of the City Company duly recognized by the court is to obtain just such an accounting, the bondholders of the Metropolitan Company through their trustees resisting it, with the receivers of the estates of both companies represented and ready to furnish all information, but remaining neutral as to the particular questions involved.

Some account of the history of the relation of the two companies prior to the receivership and of the receivership during the period involved, familiar as it is to court and parties, is necessary to an understanding of the contentions involved. In 1902 practically the entire street surface railway system of the borough of Manhattan and the Bronx was operated by the Metropolitan Company as owner, lessee, or through the control of stock of companies whose independent existence and operation continued. Its outstanding share stock then as now was $52,000,000 on which it had paid dividends for years of 7 per cent. In 1901 and 1902 these dividends, though paid, were not earned, deficits resulting of $31,000 in 1901, and $216,200 in 1902, which did not include franchise taxes then in dispute, but paid since the receivership, nor interest on the floating debt, which would have increased these yearly deficits by over $600,000 in each year. On the 14th day of February, 1902, as on the 24th of September, 1907, in addition to its own outstanding bonded debt, there were outstanding against its properties various bonded debts, and in 1902 it owed in addition to all these a floating debt of about $11,000,000.

The City Company in 1901 acquired the property of the North Mt. Vernon Railway Company which had been sold in 1898 for about $15,000. It consisted of two or three miles of track in Mt. Vernon, a car barn, and three or four cars, and it constituted the only railway asset of that company above referred to. It had no direct connection with any of the lines owned, leased, or operated by the Metropolitan Company, although it did then or later connect with those of the Union Railway the stock of which the Metropolitan Company controlled. The City Company also had a traffic agreement with the Ft. George & Eleventh Avenue Railroad Company, but the road of that company consisted of but a mile of track on 145th street in the borough of Manhattan extending eastward from Eleventh avenue to the Harlem river. While some stress is laid on these facts, it is, of course, obvious that these tracks formed no part of any line or route important to the system, and that they furnished no connection with that system which either the court or its receivers would for a moment at any time have deemed it necessary to preserve.

On February 14, 1902, the Metropolitan Company leased its system to the City Company for 999 years in consideration of the latter's promises

to operate, maintain, and keep it in repair, to pay the former's obligations as they accrued except the principal of its funded debt, and to pay an annual rental of 7 per cent. upon its outstanding share stock of $52,000,000. The items of interest and rentals accruing yearly thus assumed amounted to over $10,000,000 in addition to the annual rental of $3,640,000. It further agreed to pay $23,000,000 to be used to pay its floating debt, and for the improvement, extension, and equipment of the property, and this it paid prior to May 22, 1907, advancing in addition $2,834,000 for construction work prior to the receivership for which the Metropolitan Company by the terms of the lease was on September 24, 1907, its debtor. Betterments and improvements of the character of the scraper cars and feeders here in dispute were to be paid for by the Metropolitan Company under article 15 of the lease.

Operation under the lease by the City Company began in April, 1902, and payment of the fixed charges and rental continued during that portion of the term between that time and the appointment of the receivers, but with a constantly increasing annual deficit, as shown by the reports to the Railway and Public Service Commissions amounting from June 30, 1902, to September 20, 1907, to $11,425,939, which amount does not include more than $3,000,000 for disputed franchise taxes for such period recently paid on adjustments obtained by the receivers. These payments sufficiently account for the insolvency of the lessee company, and show not only that the Metropolitan stockholders received for five years or more dividends that were not earned, but that Metropolitan bondholders received interest for at least a year prior to the receivership amounting to more than $1,265,000 that was not earned.

On September 24, 1907, the creditors' bill was filed and an order entered with the City Company's assent appointing Messrs. Joline & Robinson temporary receivers of the estate of the lessee company, including the assets owned by it above described and this leasehold interest. The bill contained the usual allegations, among them allegations that the lessee's only means of meeting its obligations to its lessor were by continued operation as a whole, and that a receiver was needed with power to that end for the preservation of the property and the accommodation of the public, with a prayer for such appointment "to preserve the unity of the system as it has been maintained and operated." These allegations, however, though the contrary is urged by the bondholders, it is understood bind nobody, not even the parties making them, and furnish no aid in determining which estate shall ultimately bear the deficit in operation. Ames v. Union Pacific R. R. Co. (C. C.) 74 Fed. 335. The order entered also contained provisions for continued operation to the end "that operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged."

On October 1, 1907, just one week after the entry of this order, the Metropolitan Company filed its petition stating that it was of vital importance to itself and its creditors that the property be kept intact, alleging its own insolvency caused by that of its lessee, and suggesting as a reason for the court's prompt interposition that the lease reserved no right of entry for any default until a year after such default and after written demand and notice. It asked to be made a party defendant, and that the receivership be extended to its property, and on the same day the same men were appointed temporary receivers of that property which was thus made liable for the result of subsequent operation. N. Y. Security & Trust Co. v. St. Louis, Cons. R. R. Co. (C. C.) 102 Fed. 391.

In the opinion granting the application, the court said that: "The receivers are now in possession of the earning power of the petitioner, and under the terms of the lease petitioner can avail of no default in payment of the amount stipulated within a year from such default. The property is an intricate combination of various roads, one or more of which might be cut out of the system by failure to pay interest on some underlying mortgage or some rental due the constituent road. It is of vital interest to the petitioner that the property be kept intact. * * * The interests of lessee and lessor are different and in a sense diverse. Nevertheless it

seems practicable to adjust all questions in a single receivership. * * * Their (the receivers') sole functions are to hold the property intact, operating it as efficiently for the public service as their resources will permit, to ascertain the liabilities, to marshal the assets, and, eventually, unless in the meantime some entirely solvent concern able to liquidate all obligations and succeeding to owners' and lessees' interests shall appear to take it off their hands, to sell it to the best advantage, and apply the proceeds to the payment of the liabilities. It is thought that the present receivers can do this as holders of the interests of both lessor and lessee. Should future experience seem to indicate that a separate trustee for one of the parties is required, some way to meet that difficulty will be found." Penn. Steel Co. v. New York City Ry. Co. (C. C.) 157 Fed. 442.

On October 9, 1907, the Morton Trust Company, trustee under the refunding mortgage, to whose rights and obligations under that mortgage the Farmers' Loan & Trust Company, respondent in this proceeding, has in the meantime succeeded, filed a bill of re-entry, and at its instance the same receivers were appointed of the mortgaged property and its income. This mortgage was made by the Metropolitan Company subsequent to the lease, to which it was subject, and it covered that company's reversionary interest in all of the property demised to the City Company of which that covered by the mortgage to the Guaranty Trust Company made prior to the lease was a part. On this same day, too, an order had been entered making the receiverships of the Metropolitan and City estates permanent, such order having been entered in pursuance of an opinion filed the day previous, in which the court, after referring to its prior memorandum quoted from above, said: "Having taken its (Metropolitan's) entire property into possession of the court under conditions which left it powerless to recover the same for a year, the receivership left it wholly without means to meet its obligations, and it seems to be clearly the duty of the court which has thus deprived it of its resources to protect it against execution while receivers handle and distribute those resources. *Having possession of the res, the court acquires jurisdiction of its owner.*" 157 Fed. 445. After referring to rentals due to companies leasing their lines to the Metropolitan and to the interest on various mortgage bonds of such roads which by the lease the City Company had covenanted to pay and directing the payment of the same, it continued: "This will not include the rental to the Third Avenue Company which will fall due the last of this month (October, 1907). A clause in the lease by that road provides that default in the payment of any installment of that rental cannot be availed of for six months. * * * Until further orders the receivers will also, if the other parties to such arrangements consent, carry out the arrangements by which the New York City Railway Company operates certain railroads not under lease, such as the Dry Dock, East Broadway and Battery Railroad and the Union Railway." Penn. Steel Co. v. New York City Ry. Co. (C. C.) 157 Fed. 446.

On November 9, 1907, alleging defaults in payment of interest due under the Third Avenue mortgage, the Morton Trust Company filed its bill for foreclosure, and again asked the appointment of receivers in that suit which was made, the same receivers being appointed by an order entered on November 19, 1907. A similar bill alleging similar defaults was again filed by it on June 12, 1908. In obedience to the direction of the court, the receivers paid no dividends, rentals, or interest on the stock or bonds of the Third Avenue accruing under the lease by it to the Metropolitan and by the Metropolitan to the City Company, and the Central Trust Company, trustee under the mortgage securing its bonds, having filed its bill of foreclosure, an order was entered on January 6, 1908, appointing Frederick W. Whitridge, Esq., as receiver of the Third Avenue Railroad Company, and in pursuance of an order entered January 9, 1908, the property of that company comprising as it did two-fifths of the whole Metropolitan system, was transferred at midnight between January 11th and January 12th to its receiver. The system was still further disintegrated on May 1, 1908, by cessation of operation over the tracks of the Fulton Street Company, on June 29, 1908, over those of the 28th and 29th Street road, and later on, on the petition

of the receivers filed June 17, 1908, over those of the Central Park, North & East River Company known as the "Belt Line."

On February 26, 1908, the Guaranty Trust Company, trustee under the general mortgage of the Metropolitan Company made in 1879, prior to the lease, covering a portion of the property subsequently demised, filed its bill of foreclosure. On March 17, 1908, an order was entered appointing the same receivers of the property thus mortgaged to it. Its bill prayed that the City receivers be directed to account and pay over to the receivers to be appointed in the cause thus begun by it the entire net earnings of the street railways and property in their possession covered by its mortgage not exceeding the rental reserved in the City lease so long as said lease might continue in force.

In its answer to the petition of the Morton Trust Company filed June 24, 1908, that possession of the leased property be turned over to the Metropolitan receivers, and that a separate receiver of the City Company be appointed, the Guaranty Trust Company stated that it had not theretofore applied for a separate receiver of the property involved in its suit, as its mortgage extended to a portion only of the Metropolitan property, and that it did not believe that sufficient advantage would result to its bondholders from separate operation to justify a disintegration of the system. Up to this time on June 24, 1908, just nine months after the appointment of the receivers at the instance of the City Company, neither mortgagee had asked for a separate receivership, but the result of all these proceedings is summed up by the court's statement that "the entire system as a going concern was placed in the hands of the court, on the application of a creditor of the lessee, but with the assent of both companies and the subsequent approval of the representatives under the lessor mortgages." Id., 165 Fed. 465. On July 28, 1908, William W. Ladd, Esq., was appointed separate receiver of the City Company, Messrs. Joline and Robinson retaining possession of the Metropolitan system as receivers of that company's property which they have been operating since. In the order making this appointment, the court reserved the right to impose a lien upon the properties constituting the Metropolitan system for the unpaid obligations of the receivers prior to August 1, 1908, and directed the Metropolitan receivers to account to receiver Ladd for all the City Company's assets, which petitioners now insist they have not done.

Certain undisputed facts bearing upon the general equities involved as to the condition of the property taken over by the receivers on September 24, 1907, and as to the character of their expenditures during the period in question, may be noted in concluding this statement of facts. In their report in evidence the receivers stated that at that time the condition of the operating plants with the exception of the power houses had been allowed to deteriorate to so great an extent that a collapse was imminent, and that, "realizing that the interests of the holders of the corporate securities, and the welfare of the public at large demanded the continuance of the operation of the property, as an entirety, they set themselves to the task of rehabilitation." The condition of the cars on hand was bad and the destruction of over 600 cars necessitated the purchase of 155 pay as you enter cars, 89 standard closed cars, 22 snow sweepers, and 10 slot scrapers. It was also necessary to install improved sprinkler apparatus and new substation equipment. The electric track installed from 1897 to 1900 was worn to an extent that subjected the rolling stock to great strains and jars, and much rehabilitation of track structure was therefore instituted. The expenditures made for these purposes were under the supervision and direction of the court which confined them to such as were necessary. Id., 160 Fed. 223. That they were necessary is fully indicated by the testimony adduced before me. They have undoubtedly preserved the system, and have probably to a considerable extent added to its value, much of the property purchased and installed being now included in that to be sold under foreclosure.

It is conceded by the respondents that neither the court nor its receivers at any time prior to the entry of the formal order directing the surrender of the demised property on August 1, 1908, ever adopted the lease. Indeed, the acts of the receivers taken under the direction of the court, at the very in-

ception of the receivership, amounted to an open renunciation of it. They were directed not to pay the dividend due in Ocotober, 1907, by way of rental on Metropolitan stock, and, of course, did not. They were directed not to pay dividends on the stock of the Third Avenue Company, due October 13, 1907, and interest on the bonds of that company due January 1, 1908, both of which payments were fixed obligations accruing on the dates named as rental under the lease of that company to the Metropolitan and absolutely assumed by the City Company as a fixed charge payable by way of rent from it, which defaults on January, 1908, resulted in cutting out a most important two-fifths of the entire system committed to their charge. They were instructed to eliminate the Fulton Street Road, the Twenty-Eighth & Twenty-Ninth Street Road, and later on the Belt Line, the last important not only because of its length, but because of the connections it insured. That they had a reasonable time within which to determine whether it would be to the advantage of all interested in the property either as creditor of either company or as lessor or mortgagee to adopt the lease is, of course, established (Quincy Ry. v. Humphreys, 145 U. S. 82, 105, 12 Sup. Ct. 787, 36 L. Ed. 632; U. S. Trust Co. v. Wabash, 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; Park v. N. Y., Lake Erie & W. Ry. Co. [C. C.] 57 Fed. 799); nor is it urged that the 10 months that elapsed before there was a formal separation of interests by the entry of an order appointing a separate receiver of the City estate was so unreasonably long as to constitute an adoption, as, in view of the complexity of the system and the vast financial problems, difficult legal questions and onerous obligations to the traveling public involved, it could not be. There is, however, no approach to unanimity in the positions of the two mortgagee trustees, respondents here, respecting the question as to whether during the period the lease controls as to the obligations of the City Company and as to the right of its estate to reimbursement for expenditures made or obligations incurred while operating. Counsel for the Farmers' Loan & Trust Company, though in substance conceding that the City estate in the hands of the receivers is not bound by the terms of the lease in the sense that it would be had it been adopted, nevertheless insist that during the 10 months involved it does control, and their whole argument is based mainly on that legal proposition. Thus they say that, "as far as all expenditures for current maintenance and operation are concerned, it is clear from the lease that they are to be paid by the lessee or whoever claims under it," and this includes the conductor wage type of operating expense above referred to; and while conceding as strict logic would seem to require that the lease also controls as to outlays for construction of which the scraper cars and feeders are the stipulated types, and that by article 15 such outlays constitute an ultimate charge against the Metropolitan estate, they avoid the effect of this concession by restricting reimbursement to securities or funds of the Metropolitan which might properly be used for that purpose if it shall appear on a complete accounting that there are such, which I take to mean funds or securities in excess of those needed to satisfy the mortgage liens. To the contrary of this, counsel for the Guaranty Trust Company says that "the lease was a contract between the Metropolitan and City Companies which the receivers of neither company adopted in any such sense as to be bound by it as an executory contract, and that the right of the lessee company's receivers to reimbursement for any expenditures during the period of their possession must rest either upon contract or upon some equitable ground; that there is no contract upon which it can rest except the lease; that obligations for reimbursement arising under the lease are the obligations of the Metropolitan Company and not of its receivers; and that, if any equitable ground exists (which he denies), it cannot arise out of the lease."

[1] That a court in possession through its receivers of property demised by a lease is not, prior to its adoption, express or implied, bound by any of its terms, is I think to be now regarded as generally and definitely settled. The principle as laid down by the Supreme Court in the cases arising out of the Wabash receivership, cited supra, has, perhaps, not been always followed out, and there are doubtless expressions in judicial opinions which considered apart from the facts suggesting them lend some support to the

contention of counsel for the junior mortgagee. Such expressions occur in the cases relied on. Clyde v. Richmond & D. Rd. Co. (C. C.) 63 Fed. 21; Johnson v. Lehigh Valley Traction Co. (C. C.) 130 Fed. 932; Central Trust Co. v. Wabash, etc., Rd. (C. C.) 34 Fed. 259; more particularly Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co. (C. C.) 58 Fed. 257; and Felton v. City of Cincinnati, 95 Fed. 336, 37 C. C. A. 88. Nevertheless all of these were cases where the facts suggest an implied adoption of the lease. The rule as laid down in this circuit in the Erie receivership (supra 57 Fed. 799) and accepted by Judge Lurton speaking for the Circuit Court in N. Y. Penn. & O. R. R. Co. v. N. Y. Lake Erie, etc. (C. C.) 58 Fed. 268, is, however, as stated, and that rule has been nowhere applied in any of the cases to facts more closely resembling those here under consideration than in Mercantile Trust Co. v. Farmers' Loan & Trust Co., 81 Fed. 254, 26 C. C. A. 383, decided by the Circuit Court of Appeals for the Eighth Circuit. That was an appeal from an order denying the receivers of the St. Louis & San Francisco Railroad Company leave to renounce four leases. The receiver had been appointed in a suit to foreclose a consolidated mortgage made by the lessee company subsequent to the date of the leases to it of four railroads, which leases secured bonds that were issued under first mortgages upon the respective roads made simultaneously with the leases. The San Francisco Company covenanted in each lease to pay taxes, to operate, and to pay certain rent in no event less than the interest on such first mortgage bonds. The receivers appointed in foreclosure of the consolidated mortgage made by the lessee to the appellant Mercantile Trust Company operated the four-leased lines for a year when they petitioned for leave to renounce the leases, and on reference to a master the trustees under the first mortgages appeared before him and resisted the application. He reported insufficient earnings from leased lines, but that the unity of the property covered by the consolidated mortgage was its chief value, and should be preserved, that the leases should be affirmed, and the deficiences met out of the earnings of the entire system, and this report the court confirmed, adjudging the receivers liable for the rentals, and making them a lien superior to the consolidated mortgage. The appeal taken by the trustee under that mortgage therefore squarely suggested the question here involved, and the court, speaking through Judge Sanborn, said: "Counsel have devoted much time and space to a consideration of the question whether or not the income of the entire property covered by the consolidated mortgage was sufficient to pay its operating expenses and rent reserved under these leases during the receivership. That question is immaterial. If the leases should have been renounced, no part of the deficiency resulting from the operation of the leased lines can be charged against or paid out of the proceeds of the corpus of the trust estate (the property of the lessee covered by the consolidated mortgage), but these deficiencies must all be paid by the railroads which respectively caused them;" and the cases cited in support of this proposition include not only the cases above cited arising out of the Wabash and Erie receiverships and in addition those out of the Union Pacific receivership (Ames v. Union Pac. R. Co. [C. C.] 60 Fed. 966, and Id., 74 Fed. 335), but two of the very cases mainly relied on by counsel here in support of the contrary of the proposition, viz., the Central Trust Company v. Wabash and the Northern Pacific Cases, supra. On the other hand, the court said that, if the leases had been properly adopted by the court below, then the rentals reserved became an integral part of the operating expenses of the trust estate in the hands of the receivers, and secured a preference in payment not only out of income, but out of the corpus of the trust, and it held that they had been.

This case is conclusive, not only against the contention that the lease during the period in dispute controls for certain purposes which is urged in behalf of the junior mortgagee, but, if well decided in its application of principles determined by the Supreme Court, it is conclusive, also, as to the contentions urged on behalf of the senior mortgagee which are based not upon the lease—which, as I have stated, it concedes does not control—but upon general equitable principles. These, I think, are two which may be thus

summarized: (1) That a court of equity will not displace the lien of a mortgage on property of which it has taken possession at the instance of the owner, or of his lessee or of the creditors, secured or unsecured, of either, for the payment out of such property of expenses incurred in its operation and preservation, even if such expenses be dictated by strict necessity and the property be of a nature requiring its continued use for public purposes, provided there be any other fund out of which such payment can be made; (2) that, even if no fund exist, such lien can be displaced only in cases where the liabilities incurred result from strict necessity, and that the exercise of the power is then confined to such expenditures as would come within the operation of the 6-month rule had they been made by the mortgagor.

It is obvious, not only that neither of these asserted principles find any support in the case above cited, but that they are in violation of it, and I am referred to no case which flatly lays down either doctrine except the case of the N. Y. Security & Trust Co. v. Louisville, etc., R. R. Co. (C. C.) 102 Fed. 397, decided at Circuit, in 1900, which does lay down the first. There receivers were appointed of a consolidated company at the instance of creditors and subsequently of the trustee of its mortgage. The company had resulted from the consolidation of companies owning lines subject to divisional mortgages so called which were subsequently foreclosed; a receiver having been also appointed in these latter suits. The master held that the expense incurred in operating each division during the first receivership should be charged to the division which caused it, but the court held that the expenses of the receivers incurred before a receiver was appointed at the instance of divisional mortgagees should be first paid out of any surplus that might arise from the entire properties after paying the divisional bondholders. Notwithstanding the thorough discussion by counsel of the cases involved, I am unable to reconcile this case, not only with the San Francisco case, but with the decision of the Supreme Court, in Union Trust Co. v. Ill. Midland Railway Co., 117 U. S. 469, 6 Sup. Ct. 809, 29 L. Ed. 963, or with the decisions arising out of the Union Pacific receivership in the Gulf Company and Gunnison Company Cases (C. C.) 60 Fed. 967, and 74 Fed. 335, in which as it seems to me the opposite conclusion was reached.

[2] With reference to the second principle asserted by counsel for the senior mortgagee, it is to be noted that, if it be correctly stated and applied, then the power of a court upon which circumstances have imposed the serious obligation of operating railroad properties or other public utilities is, if not nullified, so far curtailed as to make it dangerous for it to attempt to operate at all. It doubtless is the rule marked out in the many cases cited by counsel in support of his extension of the doctrine that only those expenditures of a corporation which the creditor would have a right to expect to have met out of current income as distinguished from those for construction, including not only betterments, but perhaps even more or less necessary repairs involving restorations of permanency can be preferred and are then payable only out of income, unless diversion be shown when they become payable out of the corpus to the displacement of prior liens. These cases are Lackawanna Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 40 L. Ed. 475; International Trust Co. v. Contracting Co., 95 Fed. 850, 37 C. C. A. 396; Illinois Trust & Savings Bank v. Doud, 105 Fed. 125, 44 C. C. A. 389, 52 L. R. A. 481; Fordyce v. Omaha R. R. Co. (C. C.) 145 Fed. 544; Street v. Maryland Ry. Co. (C. C.) 59 Fed. 25; New England R. R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; Bound v. S. C. R. R. Co. (C. C.) 51 Fed. 58; Atlantic Trust Co. v. Dana, 128 Fed. 209, 62 C. C. A. 657; Rodgers Ballast Car Co. v. Omaha, 154 Fed. 629, 83 C. C. A. 403, to which may be added the most recent expression of the Supreme Court cited by counsel for the junior mortgagee on this question in Gregg v. Met. Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, in which by a divided court an indebtedness for railroad ties contracted prior to the receivership was held not to be entitled to preference, even though the receivers retained and used some of the ties; no diversion of income having been shown. These cases, however, refer only to expenses incurred by the

corporation itself, and do not hold that this doctrine controls a court operating, not only for the benefit of all ultimately entitled to the property, but for the convenience of the public as well, and such is certainly not the rule in the federal courts. Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528; Kneeland v. Bass Foundry & Machine Works, 140 U. S. 592, 11 Sup. Ct. 857, 35 L. Ed. 543; Union Trust Co. v. Midland R. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Miltenberger v. Logansport R. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117. Indeed, it has been repudiated by the Circuit Court of Appeals in this circuit in these very litigations for on the appeal from the order authorizing receivers' certificates for expenditures for just such betterments and constructive items as are here involved it affirmed the order, thus opening the way to a possible, if not probable, displacement of the liens of these mortgages, as to which it said: "The justification of displacing liens is the preservation of the property upon which they exist." Penn. Steel Co. v. N. Y. C. R. Co., 163 Fed. 243, 90 C. C. A. 188. If it were the doctrine, it is easy to see where it would lead. In the Lackawanna Case, supra, the Supreme Court decided that expenditures incurred by the Houston & Texas Railway Company to replace rails the condition of which, as the master found, was such as to make travel unsafe, did not constitute an indebtedness of such a nature as to justify displacement of the mortgage lien. To hold the doctrine urged would therefore mean that the court has not the power to incur expenditures to make travel safe. I think the true view is that purchasers of the securities of a railroad company must be held to have bought with the fact in view that its property is devoted to a public use, that the demands of the public are first to be considered, and that just such expenditures may be preferred, if the occasion arises, as this court, having such principle in mind (157 Fed. 445), decided might be made when it entered its order of October 29, 1907, among others in evidence here, reciting that the expenditures by the receivers then authorized were "necessary to make the road under their charge efficient, to place their equipment in proper condition, and to perfect the service of said roads." Those expenditures thus authorized included, among others, such "betterments," if that be the proper characterization where improvements are suggested by necessity, as are indicated by the stipulated types of feeders and cars here in dispute.

[3] Moreover, apart from the consideration of the refinements and distinctions drawn from the precedents elaborately presented and discussed in the briefs, it is clear to me that the equities suggested by the facts here present, effectively grouped by their counsel, are wholly with the petitioners. The assertions made in behalf of the senior mortgagee that the principle underlying the petitioner's claim is that one who expends money upon the property of another, either with or without his consent, is entitled to a paramount lien upon such property for the amount of the expenditure, or that the proposition of law urged by them is that a court of equity, at the request of a stockholder or creditor (including a lessee and the lessee's creditors), will undertake to experiment with the property of an insolvent corporation at the risk of its bondholders in disregard of all liens—the benefits of the experiment, if any, to accrue to the petitioning creditor, while, if loss results, the burden is to be thrown on the bondholders—altogether misconceive the position taken on behalf of those creditors. That position is that a fund of upwards of $2,000,000 in value of property on which the court by the appointment of its receivers made an equitable levy which would have inured largely to their benefit ought not to be expended to their detriment in the operation of a system of street railroads covered by a lease constituting their debtors' only other asset, when the partial preservation of the unity of that system, of primal importance to the public, has inured almost wholly to the advantage of these very mortgagees and to theirs not at all. That such position involves the possible displacement of liens and the exercise of a power in the court, challenged it is true, but which for reasons stated, must be held to exist, so to charge property devoted to a public use, both for operation and improvement, does not deprive it of any of its force, even though it be conceded that such power is to be exercised with proper caution, for the wisdom and propriety of the expenditures actually made is not only not challenged, but

substantially admitted. Had the court, on the very day that it entered its order of October 1, 1907, extending the receivership to the interest of the lessor at the latter's express instance, inserted in that order a provision that the lease be deemed not to be in effect, there can be no doubt that the quick assets of the lessee would have gone to its creditors without challenge, and that the burden of subsequent operation would have fallen where petitioners now contend it should fall. Neither can there be much doubt that if the facts disclosed by the record as to the financial history of the Metropolitan for two years prior to the lease and of its lessee under the lease for the years ending in the receivership had been known to the creditors and had been put before the court at that time, just that direction, if demanded, would have been inserted in that order. Those facts known at the time from public reports, though not necessarily to creditors, contract or tort, who were under no obligation to know them, demonstrate clearly the utter hopelessness of expecting that any profit would accrue to those creditors from continued operation, for a profit to them meant that many millions in excess of the receipts from operation that the experience of the prior years indicated as probable would have to be earned to meet the fixed charges accruing under underlying leases and mortgages, the interest on the consolidated mortgages, franchise taxes, and the rental to the lessor company, all of which would have had to be earned before anything could have been added to the funds available for payment to those creditors. In the light of these facts which, if unknown to the mortgagee trustees, they were certainly under more of an obligation to know than were the petitioners, operation during the period in dispute can hardly be called an experiment, but, if it could, it was an experiment which they, too, had it in their power to end in the earliest part of that period, and for it they must accept their share of responsibility. No court would then have refused them the surrender involved in a separation of receiverships—from any aspect, as it seems to me, a pure matter of form and not of substance—which neither asked for until June 24, 1908, for this very condition of hopeless insolvency put an end to the period of grace after default provided for in the City and Third Avenue leases which they not only now urge as a reason for their own inaction, but point to without convincing reason as something of which the petitioners were attempting to take advantage. Quincy R. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632. I therefore think that that should be regarded as having been done that should have been done; that, since no intervening equities prevent, a provision should be regarded as having been contained in the order of September 24, 1907, directing that the lease be not adopted; and that whatever words of description the receivers may have used in their transactions during the period in dispute, or however they may have been spoken of by parties or the court, they should be deemed to have been, just what the court has called them, operating conservators of the property in its custody committed to their charge for the benefit of those ultimately entitled and, for the purpose of deciding the incidence of the deficit from operation during the whole of the period in question, receivers of the property of the Metropolitan Street Railway Company.

I am aware that for the week elapsing between their first appointment and October 1, 1907, when the lessor company intervened, a doubt has been expressed, though not by petitioners who assert the contrary, as to whether they can be so regarded, but I think that, as matter of law, they not only can, but should be. The court has said in the expression italicized above of its act in appointing receivers on the earlier date that having taken possession of the res, it acquired jurisdiction of its owners, and the Supreme Court in the Illinois Midland Case, 117 U. S. 460, 6 Sup. Ct. 809, 29 L. Ed. 963, clearly lays down the doctrine that those ultimately entitled, like the respondents here, as mortgagees, are not entitled in the first instance to notice of application for leave to make expenditures in displacement of their lien such as are here involved which may be authorized before they were parties—and in that case were—but that what they can ask is, what is now in this proceeding being accorded to them for expenditures made during the

whole period in dispute including its first week, full opportunity to be heard before the incidence of those expenditures has been determined.

Contentions are urged on behalf of both the respondents that admissions in answers interposed by the petitioners to amended bills in the foreclosure suits that Messrs. Joline & Robinson, were operating as the receivers of the New York Railway Company during the disputed period are conclusive against their present contentions. Such admissions are, however, equivalent to nothing more than statements that the lease was then in force—an admission of a conclusion of law, as to which the mortgagees themselves are not in accord, which binds nobody. So it is urged on behalf of the junior mortgagee that the order made by the Circuit Court of Appeal on the appeal from the order authorizing the issue of receivers' certificates directing an extension of the lien of those certificates to the property and net income of the City Company and the order made by the Circuit Court separating the receiverships and directing the surrender of the property covered by the lease, to which proceedings the petitioners were parties, make the question as to who was operating res adjudicata as to them, and constitute a bar to this proceeding. In the final order made in the latter proceeding, however, the court expressly reserved the right to impose a lien upon the properties constituting the Metropolitan System for the unpaid obligations of the receivers prior to August 1, 1908, and directed Messrs. Joline & Robinson to account to receiver Ladd for all the City Company's assets, thus leaving the very question here involved open; while, in the former proceeding, the amendment of the order concludes parties including the trustees themselves only as to the extension of the lien to net income, meaning undoubtedly, income, if any, in excess of payments from receipts of all charges reserved by the lease including dividend rental to Metropolitan stockholders, or, in other words, income from operation under the lease which would mean its adoption. The court did not by that order determine that there had been such adoption or income, nor what net income is, nor to whom, subject to the lien, it should be paid, and neither the parties nor any one else are concluded as to such questions. Moreover, this question which is based on the order of the Circuit Court of Appeal made in May, 1908, as well as the arguments of respondents, based upon expressions of the petitioners, or of the receivers, or even of the court, as to the existence of the lease, or character of the operation during the disputed period have been disposed of by the court itself when, writing in September, 1910, and referring to the opinion handed down on the separation of the receiverships in July, 1908 (Penn. Steel Co. v. New York City R. Co. [C. C.] 165 Fed. 463), and to whether the lease had terminated or not, it said: "But up to that time the question when it terminated or whether it had terminated had not been raised nor argued, and *it was not then and has not been since decided.*" Id., 182 Fed. 159.

Having this in mind as well as the further declarations of the court contained in the same opinion that the better way is "to consider the receivers (during this disputed period) as acting in a dual capacity, representing both companies, but so far as the public was concerned, using money indifferently from whatever source it came to secure an efficient service and effect a restoration of the property which was in a deplorable condition," and that "subsequent accounting between the two estates will (would) determine what money should have been thus used and upon which estate lay the burden of keeping up the property as a going concern," I shall report to the court the following answers to the questions contained in its order:

(a) That the lease, dated February 14, 1902, made by the Metropolitan Street Railway Company to Interurban Street Railway Company (now New York City Railway Company) so far as the properties demised by it taken into its possession by the court through its receivers on September 24, 1907, are concerned, should be deemed to have been no longer in effect after said last-mentioned date.

(b) That during the period from September 25, 1907, to July 31, 1908, both inclusive, Adrian H. Joline and Douglas Robinson, as officers of the court, were acting in a dual capacity as receivers of Metropolitan Street Railway

Company and New York City Railway Company and as conservators of said properties demised by said lease for the benefit of the public and of those ultimately entitled thereto, including the lessor's mortgagees, and were operating said properties as receivers of the property of Metropolitan Street Railway Company.

(c) That the expenditures made and obligations incurred by Adrian H. Joline and Douglas Robinson as officers of this court, with respect of the property demised by the said lease during the period from September 24, 1907, to August 1, 1908, of which the expenditures for conductors' wages for scraper cars, and for new feeders are types, are chargeable against the estate of Metropolitan Street Railway Company.

(d) That the receipts of Adrian H. Joline and Douglas Robinson as officers of this court in respect of the property demised by said lease during the period from September 24, 1907, to August 1, 1908, are to be credited to the estate of Metropolitan Street Railway Company except such receipts as constitute a part of the estate of New York City Railway Company separate and apart from said lease and said property thereby demised.

(e) That said lease was at no time adopted by Adrian H. Joline and Douglas Robinson acting as receivers of this court in respect of the property of New York City Railway Company.

A proposed report in acordance herewith may be submitted on behalf of both petitioners on May 5, 1911, the respondents to have five days within which to file with me objections and proposed amendments after service upon them of a copy of the proposed draft report.

When the matter of accounting between the two estates, Metropolitan Street Railway and New York City Railway, was about to be taken up, it was apparent that the special master would be confronted with a crucial question, viz., whether the lease continued in force until August 1, 1908, or whether its obligations ceased to be binding on either estate on October 1, 1907. It was decided that such question should be taken up and determined as a separate proposition, the special master to pass upon certain individual payments as "types" so as to make the order to be entered upon his report a final one. See opinion Penn. Steel Company v. New York City Railway Company (C. C.) 182 Fed. 155 (Sept. 21, 1910), and order December 2, 1910. The special master took testimony and filed his report, exceptions to which are now before this court.

Davies, Auerbach, Cornell & Barry, for appellant Guaranty Trust Co.

Bronson Winthrop and Charles T. Payne, for appellant Farmers' Loan & Trust Co.

J. Parker Kirlin, for appellant Metropolitan St. Ry. Co.

Morgan J. O'Brien, Charles E. Rushmore, James Byrne, George N. Hamlin, and Charles M. Travis, for appellees Pennsylvania Steel Co. and contract creditors committee.

Benjamin S. Catchings, for appellee tort creditors committee.

Matthew C. Fleming, for appellee receiver of New York City Ry. Co.

Arthur H. Masten, William M. Coleman, and William M. Chadbourne, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The special master held that the lease of February 14, 1902, between the Metropolitan and the New York City Companies should be deemed to have been no longer in effect aft-

er September 24, 1907. He also held several other propositions as to accounting which followed as the necessary consequence of such decision. Exceptions were reserved to his findings by Metropolitan interests, and the whole subject has been argued fully before the court.

The special master filed with his report a very careful opinion, which sets forth exhaustively all the facts bearing upon the question presented, and renders it unnecessary to restate them here. A fundamental and controlling circumstance of the situation is the fact that almost at the outset this court was applied to, to appoint receivers of the lessor company under circumstances which the Supreme Court has held warranted such relief. "Having jurisdiction over the New York City Railway Company, and receivers having been appointed for it, there was every reason for extending the receivership to the Metropolitan Railway Company. The facts showed that it was so tied up with the New York Company that a receivership for the latter ought to be extended to the former. The circuit judge so held, and we think very properly upon the peculiar facts of the case." In re Konrad, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. When this decision was handed down (January 25, 1908), the same individuals were receivers of both roads "as holders of the interests of both lessor and lessee," and this court had stated why at that stage it seemed practical to adjust all questions in a single receivership. Penn. Steel Co. v. New York City R. Co. (C. C.) 157 Fed. 442. Of which disposition of the case the Supreme Court said that it was "well calculated to bring about the earliest possible conditions when those who may be the owners of the property shall be in possession of and operate it." In re Konrad, supra.

This dual receivership, however, did not exist on September 24, 1907. It began only when the application of the Metropolitan road was granted, October 1, 1907. It is thought, therefore, that the special master erred in finding that the lease should be deemed to have been no longer in effect after September 24, 1907. The date should have been October 1, 1907, and the special master's report should be corrected accordingly.

With this exception, the reasoning and conclusions of the special master are fully concurred in. They are in accord with the court's understanding of the effect of the dual receivership created October 1, 1907. It is not surprising that among the many deliverances upon various questions which have been presented during the past four years there are to be found expressions which would seem to indicate an understanding that the roads were being operated under the lease. But the language of the first opinion (157 Fed. 442) indicates the intention of the court, and passages from many other opinions cited by the special master or the appellees show quite clearly that the theory was to have receivers manage the property merely as operating conservators, leaving all questions, including the important one—whether or not the lease should be nonadopted and the public service which the property was obligated to perform rendered by the owner of the corpus—to be decided later.

Suggestion is made in the brief of the Farmers' Loan & Trust Com-

pany to the effect that at the time receivers were appointed it was supposed the lease might turn out to be profitable. It must be remembered that receivership followed an investigation of the affairs of both companies conducted by the public service commission, the details of which were published from day to day. It would seem that there could be few illusions left as to the situation and prospects. When the question arose, as it did at once, whether or not the interest on this mortgage due October 1st, should be paid, the court was strongly convinced that it should be defaulted, and expressed that conviction more than once at the conferences, where several interests were represented, and the question discussed. Such action would have at once settled the question of the lease, but it was not taken because, while the subject was under advisement, the lessor (owner of the corpus) petitioned to have the receivership extended to cover its property. It was thought that this made possible the creation of a receivership which would for the immediate present concern itself solely with the operation of the road and its restoration to a condition of efficiency, without undertaking to reach any conclusions as to who should receive the surplus over operating expenses, if there were any, or who should bear the burden of making the system perform its public duties with reasonable efficiency, if its income was insufficient so to do. It was certainly supposed by the court that, when the question came up for decision whether equity required that the estate of the New York Company should be relieved from the burden of an onerous and unprofitable contract, the question would not be embarrassed because in the meantime the receivers had used any money they could lay hold of, whether taken from the treasury or supply shops of the New York company, or received from insurance, or borrowed on pledge of the corpus. Practically the road could not have been run without the additional money, which no one would loan until the owner had put the corpus in receivers' hands, and which they could borrow only because of the action taken October 1, 1907.

With the change of date indicated, supra, the exceptions are overruled, and the report of the special master is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

FARMERS' LOAN & TRUST CO. v. METROPOLITAN ST. RY. CO. et al.
(two cases).

GUARANTY TRUST CO. OF NEW YORK v. SAME.

(Circuit Court, S. D. New York. October 6, 1911.)

In Equity. Suit by the Pennsylvania Steel Company and others against the New York City Railway Company and others, by the Farmers' Loan & Trust Company against the Metropolitan Street Railway Company and others, and by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company and others. Memorandum on filing decretal order overruling exceptions to special master's report in "termination of lease" proceeding. See, also, 190 Fed. 609.

J. Parker Kirlin, for appellant Metropolitan St. Ry. Co.
Davies, Auerbach, Cornell & Barry, for appellant Guaranty Trust Co.
Bronson Winthrop and Charles T. Payne, for appellant Farmers' Loan & Trust Co.
Morgan J. O'Brien, Charles E. Rushmore, James Byrne, George N. Hamlin, and Charles M. Travis, for appellees Pennsylvania Steel Co. and contract creditors' committee.
Benjamin S. Catchings, for appellee, tort creditors' committee.
Matthew C. Fleming, for appellee receiver of New York City Ry. Co.
Arthur H. Masten, William M. Coleman, and William M. Chadbourne, for receivers of Metropolitan St. Ry.

LACOMBE, Circuit Judge. The conclusion having been reached by the special master that September 24, 1907, should be taken as the date when charges may be made against Metropolitan Street Railway, he did not examine into the question whether or not the lease was never a valid one, although such a contention was made before him, and evidence bearing on that issue was incorporated in the record. As this court has reached the conclusion that charges of the types considered by the special master could not be made against Metropolitan until, on October 1, 1907, it applied for appointment of receivers, it might logically be said that the court should now consider such issue. It is averse to doing so until the master has first passed upon the question. A full record has been prepared in what is known as the "invalidity of lease proceeding" now before the special master. He can pass upon the question in that proceeding, and exceptions will bring his findings here for review. That proceeding can be expedited so that appeals from decisions of this court in both proceedings can be brought before Court of Appeals for argument at the same time. In that way all questions can be settled before the actual accounting begins.
For these reasons, a clause is inserted in the decretal order saving the question referred to from determination in this proceeding.

In re THE LEADER (PLUNKETT-JARRELL-McREA GROCER CO., Intervener).

(District Court, W. D. Arkansas, Texarkana Division. September 28, 1911.)

1. BANKRUPTCY (§ 140*)—PROPERTY VESTING IN TRUSTEE—EQUITABLE ASSIGNMENT.

An order executed by the insolvent prior to bankruptcy, directing insurance agents, who had only authority to solicit insurance, deliver policies, and collect premiums, to pay over to a creditor a part of the proceeds of an insurance loss due to the insolvent, no part of which ever came into the hands of such agents, without notice to the insurers, was not valid as an equitable assignment of a part of the fund as against the insolvent's receiver or trustee in bankruptcy; the equity of the receiver or trustee being at least equal to that of the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—ASSIGNMENTS—INSURANCE LOSS—ORDER TO CREDITOR.

Insolvent, having suffered an insurance loss, assigned the policies to a dry goods company, and then gave an order on the insurance agents, who only had authority to solicit insurance, deliver policies, and collect premiums, directing them to pay intervener a certain sum out of the insurance money when received. The agents gave a receipt for the order, and the loss was subsequently paid by checks sent to the agents, payable to the insured and the assignee of the policies jointly. *Held*, that under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such circumstances the checks, when received by the agents, were not subject to the order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

3. BANKRUPTCY (§ 164*)—PREFERENCES—ORDER TO PAY MONEY.

A partnership, after suffering a fire loss, was insolvent and assigned its policies of insurance to a dry goods company, to which it was indebted. Thereafter and within four months prior to bankruptcy, intervener, another creditor, having reasonable cause to believe that the partnership was insolvent, procured an order from the partnership on the insurance agents for payment of its account out of the insurance money. *Held*, that such order constituted a preference and was not valid as against the firm's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

4. BANKRUPTCY (§ 166*)—PREFERENCES—INSOLVENCY—NOTICE.

Absolute knowledge of insolvency by a creditor alleged to have been preferred is not required to justify a vacation of the transfer as a preference; the creditor only being required to have reasonable cause to believe that the debtor was insolvent and that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–258; Dec. Dig. § 166.*]

5. BANKRUPTCY (§ 303*)—PREFERENCE—INTENT OF DEBTOR—EVIDENCE.

Evidence *held* sufficient to show that the bankrupt, at the time of making transfer of insurance money to a creditor, intended a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

In the matter of bankruptcy proceedings of The Leader. On petition to review an order denying the validity of an alleged equitable assignment in favor of the Plunkett-Jarrell-McRea Grocer Company, intervener. Affirmed.

Frank S. Quinn and D. W. McMillan, for intervener.
William H. Arnold, for trustee.

YOUMANS, District Judge. John W. Sims, Clark Sims, and Van B. Sims, as partners, did a general mercantile business at De Queen, Ark., under the name of "The Leader." The business was begun in January, 1910. Van B. Sims was the manager and had entire control. On September 1, 1910, the stock of goods of the partnership was totally destroyed by fire. The value of the stock, according to the testimony of Van B. Sims, was nearly $13,000. It was insured for $7,000, by seven policies of insurance of $1,000 each. September 20, 1910, Van B. Sims assigned the seven policies, in the name of The Leader, to the Smith-McCord-Townsend Dry Goods Company. He testified that he assigned them for collection. At the time The Leader was indebted to the dry goods company in a sum between $3,000 and $4,000. On October 4, 1911, Van B. Sims delivered to T. M. Anderson, agent for Plunkett-Jarrell-McRea Grocer Company, an order reading as follows:

De Queen, Ark., Oct. 4, 1910.

McCown & Mallory, Agts.—Gentlemen: Please pay to the Plunkett-Jarrell-McRea Gro. Co., or its agents, five hundred ninety-three and $^{10}/_{100}$ ($593.10) dollars out of my insurance money when it is received, and oblige,

Yours, The Leader, Van B. Sims, Mgr.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McCown & Mallory, to whom the order was directed, were agents of some of the insurance companies which had issued policies of insurance on the stock of The Leader. A receipt was given by them to Anderson, reading as follows:

De Queen, Ark., Oct. 4, 1910.

Received of T. M. Anderson, order reading as follows:

De Queen, Ark., Oct. 4, 1910.

McCown & Mallory, Agts.—Gentlemen: Please pay to the Plunkett-Jarrell-McRea Gro. Co., or its agents, five hundred ninety-three and $^{10}/_{100}$ ($593.10) out of my insurance money when it is received, and oblige,

Yours, The Leader, Van B. Sims, Mgr.

An involuntary petition in bankruptcy against The Leader as a partnership was filed October 27, 1910. Within a few days thereafter Will Steel was appointed receiver of the partnership. On the 4th of January, 1911, he was elected trustee of the bankrupt estate. As shown by the schedules, the liabilities of the partnership amounted to $11,410.60, and the assets to $9,002.43. The insurance was adjusted at $5,990.02, and the open accounts amounted to $3,012.41. These two items made up the total of the assets of the partnership. Checks for the amount of the insurance on two or three policies, payable to the order of The Leader and Smith-McCord-Townsend Dry Goods Company, were sent by the insurance companies to McCown & Mallory after the delivery to them of the order above referred to, and prior to the filing of the petition in bankruptcy. These checks amounted to more than the order. After the filing of the petition and the appointment of the receiver these checks were returned to the insurance companies. They had not been indorsed by either one of the payees. The dry goods company afterwards released its claim in favor of the receiver, and other checks payable to his order were made out and delivered to him by the insurance companies, and the proceeds are now in his hands as trustee. The Plunkett-Jarrell-McRea Grocer Company filed an intervention, alleging that the giving of the order constituted an equitable assignment, and that it had thereby a lien on the fund in the hands of the trustee. The trustee answered and denied that the order was an assignment; that it had any legal effect; and that, if it had, it was a preference and void under the bankrupt law. The claim of the intervener was referred to the standing master, with directions to take proof, make findings of fact and law, and report the same to the court. In accordance with such order the master took testimony and made and filed his report, in which he finds, in substance, that the order was not an equitable assignment, and that the intervener has by virtue thereof no lien on any part of the bankrupt estate. To these findings the intervener filed exceptions. This is a hearing on those exceptions.

[1] The order was not drawn upon the insurance companies who were the debtors and holders of the fund. Notice to McCown & Mallory was not notice to them. McCown & Mallory were not general agents of the company. The testimony shows that their agency was limited to soliciting insurance, delivering policies, and collecting premiums. No part of the fund was ever in their hands. The testi-

mony does not disclose what directions were given by the insurance companies to McCown & Mallory with regard to the disposition of the checks. There is no testimony tending to show that the insurance companies ever had notice of the order in the hands of McCown & Mallory. In order to create an equitable assignment an acceptance by the debtor or fundholder is not necessary. Moore v. Robinson, 35 Ark. 293. But, in order that the assignment may be effective as against the receiver or trustee in bankruptcy, notice to the debtor or fundholder is necessary.

"An order, writing, or act, which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice." Spain v. Hamilton's Adm., 1 Wall. 604–624 (17 L. Ed. 619).

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignee must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fundholder is bound from the time of notice." Christmas v. Russell, 14 Wall. 69–84 (20 L. Ed. 762).

The equity of a receiver or trustee in bankruptcy to a fund in the hands of a debtor of the bankrupt is equal to the equity of a creditor of the bankrupt holding an order of which the debtor has no knowledge. Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704.

[2] It is contended by counsel for the intervener that, when the checks came in the office of McCown & Mallory, they at once became subject to this order. This cannot be true for a number of reasons:

(1) As to the disposal of the checks McCown & Mallory were bound by the directions of the insurance companies, and not by the order of Sims.

(2) The checks were not money, and could not be converted into money by McCown & Mallory.

(3) The checks were subject to the order of The Leader and Smith-McCord-Townsend Dry Goods Company, and not to the order of either one of the two separately.

(4) By reason of the fact that The Leader was named as a payee the disposition was still left in its control.

The master was right in holding that the order was not effective, and created no lien which could be enforced as against the trustee.

[3] But, even if the order were an equitable assignment of a part of the funds, it would in my opinion be void under section 60b of the

Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as a preference made within four months before the filing of the petition; the agent of the intervener having had reasonable cause to believe that it was intended thereby to give a preference. The testimony clearly establishes the insolvency of the partnership at the time the order was given. To make the preference void under the bankruptcy act, it must appear: First, that the agent of the intervener knew that the partnership was insolvent at the time the payment was made; second, that he had reasonable cause to believe that a preference was intended by the making of the payment.

After a review of the decisions bearing on the law applicable to the points above stated, the court, in the case of In re Eggert, 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1, says:

"The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debts, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or believe in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that, if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

In the case of Coder v. McPherson, 18 Am. Bankr. Rep. 523, 152 Fed. 951, 82 C. C. A. 99, in an opinion delivered by Judge Sanborn, it was held:

"That notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

Anderson, the agent of the intervener, to whom the order was given, testified at the hearing before the master as follows:

"I met Van B. Sims, manager of The Leader, on the street, and asked him about his account with us, and he told me that he thought he would have plenty of money to pay everybody, and I asked him about giving us an order on the insurance company for what he owed us, and he said he would do it, and went over to the courthouse and made out an order to the insurance agents McCown & Mallory for the amount of our account."

On cross-examination, he stated that the goods had been sold by a Mr. McMichael, one of intervener's salesmen, who lived at De Queen, where the business of the bankrupt had been conducted; that McMichael had endeavored to collect the account, but had not done so because "the insurance money had not been paid." Anderson also stated that he did not know any other source of payment. It is clear that McMichael had full knowledge in regard to the bankrupt's condition, and that this information had been communicated to Anderson, and that he knew the following facts: First, that the entire stock of goods had been destroyed; second, that the partnership was no longer a going concern; third, that the insurance on the stock amounted to $7,000; fourth, that the value of the stock was considerably larger than the amount of the insurance; fifth, that the insurance had not yet been adjusted; sixth, that the liabilities amounted to more than $11,000.

Anderson could not fail to see that the aggregate of the property of the partnership was not sufficient to pay its debts. He knew, therefore, that the partnership was insolvent.

[4] Before one can be said to have "reasonable cause to believe that a preference was intended," it must appear that the creditor alleged to have been preferred had reasonable cause to believe that the debtor was insolvent at the time of the alleged preference. Absolute knowledge of insolvency is not required.

"All that is necessary in such cases is the possession by the creditor at the time of such information relative to the debtor's affairs as should lead a reasonably prudent person to conclude that the property of the debtor at a fair valuation would not be sufficient to pay his debts." In re Pfaffinger (D. C.) 18 Am. Bankr. Rep. 807, 154 Fed. 528.

Mere suspicion of insolvency is not sufficient. Grant v. National Bank, 97 U. S. 81, 24 L. Ed. 971.

But a creditor cannot entirely close his eyes and stop his ears in order to keep himself in ignorance. Payment in the ordinary course of business by a going concern is very much different from payment by a concern that has suspended business and is in course of liquidation. This difference is emphasized when the suspension has been caused by fire.

Anderson knew facts which forced upon him the conviction that the partnership was insolvent, and he could not avoid the belief that the payment of the order would constitute a preference. It is idle to declare a belief in opposition to an obvious fact. Dogmatic assertion cannot stand in the face of positive demonstration. The fact that the entire stock of goods of the partnership had been destroyed was in itself sufficient to put a reasonably prudent creditor on notice. Anderson knew there would at least be a loss amounting to the difference between the cash value of the goods destroyed, which was about $13,000, and the amount of the insurance, which was $7,000. He knew, as a result of the fire, that there was a depreciation of assets in the neighborhood of $6,000. He also knew that the loss had not been adjusted, and must have realized that it was within the probabilities that the amount collected would be less than $7,000, as it afterwards turned out.

[5] But it may be contended that, in order to constitute a preference, intent on the part of the debtor must unite with belief on the part of the creditor, as held by the Circuit Courts of Appeals for the First and Sixth Circuits (Hardy v. Gray, 16 Am. Bankr. Rep. 387, 144 Fed. 922, 75 C. C. A. 562; In re First National Bank of Louisville, 18 Am. Bankr. Rep. 766, 155 Fed. 100, 84 C. C. A. 16), still the facts in this case show the existence of such intent. On direct examination Van B. Sims testified as follows:

"Q. State whether or not at the time you gave this order it was your intention to create a preference in favor of the Plunkett-Jarrell-McRea Grocer Company? A. It was not my intention, and I informed whoever I gave it to that it was not my intention."

On cross-examination he testified as follows:

"Q. What is the reason that you did not know, approximately, the amount you owed? A. I did know.

"Q. Well, when this order was given to the Plunkett-Jarrell-McRea Grocer Company, did you know how much you owed? A. I did.

"Q. Did you owe at that time the amount shown by these schedules to which your attention has been called? A. I did.

"Q. Then how can you say that you did not know you were insolvent when you gave this order? A. Because I had a bunch of accounts to collect and the insurance had not been collected. I think I was to get $7,000 out of the insurance, and I intended to use all I collected in paying up those debts, even though I had to borrow money to do it.

"Q. Your schedule of liabilities shows $11,410.60, and if you counted your insurance at $7,000, and, adding that to your account of $3,012.41, your entire assets would be $10,012.41. You would still have been short over $1,000. Now, please tell me how you could calculate that you were solvent before this insurance was adjusted. A. Because I intended to pay out rather than have the business to go into bankruptcy. I intended working to do it, and informed all the creditors that I talked with to that effect.

"Q. You knew your assets were not sufficient to pay out? A. I did.

"Q. Did you intend to earn enough, added to your assets, to pay it out? A. I did.

* * * * * * * * * * * * * *

"Q. When Mr. Anderson presented this order to you, you say that you told him it was not your intention to give a preference, did you not? A. As well as I remember, I told him that.

"Q. What did you mean by a preference? A. I meant that I did not intend to pay one and let the others go unpaid.

"Q. How did the question of preference ever arise in your conversation with him? A. I don't know that it arose, but I told him that I intended paying all the accounts and would sign this order if he wanted, but I intended paying it even though I did not sign the order.

"Q. You expected to collect those policies yourself, did you not? A. I did.

"Q. You thought the checks were going to be sent to you, did you not? A. I did.

"Q. And it was your intention when the checks were sent to you to collect the money on them and pay the amount due to Plunkett-Jarrell-McRea Grocer Company? A. It was my intention to pay the amount due to every one I owed.

"Q. How did you expect McCown & Mallory to pay this order if they were not in possession of funds at some time to pay it? A. I did not expect them to pay it. I informed the person I gave the order to, and also Mr. McMillan at a later date, that I did not think it had any more value than a blank piece of paper."

Disregarding Sims' statement that he considered the order worthless, and assuming that he intended it to be paid, his testimony shows that he knew some creditors must wait until he had earned money with which to pay them. He seemed to think that his declaration of intention to apply his subsequent personal earnings to the payment of the debts remaining after exhausting the assets precluded the possibility of a preference. The determination to pay ones debts out of future accumulations after exhausting present means is honorable and commendable; but it adds nothing to existing assets. Sims knew that all creditors could not be paid in full. He was bound to know that, if he paid one in full, one had an advantage or preference over others. A man must be held to intend the inevitable consequences of his own act. The fact of a preference was apparent both to him and to Anderson.

It is therefore ordered that the exceptions of the intervener to the findings of the master be overruled, and that intervener's petition be dismissed.

STEELE v. UNITED FRUIT CO. et al.

(Circuit Court, E. D. Louisiana. June 12, 1911.)

No. 13,762.

1. MONOPOLIES (§ 24*)—ACQUISITION OF CONTROL OF COMPETING CORPORATIONS—FOREIGN COMMERCE.

Evidence *held* to warrant findings that defendant fruit company, engaged in foreign commerce, acquired a controlling interest in a competing steamship corporation to control its operation, prevent competition and the increase of its business by the addition of new capital, and that a subsequent sale of such stock to individuals was formal only, and not intended in good faith to divest the fruit company of its control, authorizing an injunction restraining it or the purchasers from voting the stock in the fruit company's interest.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

2. MONOPOLIES (§ 21*)—PURCHASE OF STOCK—VALIDITY.

Purchase by one corporation engaged in foreign commerce of a controlling interest in the stock of a competing company similarly engaged, for the purpose of eliminating competition, though invalid in so far as the right to vote the stock is concerned, does not invalidate the stock so as to preclude the purchasing company from transferring the same to another in good faith, and conferring the right to vote the stock so transferred on the purchaser in case the transfer is without suspicion of retained control, and the purchaser is not otherwise prohibited by law from voting the stock.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 21.*

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

In Equity. Bill by Frederick M. Steele against the United Fruit Company and others. On exceptions to the report of the master. Overruled.

E. D. Owen, W. L. Hughes, and Rouse, Grant & Grant, for complainant.

Howe, Fenner, Spencer & Cocke, for United Fruit Company.

Dufour & Dufour, for Charles and Jacob Weinberger.

Farrar, Jonas, Goldsborough & Goldberg, for Bluefields Steamship Company.

FOSTER, District Judge. On December 3, 1909, Frederick M. Steele, a stockholder of the Bluefields Steamship Company, filed his bill against the United Fruit Company, against Andrew W. Preston, Minor C. Keith, and Bradley W. Palmer, its president, vice president, and secretary, respectively, against Crawford H. Ellis, its agent in New Orleans, against the president and other officers of the Bluefields Steamship Company, and against Charles and Jacob Weinberger. The bill is voluminous, and sets up generally that the United Fruit Company is an unlawful combination; that, having acquired the majority of the stock of the Bluefields Steamship Company, it had thereby controlled it for the purpose of suppressing competition with itself and to create a monopoly, in violation of the laws of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Louisiana and of the United States; that the United Fruit Company had no capacity to take title to, nor right to hold and vote, the stock of the Bluefields Company; that it had assigned all of its stock to Charles and Jacob Weinberger, one-half to each, and that the assignment was fraudulent and a sham and was only to enable the Weinbergers to vote the stock in the interest of the United Fruit Company and according to its instructions, for the purpose of continuing its control of the Bluefields Steamship Company. The bill also sets out a number of specific acts, violative of the neutrality laws of the United States, alleging the same to be intentionally and fraudulently done on the part of the officers of the Bluefields Company at the instance of the United Fruit Company, for the purpose of causing the Bluefields Company to lose a valuable concession in Nicaragua, to wit, the right to exclusive navigation of the Escondido river. The bill also charges fraudulent mismanagement generally against the officers of the Bluefields Company, at the instance of and for the benefit of the United Fruit Company, and prays that the United Fruit Company and Charles and Jacob Weinberger be enjoined from claiming any right, title, or interest in the said stock, from interfering in any way with the business of the Bluefields Steamship Company, and from voting the stock at any meeting, and that a receiver be appointed pending the litigation. On this application, in view of the extraordinary allegations of the bill, and of the war then raging in Nicaragua, a receiver was appointed for what legal effect the appointment might have, but he was ordered not to take physical possession. On December 8, 1909, an amended bill was filed, which amplified the allegations of the original bill. On January 17, 1910, Simon, Emanuel, and Adolph Steinhardt, also stockholders of the Bluefields Steamship Company, filed a cross-bill, praying for substantially the same relief as Steele, and on the same date Adolph Segal filed an intervention, joining the complainant, Steele, and praying for the same relief. In due course the defendants filed answer, denying the allegations of the bill and other pleadings and affirming the good faith of the sale and transfer of the United Fruit Company's stock to the Weinbergers. After a hearing, the appointment of the receiver was maintained, and he was directed to take charge of all the assets of the Bluefields Steamship Company, and the preliminary injunction issued as prayed for. The case was then referred to a master to take the evidence and report his findings of fact and conclusions of law thereon, and is now before me on final hearing on exceptions to his report.

The proceedings before the master took a wide range, but in his able and painstaking report he has endeavored to deal specifically with all of the contentions of the parties and to find the facts with particularity, those collateral as well as those material to the main issues. The master reduced his conclusions to some 51 special findings of fact. To these facts the defendants have filed 37 exceptions, divided into many subheads, and the complainants have filed some 17 exceptions. The exceptions to the master's report are largely to his findings of collateral facts, and principally to his deductions therefrom. Some are directed only at his choice of language, and others com-

plain that he did not find the facts regarding incidental transactions more in detail. Had counsel followed the better practice of filing their exceptions before the master, doubtless he would have corrected his report to conform more nearly to their views. Most of the exceptions are unimportant and need not be further noticed. Those I consider material will be referred to later.

It is undisputed, however, that the Bluefields Steamship Company was organized December 28, 1897, as a Louisiana corporation, with an authorized capital stock of $100,000, all of which was issued before January 1, 1899; that the company was engaged in the banana importing business from Bluefields, Nicaragua, to the United States; that the United Fruit Company was incorporated March 30, 1899, under the laws of New Jersey, and in June, 1899, entered into competition with the Bluefields Steamship Company, operating one ship a week from Bluefields; that on September 20, 1899, the United Fruit Company consolidated with six other New Jersey corporations, all engaged in the fruit business, and Messrs. Andrew W. Preston, Minor C. Keith, and Bradley W. Palmer became, respectively, its president, vice president, and secretary, as well as directors; that in October, 1899, after the said consolidation, the United Fruit Company acquired, in the name of its president, one-half of the outstanding stock of the Bluefields Steamship Company—500 shares—and at the same time there was assigned to him an additional share for voting purposes; that the said competition ceased, and three employés of the United Fruit Company were elected directors of the Bluefields Company, the board consisting of six members, and so maintained continuously until 1907, during all of which time the United Fruit Company or its officers controlled the election of all the directors of the Bluefields Company by a clear majority vote of all the capital stock in existence; that on August 31, 1907, the United Fruit Company disposed of 4 shares of its stock, and its three employés resigned from the board of the Bluefields Steamship Company, but the United Fruit Company continued to vote its stock, and all elections for officers of the Bluefields Company were unanimous; that in 1909, before this suit was filed, the United Fruit Company purchased 70 additional shares of the stock of the Bluefields Steamship Company, which gave it 53 per cent. of all the stock of the company issued.

[1] From these facts the conclusion is irresistible that the object of the United Fruit Company in first acquiring the stock was to control the competition of the Bluefields Steamship Company, and, no matter what may have been its intention during the period between 1907 and 1909, with the acquisition of the additional stock in September, 1909, the power of absolute control returned, and it is plain that the injunction should be perpetuated against the United Fruit Company, if it has now any interest in the Bluefields Company's stock. Factors' & Traders' Ins. Company v. New Harbor Protection Patrol, 37 La. Ann. 233; State ex rel. Jackson v. Newman, 51 La. Ann. 838, 25 South. 408, 72 Am. St. Rep. 476; Northern Securities Company v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. It appears, however, that the United Fruit Company, on September 15,

1909, transferred all of its Bluefields Company holdings to Charles and Jacob Weinberger by a written contract, which was amended on December 31, 1909, while the litigation was pending.

The undisputed facts relevant to this transfer are as follows: Charles and Jacob Weinberger became stockholders in the Bluefields Steamship Company at its formation and owned, together with a third brother, one-third of its capital stock. They were active in securing control of the corporation for the United Fruit Company, and sold it one-half of their stock in October, 1899. Charles Weinberger was put in sole charge of the New Orleans division of the Fruit Dispatch Company, a subsidiary corporation of the United Fruit Company controlled by it, in June, 1902, and is still so employed. Jacob Weinberger had no active connection with the fruit business in Nicaragua from June, 1905, to September, 1909, and he was then engaged, over the protest of some of the minority stockholders, to go to Nicaragua merely to look into the affairs of the Bluefields Company and make a report, at a salary of $416.67 per month. In the early part of 1909 the United Fruit Company was advised by its counsel that it probably could not vote any of the Bluefields stock standing in its name and in the name of its officers. Jacob Weinberger learned of this advice, and tried to buy all of its Bluefields stock, but was unsuccessful. As early as December, 1906, Charles and Jacob Weinberger were unable to pay their debts, and in August, 1909, while still apparently insolvent, all of their Bluefields stock, which was then pledged to the State National Bank, with the exception of 38 shares, was sold by the liquidators of the bank to Steele with the knowledge of Charles Weinberger and without objection on his part. At about the same time Steele began buying Bluefields stock in August, 1909, the local manager and local attorney of the United Fruit Company suggested to the Weinbergers that they might make arrangements for buying the United Fruit Company's stock, and by the agreement of September 15th the United Fruit Company transferred to the Weinbergers 686 shares of Bluefields stock for the price of $450 a share, and further agreed to deliver and sell to them 70 additional shares at the same price. The United Fruit Company was compelled to buy the 70 additional shares for cash, and paid more for them than it sold them for. The stock transferred constituted 53 per cent. of all of the stock of the Bluefields Steamship Company. The sale was made on terms of 10 years' credit, payable in equal annual installments, no cash was paid at all, and the United Fruit Company retained the right to rescind the sale at any time. The Weinbergers on their part agreed that the voting power of the stock should be used to elect a director nominated by the United Fruit Company and to amend the charter so that the directors and other officers would hold office at the will of the stockholders, and that all of their acts should require the ratification of a majority of the stockholders; that no extraordinary or unusual indebtedness should be incurred except with the consent of this director, the president, or vice president of the United Fruit Company; that the capital stock should not be increased or diminished except by consent in writing of the president, or the vice president,

or the executive committee of the United Fruit Company. During the pendency of this suit, the parties amended this agreement with the view to eliminate all clauses supposed to be objectionable to the court, but the sale still remains as one entirely on ten years' credit, with a provision for foreclosure and sale of the stock without judicial proceedings on default of any payment of principal or interest, or in the event of the purchasers' bankruptcy.

With regard to this transfer, the master found, as evidenced by his twenty-first, fortieth, and forty-first findings of fact, that the sale to the Weinbergers was coupled with the retained control of the voting power of the stock in the United Fruit Company, and that its purpose was to vest the control of the Bluefields Steamship Company in a stockholder under obligations to the United Fruit Company, one that could be relied upon to carry out its wishes, and that it did not divest the United Fruit Company of the control of its 756 shares referred to, and was not intended by the parties to do so. The defendants have excepted to the master's said findings of fact on the ground that the uncontradicted and unimpeached testimony of all the parties to the transaction shows that it was a real transfer, and was intended by all of the parties to divest the United Fruit Company both of its ownership and control of the stock.

It is difficult, to my mind, to conceive how a more complete control could be retained or exercised than was contemplated by the original agreement. Conceding that it was the intention of the United Fruit Company to transfer to the Weinbergers the complete ownership of the stock at the expiration of the credit period, it is manifest that, without the consent of the United Fruit Company, there was no possibility of the Bluefields Steamship Company increasing or expanding its business, or attracting new capital, and all the time the power to control, or even entirely eliminate it, was in the hands of the United Fruit Company. And the amendment of December 31st does not materially change the situation, for unless the Weinbergers paid some $51,000 in principal and interest at the end of the first year the United Fruit Company could foreclose. In the preceding ten years the Bluefields Company's profits had averaged about $60,000 a year, and on the same basis the Weinbergers' share would not be over $32,000. They were insolvent, and in the ordinary course of events they could not have met this payment. In view of all the circumstances peculiar to this transaction and the relationship of the parties, the physical and other facts may well outweigh the testimony of the parties, conceding to them the utmost good faith, for the agreement, if allowed to stand, would have to be interpreted by them, and the deep obligation of the purchasers to the United Fruit Company would necessarily lead them to conform to its wishes. It is certain that the United Fruit Company could not vote the stock held in its name, and two courses were open to it: One, to retain it quiescent, and the other to divest itself entirely of its ownership and control. If it intended to do the latter, it was not its concern who might control the Bluefields Company, and therefore the mere fact that, in order to deliver a clear majority, it bought stock for cash, which it subsequently sold for a smaller price on credit to two of its close

friends, who were at the time insolvent, indicates very plainly the real reason for making the transfer.

It is due to the defendants to say, however, that complainants failed to prove the allegations of the bill, charging intentional violations of the neutrality laws, and the master undoubtedly so intended to hold in his thirty-fifth finding. But I do not consider these allegations material to the issues now before me, nor did I so consider them at the time of confirming the receiver's appointment.

There appears to be evidence to sustain all of the master's findings of fact, though I have not examined with particularity those matters not bearing directly on the main issues before me. The findings of a master are entitled to great weight, especially when he has seen and heard the witnesses, and I am not disposed to disturb the findings in this case.

[2] I am not called upon to say anything further at present, but for the information of the master and the parties I had perhaps better express my opinion as to all the points raised. It has been urged with great earnestness and vigor by counsel for complainants that the contract by which the United Fruit Company acquired its stock was illegal, and it acquired nothing; that the stock standing in its name is void and it can transfer nothing, and that in any event, not having the right to vote the stock, it could not transfer the right to a purchaser. It may be that such a solution of the trust problem is desirable, but I cannot see my way clear to adopt complainants' contentions in the absence of a positive statute, especially in view of the expressions of the Supreme Court in the cases of Harriman v. Northern Securities Company, 197 U. S. 298, 25 Sup. Ct. 493, 49 L. Ed. 739, the Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, and the United States v. American Tobacco Company, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, recently decided. The authorities cited by complainants would perhaps be persuasive if their first premise was correct, but the Supreme Court has clearly drawn the distinction, thin though it may be, between unlawful contracts and those incidental and collateral to them. The contract of sale by which the United Fruit Company acquired this stock was not of itself illegal and it undoubtedly acquired the ownership subject to the restrictions the law has placed upon its use. Continental Wall Paper Company v. Voigt, 212 U. S. 258, 29 Sup. Ct. 280, 53 L. Ed. 486; Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

I therefore must hold that the United Fruit Company has the right to dispose of its stock, and the purchaser will be entitled to vote it, provided the transfer is entirely without suspicion of retained control, and he is not otherwise prohibited by law to do so.

The exceptions to the master's report will be overruled, and in accordance with his recommendations there will be a decree, dissolving the preliminary injunction herein, so as to permit the holding of an election of officers of the Bluefields Steamship Company, but maintaining it in all other respects, and ordering said election to be held before the master and under his control, the receiver to be maintained and jurisdiction to be retained by the court until further orders.

PAINTER v. NAPOLEON TP., HENRY COUNTY, OHIO, et al.

(District Court, N. D. Ohio, W. D. November 23, 1910.)

No. 1,310.

1. BANKRUPTCY (§ 166*)—PREFERENCE—"NOTICE" OF INSOLVENCY.
"Notice" to a township trustee of the insolvency of his brother, a defaulting township treasurer, was notice to the township, within Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), relating to preferences.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*
For other definitions, see Words and Phrases, vol. 5, pp. 4839–4844; vol. 8, p. 7733.]

2. BANKRUPTCY (§ 178*)—PREFERENCE—FRAUDULENT TRANSFER—NATURE OF TRANSACTION.
A town trustee, having discovered the insolvency of his brother, the town treasurer, and a shortage in his accounts of nearly $5,000, persuaded the mother of their wives to convey to the wives jointly certain land. The treasurer's wife then conveyed her interest to her sister for the stated consideration of $2,500. The sister and her husband, the trustee, mortgaged the land for $5,000, and drew one check for $2,500 to the order of the treasurer's wife, which she indorsed to her husband, and another to the treasurer himself for the balance of the shortage. Both of these checks were deposited to the treasurer's official credit. At the same time with these transactions, the treasurer conveyed a homestead, to which he had title, to his wife for the expressed consideration of $2,500. *Held* that, though the $2,500 check from the trustee's wife to the treasurer's wife was used by the latter to purchase the homestead, and was an attempt to put the homestead beyond the reach of creditors, so as to render the conveyance invalid and voidable by the treasurer's trustee in bankruptcy, yet the $2,500 could not be recovered from the town as an unlawful preference, the money having been donated by the mother of the wives for the express purpose of making up the shortage in the treasurer's accounts, and the treasurer's wife being liable to be compelled to devote it to that end if she had not done so, and hence the transfer of the homestead was not an essential part of the payment of the money to the town.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

Action by Clyde R. Painter, trustee in bankruptcy of Henry Delventhal, against the Township of Napoleon, Henry County, Ohio, and another. On exceptions to master's findings. Exceptions allowed.
See, also, 156 Fed. 289.

C. K. Friedman and James P. Ragan, for plaintiff.
E. N. Warden, Donovan & Dittmer, and D. D. Donovan, for defendants.

KILLITS, District Judge. This is an action on the part of the trustee to recover of Napoleon township, Henry county, Ohio, what the trustee assumes to have been a preference to the township as a creditor of the bankrupt.

The bankrupt, on the 11th of September, 1906, was treasurer of Napoleon township, and as such treasurer was charged with more than $5,000 of township funds. He was, however, actually a defaulter to the township for nearly $5,000, a fact continuing from a time prior

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the last examination of the township treasury by the trustees. It appears from the testimony that the township trustees made their examination required under the law of Ohio by taking the clerk's statement of how much money the treasurer was charged with and the treasurer's statement, unconfirmed, as to how much he had on hand, and that, had they made such an examination as the law contemplates, in March, 1906, they would then have discovered the fact that their treasurer was an embezzler.

One of the trustees was William Delventhal, a brother of Henry, who on the 11th of September, 1906, discovered the desperate condition of his brother's official and private affairs, for Henry was in fact hopelessly insolvent and had been for a long time. Henry and William had married sisters, and, in order to make up the deficiency, William, the trustee, persuaded their common mother-in-law to deed to their wives jointly 40 acres of land. Johanna, the wife of the treasurer, Henry, then conveyed to her sister, the wife of William, for the expressed consideration of $2,500, her interest in the lands thus coming to her and her sister from their mother. William and his wife, Frieda, now having the full title to the 40 acres, mortgaged the same for $5,000, and on the proceeds of this mortgage they made two checks, one for $2,464.28, and one for $2,500, making up the exact amount of the defalcation, $4,964.28. The one check was made directly to Henry Delventhal, treasurer; the other check for $2,500 was made payable to Johanna Delventhal, wife of Henry, by her was endorsed in blank, and delivered to Henry, who deposited it and the other check in a bank in Napoleon to the credit of himself as treasurer of the township. These proceedings were all had on the same day, namely, the 11th of September, 1906, except that the deposit of the checks in the bank did not occur until the following day. On the 11th, also, Henry, having title himself to a homestead in Napoleon, conveyed the same for a consideration of $2,500 to his wife, Johanna. The defalcation being made up in this way, the other trustees were informed of the situation, and the board was called together to receive Henry's resignation as treasurer and to elect a new treasurer.

On the 17th of September, 1906, a petition in involuntary bankruptcy was filed against Henry Delventhal, and the trustee has brought this action to recover of the township $2,500, upon the theory that the transactions above set out operated to prefer the township as a creditor of Henry through the transfer of his homestead to his wife, the assumption being that the check made by William and Frieda to Johanna for $2,500 was the consideration to Johanna for the conveyance to them of Johanna's interest in the land acquired from the mother-in-law, and that the same check was indorsed in blank and delivered to Henry and used by Henry to deposit to his credit as treasurer as the consideration for the conveyance by Henry to Johanna of the homestead, and that by this roundabout way the homestead property was used to prefer the township.

The case was referred to J. E. Shatzel, referee for Wood and Henry counties, as special master, and the matter now before the court arises on exceptions to the master's finding of a preference, and rec-

ommending that the township be directed to pay into the hands of the trustee $2,500. The court is with the special master in holding as a matter of fact that the consideration paid by Frieda to Johanna was used by her as a consideration for the purchase from Henry as a homestead, and that the transaction was an attempt to place the homestead beyond the reach of creditors; and as conclusions of law that the township was a creditor of Henry in the same class as the latter's general creditors, and that William's knowledge of Henry's insolvency was imputable to the township.

[1] Counsel in the case very properly regard this proceeding as coming under subdivision (b) of section 60 of the bankruptcy act, which, as applied to the facts of this case, requires that the record show facts charging the township with knowledge of the insolvency of Henry. This knowledge was, of course, only within the breast of the one trustee, his brother, William, until after the defalcation was made up.

Counsel for the township have argued strenuously and ably, upon much authority, that the knowledge of William alone was not sufficient to charge the township, citing many authorities which deal with situations growing out of the relation of directors and trustees in private business affairs to their principals and to the peculiar facts of the respective cases.

We do not think that any of these authorities apply to this situation. William Delventhal, as a public officer, owed a duty to impart to his fellow members any knowledge that he acquired affecting the public interest, and that duty was superior to any possible obligation he could be under as a private citizen, even if it affected his brother's safety. A rule which may apply to the conflicting interests of officers of private corporations cannot govern in a case of this kind, for the duties of a public officer and his private interests cannot meet on equal terms. The organized corporation of Napoleon township is its board of trustees, and every consideration of public policy seems to demand that each member of the board is the agent of the board as to any matter of knowledge coming to him affecting the public interest, and that any fact which does come to his attention which is vital to the public welfare must come to him officially. Any other rule might operate very mischievously. It has been repeatedly held, and there is no authority apparent to the contrary, that knowledge by an individual trustee, or an individual county commissioner, or an individual member of a town council, of a defect in a highway within their respective jurisdictions, is sufficient to impute knowledge to the corporation of which they are officers, respectively, in an action for personal injuries; and the rule grows out of the necessities of the situation. To say that Napoleon township did not know of the insolvency of Henry Delventhal, and did not know of his indebtedness to it, and could not know it until the trustees were convened in session is to state a proposition that we are sure no reasonable person would adhere to, and yet, in the ultimate, that is the proposition involved in the claim that the township had no reasonable cause to know the results of this situation because the facts were known to one member of

the board only. If they were known to William Delventhal officially, then, surely, they were known to the township. If we may say that they were known to William Delventhal unofficially only, then we reach the absurd conclusion that if they were known unofficially or in the same way to each of the three individual members of the board of trustees, the township could not be charged with knowledge until these three gravely got together and resolved that their unofficial knowledge should become public. Besides, the facts show that had the trustees done their duty in their last examination of the township treasury they would have discovered the embezzlement of their treasurer, and would have been put upon inquiry from which they could readily have ascertained the fact of his hopeless insolvency.

[2] These results, however, do not conclude the case. Assuming that the transfer of the homestead worked an intentional fraud upon creditors, to which William was a party, yet it cannot be said either that the township became thereby a party or that it profited as a result thereof. The participation therein of William was not an official act; it was not directed by, nor known to, the other members of the board; it was not in the line of official duty. Being a fraudulent act, it could not be the act of the township without formal direction of the board of trustees as an organization. It is equally assured that the township gained no profit thereby, for the very plain reason that it was not necessary to the acquirement of means to square Henry's official accounts. We gather from the testimony that the mother-in-law unconditionally devoted the 40 acres to that purpose, conveying them to her daughters rather than to him directly, for family reasons, at which the record hints. The use of Johanna's interest to effect a transfer of the homestead appears to have been a side enterprise, not essential to the complete devotion of the old lady's property to Henry's salvation. The brothers and their wives simply took advantage of the situation to gain another point, in which the township had no interest. It seems clear that had Johanna not otherwise joined her sister in using the property to get the means of saving her husband, she could have been compelled to act to effect the purpose for which the land was given her.

If we are right in this line of reasoning, it follows that the special master was wrong in his final judgment, and that the trustee in this case pursued the wrong parties in his action. The general creditors profit by the fact that a very large claim against their debtor is satisfied without depleting his assets, for, of course, it is not difficult, on the facts of this record, to use the homestead, as far at least as it may exceed in value the bankrupt's right of exemption, in the liquidation of general claims.

The exceptions to the findings of the master are therefore allowed.

THE MARYLAND.

(District Court, E. D. Virginia. July 25, 1911.)

SALVAGE (§ 31*)—AMOUNT OF COMPENSATION—FIRE.

An award of $19,250 in the aggregate made to the owners, officers, and crews of five tugs and a steamer for salvage services rendered in saving the steamship Maryland and her cargo which had caught fire after leaving Norfolk for New York, and had put in at the Deepwater Pier at the Jamestown Exposition at Sewells Point and landed her passengers; the value of the Maryland and cargo being about $228,000 and of the salving vessels over $100,000, and the services very efficient and rendered at considerable peril to those engaged.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 75–77; Dec. Dig. § 31.*

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit by the Chesapeake & Ohio Railway Company and others against the steamer Maryland for salvage services. Decree for libelants.

This is a case under the consolidated title of Chesapeake & Ohio Railway Co. against the steamship "Maryland," instituted through five certain libels and petitions filed by the masters and crews for themselves and the owners of their vessels, the steam tugs Baxter, McCaulley, Eccles, Helen and Wanderer, and the steamer Endeavor, to recover salvage for services rendered in extinguishing a fire upon the steamer Maryland, and her cargo, which occurred on the evening of the 15th of December, 1910, as she was proceeding on her outward trip from Norfolk to Cape Charles, Virginia, said services having been rendered at the Deepwater Pier of the Jamestown Exposition, Sewells Point, Va., to which the Maryland, while on fire, had made fast with a view primarily of landing her passengers, which she did. The fire was a serious one; the steamer succeeded in discharging her passengers, and the ship and most of the cargo was saved, though with great damage and loss to both. Valuable services were undoubtedly rendered by the salvors, whose aggregate claims amount to $146,000. The approximate value of the Maryland is $200,000, and of her cargo $27,801.42. After taking testimony and hearing arguments of proctors, the court filed a brief memorandum, as follows: "The conclusion reached by the court in this case is: That an award should be made, as against the steamer Maryland and her cargo of cotton libeled, of $19,250, to be apportioned as between the two at $17,750 against the steamer and $1,500 against the cotton, and that, as between the libels filed by the respective steamers and tugs, they should recover as follows: The steam tug Baxter and her master and crew, $5,250; the steamer Endeavor and her master and crew, $4,000; the steam tug McCaulley and her master and crew, $3,500; the steam tug Eccles and her master and crew, $3,250; the steam tug Helen and her master and crew, $2,250; and the steam tug Wanderer and her master and crew, $1,000. That the four vessels first named should have judgment against the Maryland alone, and the last two vessels, namely, the Helen and Wanderer (each owned by the Chesapeake & Ohio Railway Company, should have a joint judgment for $1,750 against the Maryland and $1,500 against the cargo of cotton. The conclusion further reached by the court under the facts and circumstances of this case is that, as between the several vessels libeled and their masters and crews, the recoveries herein allowed should be apportioned, one-half to the owners of the vessels, and one-half to the masters and crews, respectively, the same to be paid to the master and crew in proportion to the wages earned by each, except that in the case of the Endeavor, a passenger steamer of considerably greater value than the tugs, as to them the apportionment should be two-thirds to the owners of the Endeavor and one-third to the master and crew,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be distributed among them in accordance with the salaries received by them as above indicated"—intending to elaborate its views later.

Hughes & Little, for Chesapeake & Ohio Railway Co.
Thorp & Thorp, for tug H. A. Baxter.
Henry Bowden, for tug McCaulley.
William Leigh Williams, for steamer Endeavor.
John W. Oast, Jr., for tug Samuel Eccles, Jr.
Thomas H. Willcox and Floyd Hughes, for the Maryland.

WADDILL, District Judge (after stating the facts as above). In this case there is no denial by the respondent that the services sued for were rendered, and were efficient, timely performed, and most valuable in character; and the controversy is solely over the amount to be allowed the salvors therefor. No general discussion of the principles controlling salvage awards in fire cases need be entered into, as they are well and definitely understood. The Jefferson (D. C.) 181 Fed. 416. The court will therefore content itself with stating the special considerations that led it to allow the sums awarded.

First. The Maryland is a large first-class passenger and freight steamer on the line between New York and Norfolk, Va., via Cape Charles, and built to withstand the storms incident to crossing the waters of lower Chesapeake Bay. She was crowded with passengers at the time, having on board 107, and well loaded with freight on the lower and main decks, in addition to express and United States mail matter. The fire broke out about 6:40 on the evening of the 15th of December, 1910, shortly before the steamer reached the Virginian Railway piers at Sewells Point, and was at once found to be of grave character. The ship was at the earliest moment after discovery of the fire, headed for the Deepwater Pier of the Jamestown Exposition at Sewells Point, to which she was made fast, and every possible effort exercised by her master and crew to avert the impending disaster. Fire signals were promptly given, to which all of the neighboring shipping responded, and telephone communication was had looking for assistance from Newport News and Port Norfolk. The libelants, as well as other vessels in the neighborhood, appeared quickly on the scene, but to the former alone, save what assistance the Maryland herself rendered, is due the credit for extinguishing the fire and saving the ship, though one of the tugs of the respondent company likewise rendered some assistance. The passengers were all landed on the piers, and it seems without special injury to them, and, after some hours, were transferred to another steamer of the same line. The fire which for a while could not be subdued was finally gotten under control in perhaps an hour and a half; and by 11 o'clock at night was apparently entirely extinguished. The mail and express matter appears to have been saved without particular loss, though the cargo was seriously damaged, and some of it totally destroyed. The services rendered by the salvors were valuable, and performed in a highly intelligent and satisfactory manner at considerable risk at times to members of the salvors personally. Indeed, the court thinks the extinguishment of the fire was due largely to the manner in which the work in hand was

performed; the officers and crew of the Maryland likewise doing all in their power to the same end. The spirit displayed in the effort to save the burning ship on the part of all engaged in the service was highly commendable, and, indeed, it was only by the prompt and efficient action of this large number of intelligent seamen that the saving of this ship was possible, and particularly with such small damage to her.

Second. In the view taken by the court of the testimony, great success attended the service, as the steamer was in undoubted danger of total destruction, which condition was accentuated by reason of the strong wind from the west northwest, having regard to the place of anchorage of the vessel, which made her position at the Deepwater pier an exceedingly exposed one, immediately within the sweep of the wind down James river, across the upper waters of Hampton Roads and Chesapeake Bay to the Capes. The subjection of the fire under the circumstances was not only exceedingly difficult, but it is doubtful whether it could have been accomplished at all, had the fire been on the port, instead of the starboard side of the steamship.

Third. The vessels engaged in the salvage services were of great value, largely in excess of $100,000 in the aggregate. The Endeavor was a passenger steamer of large size, used as a ferryboat plying between Newport News and Sewells Point, a distance of some six miles. The tugs, with the exception of the Eccles, were all large and powerful, the Helen and Wanderer especially fitted with extra large pumps and fire apparatus, used for fighting fire in the harbors of Newport News and Norfolk, and the officers and crews of the ferryboat and tugs were men of considerable experience in extinguishing fires by means of tugboats; one or more of them being experts in that line, which greatly added to the character and efficiency of the services performed. They one and all abandoned the services they were respectively engaged in at the time the fire signals were given, and gave unremitting attention to the work of saving the Maryland, as long as they could be of service, some of the boats being detained much longer than others, the longest from the beginning of the fire until about 11:30 at night.

Fourth. At the trial, the respondent strongly urged that the award should be controlled by the fact that the Maryland could have landed her passengers, backed out into deeper water in the channel, opened her sea-cocks, and scuttled herself; and in that event certainly her hull would have been saved, and her machinery not seriously injured. This defense is apparently an afterthought, certainly nothing of the sort was contemplated at the time of the fire, and in the opinion of the court it would, under the circumstances, have been impossible, and indeed reckless to have attempted such a thing; and it by no means follows, taking into account the damage to and almost certain loss of mail and express matter, passengers' baggage and freight, that it would have been at all a practicable thing from an expense standpoint to have done. The navigators of the Maryland made no such attempt; on the contrary, they adopted an entirely different course, and one in which they sought most urgently for and accepted assis-

tance. In fact, they adopted the only course that their experience and wisdom indicated to them was proper. They displayed great coolness, courage, and sagacity in all they did, and in no other way could they have saved the steamer.

Fifth. The court will not attempt to go into details of the reasons which impelled it to make the apportionment of the award between the several salving vessels, as there is no exception in that respect among them, further than to say that they will fully appear by a careful examination of the testimony, and the circumstances under which they severally performed the work in hand. An illustration for instance of one of the cases is that of the Eccles, a small tugboat, which by reason of her light draft, could pass around the steamer into shoal water, and fight the fire from her starboardside, a position of great advantage, though of much danger to the Eccles.

Sixth. In the division of the award between the libelant vessels and crews, there is likewise no dispute. The court believes, having regard to the services rendered, and taking into account the value of the several vessels, and the character of the services performed by the seamen, that the division is a proper one as made (Cape Fear Towing & Transportation Co. v. Pearsall, 90 Fed. 435, 33 C. C. A. 161), and within the ruling of the Circuit Court of Appeals for this circuit in the comprehensive opinion of Judge Simonton in that case.

THE PASSAIC.

(District Court, E. D. New York. August 3, 1911.)

1. COMMERCE (§ 25*)—EMPLOYER'S LIABILITY ACT—EMPLOYÉS ON FERRYBOAT.
Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), as amended by Act April 5, 1910, c. 143, 36 Stat. 291, applies to employés of a railroad company employed on a ferryboat owned and operated by the company in interstate commerce in connection with its railroad, superseding state statutes on the subject.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 25.*

What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. Co. v. Jones, 48 C. C. A. 232.]

2. SEAMEN (§ 29*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE.
Evidence considered in a proceeding on a claim for the death of an oiler employed on a steam ferryboat, caused by steam escaping from the main steam pipe which broke off at the joint where it was attached to the steam chest, and *held* not to show any act of negligence on the part of the owner of the vessel which rendered it liable, but to leave the cause of the breaking of the pipe entirely unexplained and to be conjectured only.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

3. SHIPPING (§ 209*)—LIABILITY OF VESSEL OWNER—PROCEEDINGS FOR LIMITATION.
In order to avail himself of the statute allowing a limitation of liability, a vessel owner must surrender the vessel for sale within a reasonable time after the claim arose, and in as good condition as at that time, and, if he retains and uses it for any considerable time and until

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it has from any cause greatly deteriorated in value, he cannot limit his liability to the amount it brings at the sale, but a claimant on seasonable objection may show the market value of the vessel at the time the claim arose.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-662; Dec. Dig. § 209.*]

4. SHIPPING (§ 209*)—EMPLOYER'S LIABILITY ACT—ADMIRALTY JURISDICTION—PROCEEDING FOR LIMITATION OF LIABILITY.

Whether or not Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), by implication repeals the statutory provisions permitting shipowners to limit their liability in so far as they might be used by a railroad company engaged in interstate commerce to limit its liability for injuries to employés on its vessels used in such commerce, it does not deprive a court of admiralty of the general jurisdiction over limitation of liability because such a claim is involved, nor of jurisdiction to hear and determine a claim on its merits therein with the consent of the claimant, or where the proceeding was begun before the passage of the statute and where any objection to jurisdiction on such ground had been waived.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 209.*

Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

In Admiralty. Suit by the Erie Railroad Company, as owner of the steam ferryboat Passaic, for limitations of liability. On claim for damages for the death of an employé. Decree for petitioner.

Wilcox & Green (Stetson, Jennings & Russell, of counsel), for petitioner.

Roy, Watson & Naumer (Robert H. Roy, of counsel), for claimant.

CHATFIELD, District Judge. [1] This is a proceeding on the part of the owners of the ferryboat Passaic to limit their liability under section 4283, R. S. (U. S. Comp. St. 1901, p. 2943), for claims existing against the ferryboat prior to the 26th day of April, 1910, on which their petition was filed. A sale of the boat was had and the proceeds deposited. But one claimant has filed a claim. This claimant is the personal representative of one Wilson, who was almost instantly killed upon the morning of October 20, 1908, by the escape of steam into the fireroom of the Passaic, just after she had left her slip on the Jersey side and was straightening into her course across the Hudson river. She was then within the state of New York, and such a claim would arise under section 1902 of the Code of New York. But this statute has been superseded and a broader right in interstate matters has been given by the Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), as amended by the Law of April 5, 1910, c. 143, 36 Stat. 291. Fulgham v. Midland Valley R. Co. (C. C.) 167 Fed. 660. The statute allowing the limitation of liability is hence applicable thereto. Butler v. Boston Steamship Co., 130 U. S. 555, 9 Sup. Ct. 612, 32 L. Ed. 1017.

[2] The ferryboat had a considerable load of trucks, heavy with cans of milk. Care was paid to the distribution of the load, as the Passaic was not a large boat and her displacement was materially affected by each loaded four-horse milk truck. Wilson was an oiler at the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time, and was alone in the part of the engine room where the accident occurred. The main steam pipe from the boilers to the engine, after being carried upon hangers for a considerable distance under the frame of the vessel, makes a right-angle turn to connect with the butterfly throttle valve at the steam chest. One of the flanges fastening the valve to the steam chest broke from the main portion of the valve, showing a clean fracture entirely around the end of the pipe. The position of the pipe after the accident was shown upon the trial. The remainder of the valve and the short arm of the elbow were upheld by the throttle lever running from the valve to the floor of the engine room above, while the bend of the elbow itself turned down as far as the steam pipe could sag; the nearest hanger being drawn out from the timbers of the deck to which it was suspended, thus allowing some movement or play to the elbow when freed from the counterbalance of the pipe into the steam chest.

The testimony upon the trial indicated sufficiently that the hanger was drawn out by whatever force caused the fracture. There was no evidence and no physical fact shown from which to conclude that the weight of the pipe, or any violence, tore out the hanger *before* the fracture, or that the weight of the pipe alone caused any change in the position of the hangers, except at the time of the break itself. There was no evidence of an explosion or bursting, in the sense of a blowing out from the interior of the steam pipe, and the escape of steam was shown by the testimony to have come through the open end of the pipe after the fracture. The pipe itself showed no flaw, except that it had not been cast in such a way as to secure concentric registration of the outer and inner circumferences; that is, one side of the pipe was somewhat thinner than the other at the break. But the thinnest part of the steam pipe was thicker than the minimum requirements of the United States regulations covering the use of a steam pipe for the pressure and situation specified. Upon the morning in question the steam pressure was well below the amount allowed upon an inspection but a short time before by the government inspectors.

Under these circumstances no testimony was presented from which negligence could be inferred, because no testimony suggesting a reason for the accident was furnished, beyond the fact that the death resulted from the escaping steam, and that the escaping steam came from the fractured pipe, and that the fracture was the result of a strain, either external (that is, by the application of some force to the pipe itself), or internal (by a sudden impact of steam). Any physical explanation of the accident from defect in construction or handling is impossible on the evidence.

The representatives of the deceased have offered no evidence showing any improper use of the machinery or engines from which the conclusion could be drawn that a sudden application of steam occurred, so that no negligence in that way, nor in the management of the engine itself, has been proven.

The personal representative of the deceased has attempted to show that this particular ferryboat was old, and that her deck timbers sagged and gave under the passage or continued weight of a heavy milk

wagon. But the testimony as to the structure of the boat and the plan of her timbering, which was integral with the keel and which would not allow of sagging unless it affected the entire hull, removes the possibility of concluding that the deck timbers from which the steam pipe was suspended could have sagged to such an extent as to break the pipe in question, especially as they were found afterward to be sound, and no possibility of deviation from the horizontal was located at the spot in question.

The testimony as to the displacement of the boat in the water, or as to the creaking or bending of the plank flooring of the deck, was not traced in any way to a resultant movement of the deck timbers; and, in the absence of a giving way or change in position of these timbers, it is impossible to conclude that any strain could be communicated to the steam pipe by means of the hangers, sufficient to cause the break in question. In this regard it must be remembered that the break was inside of the engine room space, and that the pipe was suspended under the deck timbers forming the side of the engine room space at the inner side of one of the horse-gangways. A strain caused by displacement, sufficient to break the pipe at the flange, would have had to be transmitted by the pipe itself, and, taking into account the elasticity of the timbering, the hangers, and the pipe (even if the structure was substantially rigid), it is evident that a displacement sufficient to break the pipe at a point distant some feet from the application of the strain causing the displacement of the parts would have been so great as to leave some evidence other than the fracture of the steam pipe and the pulling out of the hangers.

It will be seen that, as the hangers were rigid, they could not have been pulled out by transmitting the strain, but would have remained in the same position after the strain had been relieved by the breaking of the pipe.

It follows, therefore, that no negligence on the part of the company has been shown, and the accident would seem to have occurred from some unascertainable, and hence unavoidable, violent movement of the machinery or pipe (and no suggestion of cause for this can be found in the record), or that a sudden pressure of the steam in the pipe in question broke the pipe at the weakest point, namely, the point of joining the flange with the valve, and that no exercise of care (for which the railroad company or its agents were responsible) could have avoided or anticipated the occurrence.

[3] The decedent's representative was notified of the proceedings to confirm the sale and did not oppose confirmation. He thereby consented to the substitution of the fund for the boat, and consented to the proceeding to limit liability in so far as the release of the boat from the lien was accomplished thereby. It has now been suggested, and some evidence has been produced to indicate, that the boat in question was worth more at the time of the accident and of bringing claim because of the accident, than at the time of the sale; and it must be held that, under the statute allowing limitation of liability, the petitioner must at the end of the voyage, or if there be no voyage within a reasonable time, offer the boat as she is. A petitioner may not keep the

boat and elect to retain her for his own benefit, rather than to turn her over to the court for sale, and after some time, if a claim arises, yield up a boat greatly deteriorated in value or even partially destroyed, in place of what was subject to the claims at the time those claims arose. In the present instance the decedent's representative brought suit in the state court, and it was not until some 18 months after the accident, and after, as has been shown by the testimony, ferryboats were not so useful to the railroad company (because the opening of tunnels under the Hudson river had materially diminished the use of such boats), that the company surrendered the boat to the court for sale.

Under these circumstances it must be held that the decedent's representative has a right to show that the ferryboat was worth more at the time the claim attached, and that the petitioner, in a proceeding to limit liability, cannot evade personal liability to the amount of the boat's value at that time, by a surrender of the boat at a much later time. Acquiescence on the part of the various parties to the sale of the boat estopped them from questioning the amount brought at the sale. Their appearance and failure to object to the deposit of funds and to the call for proof of claims would estop them from opposing the release of the petitioners under the limitation statute, and the objection that the value of the boat had diminished would have to be seasonably taken. In the present case this objection seems to have been raised, but the evidence that the boat could have been sold for more than she brought at the time of sale is so vague as to be insufficient upon which to fix a greater value.

One of the petitioner's own witnesses testified that in his opinion the boat could have been sold for use as a barge (inasmuch as she was made of wood and the later ferryboats had steel or iron hulls) for a price nearly double what the boat did bring upon the sale. But his testimony seems to have been given under the impression that, at the time of sale, she ought to have brought just as much for this same purpose. Inasmuch as she did not sell for more, as the sale seems to have been fairly conducted, and as its confirmation was not opposed, this estimate of value cannot bind the railroad company and must be held to be mere opinion.

The result, therefore, is that the petitioning company would seem to have a right to limit its liability to the fund in question, and that the only claimant, namely, the decedent's representative, has not succeeded in sustaining the burden of proof in showing any negligence from which the company could be held responsible for the decedent's injuries.

[4] But one point remains. It has been urged that the law known as the United States employer's liability law (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]) is general in its application, and applies to all of the employés of a railroad company when engaged in interstate commerce. Hence it is urged that this statute has by implication repealed the limitation of liability statute, in so far as that may be used to limit claims for personal injury of em-

ployés when employed on work coming within the provisions of the employer's liability law.

It may be assumed that the transportation of freight and passengers by the railroad company from Jersey City across the Hudson river into New York state is interstate commerce. The employés upon the ferryboat were employés of the railroad company, therefore, engaged in an occupation within the interstate commerce jurisdiction of the Congress and the United States courts (Pedersen v. D. L. & W. Railroad [C. C.] 184 Fed. 737), and the law of 1908 is applicable thereto. It is expressly limited to the activities of a carrier by railroad. The maintenance of a ferry may be within the charter powers of a railroad company, and it cannot be said that the voyage is a carriage by rail. But the statute does not limit the liability of the carrier to its track or train service. It expressly refers to defects or negligence in boats, wharves, and other equipment, provided they and the injured party are engaged in interstate commerce. But, assuming that a right of recovery for negligence be given by this act as well as under the state statute, the law allowing a limitation of liability in admiralty might still apply, and the act of April 22, 1908, be administered in the admiralty court.

The statute allowing a limitation of liability is not inconsistent with the letter of the law, and we must look to the intent of Congress in determining whether it is in any way repealed, therefore, by the employer's liability statute, with respect to a claim such as is under consideration in this case. But the claimant herein filed his claim in this action and interposed an answer to the petition, in which he charged negligence on the part of the petitioner. He also denied the jurisdiction of the United States court, after appearing and answering to the merits.

Such a plea should have been raised in bar of the action, if the claimant objected to the trial in this court. An answer on the merits was a consent to the restriction of liability, as the court certainly had jurisdiction in admiralty of the claim, and also had acquired jurisdiction of the persons and of the subject-matter; that is, the vessel. The amendment of 1910 confers jurisdiction in personam (concurrent with the state courts) upon the Circuit Court of the United States; but this amendment was subsequent to the beginning of this proceeding and does not affect the right which the court had to proceed upon the appearance of the claimant in the proceeding in rem.

It may well be considered that the Congress in granting a broad right in personam implied an intent to repeal any compulsory limitation of liability in a particular class of cases, and that the purpose of protecting and benefiting employés shows a plain negation of the idea of defeating that right by the substitution of a limited right in rem.

But the waiver by appearance and answer makes it unnecessary to now relegate the litigants to another court, and the issue of negligence should be disposed of on the merits.

A repeal of the law allowing limitation of liability (in so far as that law related to actions for death occurring through negligence in interstate commerce) would not carry with it a repeal of the entire law,

nor of the jurisdiction of the court to determine claims in admiralty if the parties consent to the exercise of admiralty jurisdiction in determining whether any liability in rem could be shown.

A denial of jurisdiction, therefore, was not equivalent to a plea that the claimant could not be heard in admiralty against his will.

Hence the far-reaching and serious proposition, that no proceedings to limit liability can be invoked even on consent with respect to any claim that may be within the jurisdiction of the employer's liability law, is not substantiated by examination of the statute; and there is no hardship caused by allowing a limitation of liability in the present case. This accident, whether viewed from the standpoint of the statute allowing limitation of liability or from the standpoint of the employer's liability law of 1908, cannot be considered from the evidence to have been caused by negligence for which the petitioner is liable. Such a question is one of law, and the case could not get to the jury, even if it were being conducted under the statutes of April 22, 1908, and April 5, 1910, and not in admiralty.

The accident was unfortunate and shows the desirability of some compensatory method of adjustment; but, viewed from the standpoint of negligence, no liability can be ascertained. Hence the petition to limit the liability of the railroad company must be granted, and they may have a decree. Inasmuch, however, as the decedent's representative cannot maintain his action further in the state court, but has been brought into this proceeding and has not litigated the claim inequitably, the entire circumstances make it seem proper to decide that no costs should be awarded to the petitioner as against him.

THE DANA.

(District Court, E. D. New York. June 9, 1911.)

1. SHIPPING (§ 121*)—SEAWORTHINESS OF VESSEL—IMPLIED WARRANTY.

The acceptance of cargo by the master of a lighter without objection to the quantity is an implied representation that the vessel is seaworthy for the carriage of such quantity.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 449; Dec. Dig. § 121.*

Implied warranty of seaworthiness, see notes to The Carib Prince, 15 C. C. A. 388; Neilson v. Coal Cement & Supply Co., 60 C. C. A. 179.]

2. SHIPPING (§ 121*)—LOSS OF CARGO—LIABILITY OF VESSEL—UNSEAWORTHINESS.

A steam lighter under contract to carry a deck load of 173 tons of copper to be loaded on a steamship, while lying in a slip at Hoboken that night waiting to unload, and while her crew were absent, listed and dumped a part of her cargo. She could safely carry a deck load of from 150 to 160 tons, and on previous occasions a load of 180 to 190 tons had caused her to spread and leak. The weather was calm, and under the evidence it appeared that the listing was probably caused by the presence of water in the vessel, due either to leakage caused by overloading or to water siphoning from a tank through failure to close a cock. *Held* that, in the first case, the vessel was not seaworthy for the voyage, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the second she was not properly cared for by her crew, and in either case was liable for the loss.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 450; Dec. Dig. § 121.*]

3. SHIPPING (§ 113*)—CONTRACT OF AFFREIGHTMENT—PLACE OF DELIVERY.

A contract by a lighter to carry a cargo from Chrome, N. J., to New York, covered its carriage to the Hoboken docks.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 427; Dec. Dig. § 113.*]

4. SHIPPING (§ 141*)—CHARTER—LIABILITY FOR LOSS OF CARGO.

Under a charter to carry a cargo which provided that the owner should provide a seaworthy boat, a further provision exempting him from "marine risks" did not relieve him from liability for cargo which was dumped from the deck by the listing of the vessel due to excessive or uncared for leakage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 497; Dec. Dig. § 141.*]

5. SHIPPING (§ 27*)—SALE OF VESSEL—RIGHTS OF PURCHASER—LIENS.

Where, at the sale of a vessel in an action at law, announcement was made of a maritime lien claimed against it, the purchaser was charged with notice of, and took subject to, such lien if established as a prior lien.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 90; Dec. Dig. § 27.*]

In Admiralty. Suit by the United States Metals Refining Company against the steamlighter Dana. Decree for libelant.

Wallace, Butler & Brown (Archibald G. Thacher, of counsel), for libelant.

Wray & Callaghan (Stephen Callaghan and Nelson L. Keach, of counsel), for claimant.

CHATFIELD, District Judge. The claimant purchased at a sale under judgment the steamlighter Dana, which had previously dumped a portion of a deck cargo of copper, upon the night of November 25th, in the slip between the lower North German Lloyd pier and the upper Hamburg American pier, in the Hudson river, at Hoboken, N. J. Upon the afternoon of the night in question, the Dana was moored alongside of a large square-sided barge, the Seneca, while waiting to load the copper upon the steamer Kaiserin Augusta Victoria, which was lying on the other side of the slip. The crew of the Dana were ultimately produced upon the trial. They testified that they left the vessel in good order after their day's work was done, and that all of them went ashore. The engineer testifies that the vessel was then free from water, and not leaking; that his fires were banked, and there was no steam to work the steam pump, while the deckhands even left the vessel to go to a theater in Hoboken, returning in the neighborhood of midnight. A watchman furnished by a company hiring men for that purpose was upon the vessel to see that none of the cargo was stolen, and that no damage was done, and upon the return of the two deckhands, between midnight and 1 o'clock, this watchman was found standing watching the Dana. Her list was such that, according to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their testimony, the watchman advised them not to go on board, and one deckhand stayed upon the pier, while the other one, who had left some money in his berth forward in the Dana, went on board and saved the money, but scarcely had time to get back to the dock before the Dana listed to starboard, and the greater part of her deck load of copper was thrown into the slip between her and the square barge to which she was tied. Her lines were broken, and part of the rail carried away by the copper, which caused marks and gashes in the side of the square barge. The loss of the rail and these marks upon the side of the square barge were the only indications of any violence or contact between the boats.

The Dana was a round-bottomed craft, with a pointed bow arranged for carrying the greater part of her load upon the deck rather than in the hold, and forward rather than aft. She thus rode higher at the bow when unloaded, and the carrying of a deck load balanced the weight of her machinery, which was placed well aft. She had just previously been repaired and her seams caulked, in so far as they showed the necessity of repair when she was light, but not drawn out of the water. The testimony indicates that she was able to carry a load of some 150 to 160 tons upon her deck with apparent safety. A load of more than that amount set her down by the head sufficiently to make her steer with some difficulty, and on previous occasions a load of 180 to 190 tons had caused a spreading of the boat and a leaking, which was not apparent when the load was not excessive. On the afternoon in question she had brought up a cargo of 173 long tons upon the deck, while her hold was filled with bundles of shingles. The conditions were such in coming up the bay that no excessive strain and no resultant damage can be traced to anything, unless to the weight of the deck load itself. A secret or undiscoverable leak between the skin of the vessel and the false lining to the forecastle is indicated by the testimony of some of the witnesses. The facility with which bilge water could run back through the limber holes, and the possibility that water could collect at the bow in a sufficient amount to affect the stability of the vessel, was indicated by the testimony of some of the witnesses.

The most difficult point in the case has to do with the amount of water in the vessel after the load was dumped, because of the testimony of the engineer of a Hamburg-American tug, who was summoned by the watchman just before the accident, and who arrived within a few moments thereafter upon his tug, having come around from a pier to the south of the pier in question. This engineer, who sounded the water in the Dana, examined it through the well, and testifies that it did not come over the floor beams of the vessel at that point. He did not try to use his pump, for he estimated that the water was not more than six inches deep in the well, and his pump would suck at a depth of eight inches of water. He could find nothing on board of the Dana indicating the presence of sufficient water to affect her equilibrium, nor anything from which he could draw an explanation of the accident. Another witness at daylight the following morning when the vessel was lightened of a

great part of her load, and when she had been untouched so far as pumping was concerned for five or six hours, also testifies that there was no water in the boat. The engineer of the Dana testifies that he found 10 inches of water when he returned that day. Winslow, a witness for the libelant, but in the employment of the North German Lloyd Line, who arrived at the scene shortly before the tug, and who found the cargo already dumped, testifies that he saw and measured seven inches of water in the hold at the same point at which the Hamburg-American's engineer shortly thereafter found not enough to pump. The captain of the Dana, however, testifies that the engineer measured the water in the well, and found 22 inches when he arrived in the morning. No pumping had been done in the meantime, and it must be held that the amount of water estimated by this witness could not have been present during the night before, unless it had not yet distributed itself aft for some time after the accident, and thus did not disclose signs of its presence when the engineer of the Hamburg tug came on board. This testimony indicates the difficulty as to the whole case. The libelant claims that the boat was unseaworthy, in that it was not fit to carry the cargo which its captain undertook to take from Chrome, N. J., to the dock in question.

[1] It appears that the load was furnished by the libelant, and that the quantity offered was also determined by the libelant's agent, while the captain of the vessel only supervised, in a general way, the placing of the cargo, and indicated the quantity which he would undertake to carry. Here, again, the master's actions were of a negligent character. He did not refuse or object to carry the amount offered, nor did he object to the way in which the load was placed upon his vessel. So it must be assumed that he undertook the voyage with the cargo in the condition in which it was put upon his vessel, and therefore that the vessel was held out to be seaworthy, to the extent of being able to undertake what her master undertook to do with her. The Oneida, 128 Fed. 687, 63 C. C. A. 239, citing The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. The libelant also claims that unseaworthiness was shown by her making water while lying at the pier in question, as indicated by the water which the witnesses above referred to say they found in her after the load had been dumped. The allegation of unseaworthiness has been contradicted as has also the charge of leaking, and upon all of the testimony it would seem than even if the vessel were cranky, so that she steered badly with such a load, or that she might have difficulty in rough weather, nothing occurred upon this trip from which such defects might be held a violation of the implied warranty of seaworthiness.

[2] The whole case comes down to the charge that with the amount of copper which she attempted to carry her seams were opened, or the vessel strained or spread sufficiently to allow leakage enough to destroy the equilibrium when resting in the slip, with a deck load of the sort in question. The claimant has attempted to show that the swells of passing vessels and the conditions of weather

were such that the accident might have been caused by a wash or rough water within the slip. The velocity of the wind, general conditions of weather, the locality when considered in connection with the direction of wind shown, and the failure to indicate any unusual effect of passing vessels utterly deprive the claimant of any defense on such grounds, other than the general burden which rests upon the libelant to show that the accident occurred from the presence of water within the vessel.

There is also no evidence to indicate that the lighter and the Seneca came in contact or that the barge rested upon the lighter, so as to bear down the starboard side of the lighter sufficiently to do it any injury. On the contrary, the testimony would show that the vessels were properly moored and rested quietly, but that, when the deckhands returned, the lighter had already listed toward the barge, and was straining the lines thereto.

The libelant has also offered some testimony as to two water-tanks so placed upon the vessel that the pipe leading to the boilers, and shut off by the stop-cock between these two tanks, could be affected by the operation of this connecting pipe as a siphon, if the stop-cock were left open. The general position of these tanks, the amount of water which they contained, and the fact that, even if the stop-cock was open next morning, the weight of water would not by itself cause a dangerous list, do not indicate such carelessness because of the condition of this stop-cock as to entirely explain the accident. But the slight additional list from this source may have aided in producing the condition of danger, and for this the boat must be charged.

We are reduced, therefore, in the absence of any suggestion that the load shifted, or that the balance of the boat was disturbed by anything except the water inside the hold, to a consideration as to whether the libelant has proven his case by showing that the accident occurred from leakage, and that the leakage occurred from the spreading of the vessel and the opening of seams through the carrying of such a load. The water in the vessel, whether much or little in quantity, would quickly respond to the decided change in level caused by the dumping of the deck load. But the lightening of the load forward should have caused a flow of water toward the stern, where the weight of the engines was constant, and, if on the following morning more water had shown in the stern than was noticed at midnight, it would logically follow that the water which during the early part of the night had caused the boat to list when heavily loaded at the bow had gradually run toward the stern and distributed itself so as not to affect the equilibrium. In fact, the testimony as to a hidden and secret leak indicated that the water from this leak came in near the bow, and the testimony of the witness Tuttle to the effect that 22 inches of water was present in the engine room at 8 o'clock goes to show that a considerable quantity of water was in the bow of the boat up to the time when the load was dumped. Assuming that the list was caused by the presence of water either accumulating from leakage or from siphoning from

the tank, the conclusion necessarily follows that the claimants were negligent in providing for the care of their boat. And if the accident happened because the boat was so unstable or so weak that the deck load of itself caused a twisting or bending of the entire frame out of equilibrium, so as to gradually cause a list, again, the owners should be held responsible, for such a boat could not be considered seaworthy, and the testimony as to previous cargoes would indicate that they had had sufficient notice of such defect.

[3] The claimants have interposed an additional defense, the contract under which the boat was carrying the particular cargo, which provided that copper pigs should be carried from Chrome, N. J., to New York. It is urged that, inasmuch as this was a cargo to Hoboken, it was not within the contract, and that, therefore, the general provisions applicable to a common carrier would cover the situation. But there is no reason to hold that the contract in question was not intended to and did not cover a voyage to the Hoboken docks as well as to docks in Manhattan or Brooklyn. The charter, however, did provide that the carrier should not be responsible for "marine risks," but should provide only "seaworthy boats," and should bear all expenses caused by "unseaworthy craft."

It is urged that under this contract the owners of the boat were neither common carriers nor bound under the language of the particular charter. While it would seem that a charter of this nature for the performance of a particular service, and providing by its terms for particular conditions, would have to be viewed by those provisions, and that the parties thereto should not depend upon the general obligations of a common carrier, where the particular contract took the place of a common carrier's liability, nevertheless, aside from the language of this particular charter, the obligation of the owner seems to be no different from that of a common carrier in providing a seaworthy boat.

[4] As to the claim that the words "marine risk" are not equivalent to "perils of the sea," and that they absolve the carrier from responsibility for such an accident as the dumping of cargo because of excessive or uncared-for leakage, an examination of the authorities and a consideration of the dangers and accidents at sea, usually considered as perils of the sea, show that such an exception cannot include the effects of ordinary leakage, when allowed to cause danger by the neglect of watchmen, when the vessel is lying at a dock, nor do these words cover such a case as the unusual weakness or crankiness of a vessel, when furnished as seaworthy for carrying a special cargo.

[5] As to the defense that the sale of the boat to the present claimant was made in such a way that he became an innocent purchaser for value, without notice of the maritime lien claimed because of the loss of this cargo of copper, it need only be said that the sale seems to have been properly conducted, and was in an action at law rather than in admiralty, that the claim for the loss of this cargo was made known at the time of the sale, and a purchaser signing the terms of sale must be held to have assumed the obligation of any lien which would have been called to his attention

if he had made inquiry or paid attention to the sale. Further, the purchaser is shown to have been either within hearing distance or actually present at the time that the announcement of this lien was made, and must be held either to have heard it at the time, or to have disregarded what he should have paid attention to, even if it be not considered that he purposely avoided listening to what might be said.

The libelant may have a decree, with costs.

R. J. DARNELL, INC., v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, W. D. Tennessee, W. D. June 23, 1911.)

1. COMMERCE (§ 92*)—EXCESSIVE CHARGES BY INTERSTATE CARRIER—ACTION FOR DAMAGES—JURISDICTION.

Jurisdiction of a claim for damages against an interstate carrier because of excessive rates charged and collected by it from the claimant is expressly limited by Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to the Interstate Commerce Commission or a District or Circuit Court of the United States, and the provision of section 16 of the act, as amended by Act June 18, 1910, c. 309, § 13, 36 Stat. 554, extending such jurisdiction to the state courts, applies, by its terms, only to claims which have been previously determined by the commission, and on which it has made awards which have not been complied with.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 92.*]

2. REMOVAL OF CAUSES (§ 10*)—JURISDICTION ACQUIRED BY REMOVAL—JURISDICTION OF STATE COURT.

A federal court cannot acquire jurisdiction by removal proceedings of a cause of which the state court was without jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 28; Dec. Dig. § 10.*]

At Law. Action by R. J. Darnell, Incorporated, against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. On demurrer to declaration. Demurrer sustained.

Percy & Hughes, for plaintiff.

Chas. N. Burch, H. D. Minor, and Lamar Ross, for defendants.

McCALL, District Judge. This case is before me upon a demurrer to the declaration.

At the very threshold and independent of any of the grounds assigned in the demurrer, a question of the jurisdiction of this court over the subject-matter of the litigation arises, owing to the circumstances under which the case has been brought here. Upon this jurisdictional question depends the authority of this court to make any valid order herein, affecting the rights or interest of either party to the litigation, and must be disposed of "in limine."

This suit was brought in the circuit court of Shelby county, Tenn., by R. J. Darnell, Incorporated, against the Illinois Central and the Yazoo & Mississippi Valley Railroad Companies to recover the differ-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ence between a freight rate of 10 cents per 100 pounds and 12 cents per 100 pounds on 35,424,949 pounds of lumber shipped from Memphis to New Orleans, amounting to $7,084.89, which was charged by the defendants and paid to them by the plaintiff.

The first count in the declaration alleges that the rate of 12 cents per 100 pounds charged and collected by the railroad companies was excessive and unlawful to the extent of 2 cents per 100 pounds. The second count alleges that on January 1, 1908, in the case of J. W. Thompson Lumber Company and others against the Illinois Central and the Yazoo & Mississippi Valley Railway Companies, then pending before the Interstate Commerce Commission, an order was made and entered by the commission, directing the railroad companies to desist from enforcing a rate of 12 cents per 100 pounds on hardwood lumber in car load lots from Memphis to New Orleans, and fixed the rate at 10 cents per 100 pounds. In obedience to this order, the railway companies made a rate of 10 cents per 100 pounds on hardwood lumber in car load lots from Memphis to New Orleans, effective August 1, 1908. The plaintiff herein was not a party to the proceedings before the Interstate Commerce Commission, but was a large manufacturer and shipper of hardwood lumber, located at Memphis, Tenn., and shipped large quantities of such lumber over said railroads from Memphis to New Orleans. On the 22d day of February, 1911, plaintiff brought this suit against the defendant, as has been stated, in the circuit court of Shelby county, Tenn., which was subsequently removed to this court on the petition of defendants upon the ground of diversity of citizenship; the necessary jurisdictional amount appearing.

[1] The wrongs of which complaint is made arise out of interstate shipments of lumber, and must be considered under the provisions of the act of Congress to regulate commerce. 24 U. S. St. L. c. 104, p. 379. It is provided by section 9 of said act:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

It appears from this section that, had this suit been originally brought in this court, no question could have arisen as to the jurisdiction of the court to hear and determine the questions now raised by the demurrer. The case, however, is here upon a removal; it having been brought in the state circuit court. Under such circumstance. this court has only such jurisdiction as the state court had, and, if that court was without jurisdiction to entertain the case, so also is this one. The interstate commerce act, as amended June 18, 1910, confers jurisdiction on state courts to hear and determine certain cases arising under the act. Section 16 is as follows:

"That if, after hearing on a complaint made as provided in section thirteen of this act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. * * * If a carrier does not comply with an order for the payment of money within the time limit of such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises." 36 U. S. St. L. c. 309, p. 554.

The declaration herein does not disclose such a state of facts as is made necessary by section 16 to confer jurisdiction upon the state courts. The commission has not determined that the plaintiff is entitled to an award of damages under the provisions of the act for a violation thereof, nor has the commission made an order directing the defendants to pay the plaintiff any sum as an award on or before a day named. This must have been done, and, in addition, the carrier must have failed to comply with such order before the state court would be open to the plaintiff for the institution of this suit therein. As we have just seen, section 9 of the commerce act gives the right of action to recover damages for which common carriers may be liable, arising under the provisions of said act, either before the commission, or "in any District or Circuit Court of the United States of competent jurisdiction." The forum in which suits of this character can be brought is specified in the act and limited to the Commerce Commission and the United States courts, and I know of no rule of construction that will permit the extension of this right so as to confer jurisdiction upon the state courts to entertain such case.

[2] The state court not having jurisdiction, does the removal of the case here confer jurisdiction on this court? "A federal court cannot acquire jurisdiction by removal proceedings, of which the state courts had no jurisdiction. It was so held where an action was brought in a state court upon a cause of action of which the federal courts had exclusive jurisdiction, namely, to recover overcharges under the interstate commerce law; where it was instituted in what was supposed to be a state court, but in one which the Supreme Court of the state subsequently held had no legal existence; and this was said to be the case where the state court had a limited jurisdiction, and the suit sought to be removed was not within the same." Foster's Federal Practice, p. 1482. See, also, Auracher v. Omaha & St. L. R. R. Co. (C. C.) 102 Fed. 1; Sheldon v. Wabash R. R. Co. (C. C.) 105 Fed. 785. I do not think that the jurisdiction of the court as respects the subject-matter of a litigation, and such as is here under consideration, is of a character that can be waived by the parties. Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Bates' Federal Practice, 1029.

I am not sure that the question of the jurisdiction of the state circuit court is raised by the demurrer, although the attention of the

court is called to it in the brief of counsel for the defendants, yet it is the duty of the court, on its own initiative, if not otherwise presented, to determine the question of jurisdiction in each case coming before it. "This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." M. C. & L. M. Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; C., B. & Q. Ry. Co. v. Willard, Adm'r, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521. While I am of the opinion that this court is without jurisdiction upon the grounds and for the reasons stated, yet, in view of the importance attached to this litigation by counsel, I feel that the other questions raised by the demurrer should be disposed of, so that, if the court is in error in its conclusion herein stated, it may also go up upon the other different questions raised by the demurrer, if the case should be appealed.

The first, second, and third causes of demurrer are in my judgment ruled by the cases of Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 436, 27 Sup. Ct. 350, 51 L. Ed. 553; Southern Railway v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, and these causes of demurrer are therefore sustained. The fourth ground of demurrer is overruled. An order will be entered in accordance with the views set forth, and the case dismissed for want of jurisdiction. Twenty days are allowed plaintiff to amend, if he be so advised.

DARNELL-TAENZER LUMBER CO. et al. v. SOUTHERN PAC. CO. et al.

(Circuit Court, W. D. Tennessee, W. D. August 17, 1911.)

No. 4,068.

1. COMMERCE (§ 95*)—EXCESSIVE CHARGES BY INTERSTATE CARRIER—ACTION FOR DAMAGES.

The interstate commerce act (Act Feb. 4, 1887, c. 104, §§ 14, 16, 24 Stat. 884 [U. S. Comp. St. 1901, pp. 3164, 3165]), as amended by Act June 29, 1906, c. 3591, §§ 3, 5, 34 Stat. 589, 590 (U. S. Comp. St. Supp. 1909, pp. 1157, 1159), provide that the Interstate Commerce Commission shall make a report in writing in respect to its investigation into the reasonableness of rates, and that "in case damages are awarded such report shall include the findings of fact on which the award is made." They authorize the commission on a determination that a party complainant is entitled to an award of damages against a carrier because of the charge and collection of excessive rates in violation of the act to make an order directing the payment of such damages on or before a day named, and provide that, on a failure to comply with such order, the complainant for whose benefit it is made may file a petition in a Circuit Court "setting forth briefly the causes for which he claims damages and the order of the commission in the premises"; that "such suit shall proceed in all respects like other suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated." *Held*, that such provisions do not make the order prima facie evidence in such suit of the liability of the carrier, but only of the facts stated in the order and findings, and that it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the province of the court to determine whether such facts sustained the order.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 95.*]

2. COMMERCE (§ 95*)—EXCESSIVE CHARGES BY INTERSTATE CARRIER—RECOVERY OF DAMAGES—AWARD BY INTERSTATE COMMERCE COMMISSION.

An order of the Interstate Commerce Commission awarding damages to a complainant against railroad companies is not sustained by findings that the carriers charged a rate on lumber shipped by the complainant which was excessive and unreasonable to the extent of the damages awarded, where it is also found that the complainant added the increased freight to the price of the lumber and the same was paid by the consumer, and it is not found that the freight was in fact paid by the complainant, or that it in any way suffered actual damage from the excessive rate.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 95.*]

At Law. Action by the Darnell-Taenzer Lumber Company and others against the Southern Pacific Company and others. On demurrer to the declaration. Demurrer sustained.

Percy & Hughes, for plaintiffs.

Chas. N. Burch, H. Dent Minor, Lamar Ross, F. C. Dillard, Robt. Dunlap, Sam. P. Walker, and J. W. Canada, for defendants.

McCALL, District Judge. This case is before the court upon a demurrer to the declaration.

It is alleged in the declaration that on June 2, 1908, the Interstate Commerce Commission filed its report in the case then pending before it of "Geo. D. Burgess et al. v. Transcontinental Freight Bureau et al., No. 1138, 19 Interst. Com. Comm. R. 611," adjudging that a rate of 85 cents per 100 pounds on hardwood lumber from all points west of Chicago and the Mississippi river, including Chicago, Memphis, and other points mentioned in the declaration, to Pacific Coast terminals, was excessive and unreasonable, and had been so from January 8, 1904, the date of the advance. Thereupon the commission caused an order to be entered directing the carriers who were parties to this excessive and unreasonable tariff to put in force a tariff rate not to exceed 75 cents per 100 pounds from such points of origin to such points of destination. This order of the commission has been complied with.

It is alleged that said commission further found that the defendants should make reparation to the plaintiffs of all sums collected from them in excess of 75 cents per 100 pounds between the date of June 8, 1907, and August 1, 1908, and the case was "retained for further proceedings in the matter of reparation." And thereafter, on the 10th day of October, 1910, the commission filed a report and an order fixing the amount of the reparation for each of the plaintiffs against certain of the defendants therein, all of which said several shipments, as so reported, it is alleged were actually made, and said illegal sums actually collected by the said several defendants, each of whom is jointly and severally liable for the amount as reported by the commission. Then follows the amount of the award to each of the plaintiffs and against one or more of the defendants, and an order to pay the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same. It is then averred that said sums have not been paid to the plaintiffs, and are due and owing to them, respectively, with interest. The following appears in the declaration: "Profert is here made of a certified copy of said report." At the hearing some uncertainty seemed to exist as to just what report was referred to by this clause, and it was then agreed and understood that it should be treated as making the report and order of the commission made June 2, 1908, and the report and order made October 10, 1910, a part of the declaration, and I have so considered them.

[1] There are seven grounds of demurrer assigned, but all of them, I think, are in effect included within the first, which is that "the declaration fails to state any cause of action," and I shall consider and dispose of the case as if it were the only ground of demurrer assigned, treating the other grounds assigned for whatever they may be worth in more specifically stating why in the opinion of the pleader no cause of action is alleged in the declaration. This is a statutory action, and the sufficiency of the declaration upon demurrer must be determined by the act of Congress to regulate commerce, as amended, under which it is brought, and, if the court should be of opinion that no cause of action is stated in the declaration, when measured by the requirements of that act, then the demurrer should be sustained. An investigation has been made by the Interstate Commerce Commission as authorized by the thirteenth section of said act. Under the fourteenth and fifteenth sections of said act the commission has found and reported that the tariff rate of 85 cents per 100 pounds on hardwood lumber from the points hereinbefore stated to the Pacific Coast terminals was excessive and unreasonable to the extent of 10 cents on the 100 pounds, and ordered its reduction. It also awarded reparation to the plaintiffs in this case, and directed the defendants herein to pay the same on or before a day certain. This the defendants failed to do, and under the sixteenth section of said act they have brought this suit to recover said awards.

Section 14 of said act provides, among other things, that, when an investigation has been made by the commission, it shall state its conclusions, together with its decision, order, or requirement in the premises, "and in case damages are awarded such report shall include the findings of fact on which the award is made." Section 16 of said act provides, among other things, that, if the carrier does not comply with the order of the commission for the payment of money within the time limit in such order, the person for whose benefit such order was made may sue the carrier in the Circuit Court of the United States, setting forth briefly in his petition the causes for which he claims damages and the order of the commission in the premises, and "such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the finding and order of the commission shall be prima facie evidence of the facts therein stated."

From the facts before it the commission concluded that the plaintiffs here are entitled to damages, and it awarded them, and by its order directed these defendants to pay them, and it is so alleged in

the declaration. If the conclusions or orders of the commission were by the act made prima facie evidence of the liability of the defendant, then the declaration is sufficient. But such does not seem to be the case. The act provides that the report of the commission shall include the findings of fact only in cases in which awards for damages are made and that such findings of fact and orders of the commission shall be prima facie evidence of the facts therein stated upon the trial of a suit in the United States Circuit Court brought to recover such awarded damages. "The act does not make the mere legal opinions, arguments or reasons of the commission prima facie evidence or evidence of any kind in any judicial proceedings." Western New York Ry. v. Penn. Refining Co., 137 Fed. 350, 70 C. C. A. 23. Nor does the awarding of reparation necessarily follow a finding by the commission that a rate is excessive and unreasonable, and as a consequence orders its reduction. Farmers' Warehouse Co. v. L. & N. Ry. Co., 12 Interst. Com. Comm. R. 520; Anadarko Cotton Oil Co. v. A. T. & S. F. R. Co., 20 I. C. C. Rep. 43.

It is true that the word "order" is not used in the excerpt just quoted from 137 Fed., 70 C. C. A., yet I think a proper construction of the terms "legal opinions, arguments or reasons of the commission," employed by the court, when taken in connection with the act of Congress under consideration, is that the orders of the commission likewise are not prima facie evidence on the question of liability in a judicial proceeding. This must be so for two reasons: First. If the Congress intended that the order making the award should be taken as prima facie evidence of the liability of the carrier, then it would seem that it did a useless thing in requiring the commission by the terms of the act to make findings of facts in cases wherein awards for damages are allowed. The courts cannot presume that the Congress by legislation requires the citizen or official to do useless things. Second. If the order of the commission making an award is given the force of a probative fact, and taken as prima facie evidence of the liability of the carrier, then (as in the case before the court) a condition might arise where, in the opinion of the court, the order of the commission is not warranted by any facts found and reported by it upon which it is presumed the order of award is predicated, and the court would be unable to pronounce judgment for the plaintiff, even if no defense was interposed. In such a case the court would be at a loss to know whether it should be controlled by the facts reported or the order made by the commission in pronouncing its judgment.

In providing in section 16 of the act to regulate commerce that in suits of this character the party aggrieved shall file his petition setting forth the causes for which he claims damages, and the order of the commission in the premises, and that on trial of the case the findings of fact and the order of the commission shall be prima facie evidence of the facts therein stated, Congress intended to provide a method for getting before the court the exact facts found by the commission and also the order made by the commission based upon such facts so found, to the end that the court might upon the face of the declaration or petition adjudge whether or not the order made by the

commission was sustained by the facts reported. If the court so found, then the petitioner would be entitled to a verdict and judgment, unless the carrier, upon proper pleadings filed and evidence introduced before the court, met and overcame this presumption against him. In this, as in other character of suits, each case must be decided upon its own facts, and, since parties to a suit at law cannot be denied the right of trial by jury, Congress, doubtless to save sections 14 and 15 from constitutional objection, wisely provided that the commission should in cases of award include within its report the findings of fact, and makes this finding of fact in suits brought to recover such awards, as provided for in section 16 of the act, prima facie evidence of the correctness of the action of the commission in awarding reparation. My conclusion is that any order of award, conclusion, opinion, or argument of the commission must be eliminated in determining the sufficiency of the declaration. It is only facts found by the commission and alleged in the declaration that can be considered in deciding whether or not a cause of action is stated.

[2] Now, what are the facts alleged in the declaration as causes, for which damages are claimed, including the reports made by the commission, and which are made a part of the declaration? In the report made by the commission June 2, 1908, in so far as I am able to discern, the facts found are as follows:

"That on January 8, 1904, the freight rate on hardwood timber shipped to the Pacific Coast terminals from all points west of Chicago and the Mississippi river, including Chicago and Memphis, and certain other points, was increased from 75 to 85 cents per 100 pounds; that this rate was excessive to the extent of 10 cents on the 100 pounds; that hardwood lumber has moved to the Pacific Coast in larger quantities since the rate was advanced in 1904 than it did previously. The use of hardwood upon the Pacific Coast has very much increased. Importations from foreign countries have been greater and shipments from the East have also grown. The amount of lumber sent west from these points of origin is insignificant in comparison with the total amount handled, and the price is but little influenced by the market upon the Pacific Coast. The dealer in Wisconsin or at Memphis has charged substantially the same price whether his sales were in the East or for export and for shipment to California, and this means, of course, that the advance in the freight rate has been added to the price paid by the consumer."

It appears from the report that the defendants insisted before the commission, as here, that these facts did not entitle plaintiffs to an award of damages, but under the word "damage," as defined by the commission, it was of the opinion that damages should be awarded and so ordered and fixed the measure of damages to be the difference between a 75 and 85 cent rate, and limited it to shipments made between the dates of June 8, 1907, and August 1, 1908, with interest. The supplemental report of the commission, filed October 12, 1910, contained no additional finding of facts other than the amounts of the awards authorized under its former report filed June 2, 1908.

The declaration does not aver that the plaintiffs paid this excessive and unreasonable rate, nor that either of them was damaged thereby. It avers that the commission found that the defendants should make reparation to them of all sums collected from them in excess of 75 cents per 100 pounds between June 8, 1907, and Au-

gust 1, 1908, without alleging that in point of fact the defendants had collected any sum from them whatever. It is also averred that the commission found the amounts stated in the declaration to be due the plaintiffs and that said alleged sums were collected by the defendants. The commission in its report does not state directly or indirectly that it finds as a fact that either one, any, or all of the plaintiffs paid any part of the excessive rate, but it does report as a fact that the dealers (meaning the plaintiffs) added the increased freight rate to the price of their lumber, and that it was paid by the consumer. The record shows that the reparation awarded by the commission was the amount of the difference between the rate actually paid and the rate of 75 cents, the rate found to be reasonable.

Upon what principle of law it can be said that these plaintiffs are entitled to recover this award, unless they actually paid all or a part of the excessive rate, I am at a loss to know. They do not allege that they paid it, nor did the commission so find as a fact. The grounds upon which the awards seemed to have been made are that the defendants had collected an unreasonable amount for hauling lumber to California from Mississippi river points, and they should not be permitted to retain it, that complainants were entitled to a reasonable rate for such transportation, and that because the defendants maintained an excess freight rate the complainants were thereby deprived of a legal right, and the value of such legal right was the difference between a reasonable and an unreasonable freight rate, although the commission fail to find, as a fact, nor does the declaration aver, that the plaintiff paid it or that they are damaged thereby.

In Nicola, etc., v. L. & N. R. R. Co., 14 Interst. Com. Comm. R. 208, the commission says:

"The commission is confined in the making of award for reparation to the injury or damages sustained by those who are the real and substantial parties at interest in the transaction in which said transportation charges have been made. The reparation is due to the person who has been required to pay the excess charge as the price of transportation. It follows that we must in making the order for reparation in this case upon proper proof of the shipments make such order in favor of those who paid the charges as freight charges or on whose account the same were paid and who were the true owners of the property transported during the period of transportation."

I think that it should be averred in the declaration or shown by the report of the commission that it found the facts to be that the plaintiffs paid this excessive and unreasonable rate and that they were damaged thereby, or they should aver such a state of facts as would show that they were damaged because of such unreasonable rate or that they are the owners of the claim by proper assignment from the parties who did pay it and are entitled to recover therefor.

I do not think the declaration contains such averments in terms nor in substance, nor the equivalent thereof, and I therefore sustain the demurrer, and dismiss the suit. Plaintiffs may have 15 days to amend their declaration, if they be so advised. An order will be entered accordingly.

HUNTER v. BAKER MOTOR VEHICLE CO. et al.

(Circuit Court, N. D. New York. September 22, 1911.)

1. CORPORATIONS (§ 585*)—POWERS AND LIABILITIES—OWNERSHIP OR CONTROL OF OTHER CORPORATIONS.

While the fact that the stockholders of two corporations, or the greater part thereof, are the same persons, does not operate to destroy the legal identity of either, nor the fact that one corporation exercises a controlling influence over the other, through stock ownership or the identity of stockholders, operate to make either the agent of the other, or to merge the two into one, yet the legal fiction of distinct corporate existence in such cases will be disregarded, when necessary to circumvent fraud, or where one corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of the other.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 585.*

Acquisition by corporation of stock of another corporation, see note to Anglo-American Land M. & A. Co. v. Lombard, 68 C. C. A. 120.]

2. CORPORATIONS (§ 484*)—ASSUMPTION OF DEBTS OF ANOTHER CORPORATION—LIABILITY.

A complaint alleged that defendant corporation owned and controlled another corporation, which was organized solely for the purpose of handling goods made by defendant, and which became indebted to plaintiff; that defendant caused it to transfer its assets, which were in excess of its liabilities, to a third corporation, organized for the same purpose, and also owned and controlled by defendant, for no other consideration than an agreement to pay the debts of the transferring corporation, which it did, with the exception of plaintiff's; that plaintiff did not assent to such transfer, but brought suit against his debtor, pending which the last corporation became bankrupt; that thereupon defendant executed a bond conditioned for the payment of such sum as plaintiff might be entitled in law to receive out of the amount received by the receiver in bankruptcy, on the giving of which bond defendant received the bankrupt's assets; that plaintiff afterward recovered judgment in his suit. *Held*, that such complaint stated a cause of action on the bond; plaintiff being entitled, on the facts alleged, either to a lien on the assets of the bankrupt for the entire amount of his claim, or to share with its other creditors, a matter to be determined on the trial.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 484.*]

At Law. Action by Louis R. Hunter against the Baker Motor Vehicle Company and the American Bonding Company of Baltimore. On demurrer to complaint on the ground that it fails to state facts constituting a cause of action. Overruled.

Elisha B. Powell (Robert B. Knowles, of counsel), for plaintiff.
Willard P. Jessup, for defendants.

RAY, District Judge. The demurrer of the defendants alleges that the facts stated in the complaint are insufficient to constitute a cause of action. The rule is invoked that a demurrer admits facts alleged, but not conclusions. The complaint alleges:

(1) That the defendant the Baker Motor Vehicle Company is a corporation organized and existing under the laws of the state of Ohio.

(2) The defendant American Bonding Company of Baltimore is a Maryland corporation.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(3) The Baker Motor Vehicle Company of New York, the bankrupt corporation referred to therein and herein, is a New York corporation.

(4) The C. B. Rice Company was and is a New York corporation.

(5) Said C. B. Rice Company was organized by said the Baker Motor Vehicle Company, of Ohio, (called "Ohio Company" for brevity), for the purpose of selling in New York City and vicinity electric vehicles and parts thereof manufactured by said Ohio corporation, and a majority of its stock was owned and controlled by said Ohio corporation, which managed, controlled, and directed all the business and corporate affairs of said C. B. Rice Company, and the minutes of the corporate meetings of the Rice Company (so called for brevity) were submitted to and approved by the said Ohio Company before they became operative or effective.

(6) The Ohio corporation owned and controlled a majority of the stock of the New York Baker corporation (so called for brevity), and R. C. Norton, treasurer of the Ohio corporation, and George H. Kelly, its attorney, owned stock in said New York Baker corporation and were officers therein.

(7) The Ohio corporation caused the New York corporation to be incorporated and organized for the very purpose of taking over all the assets of the Rice Company on the consideration hereafter mentioned.

(8) October 1, 1907, the Rice Company did transfer, assign, and set over to said New York Baker corporation all its assets and property on its agreement to pay all the debts of the said Rice Company, and which agreement was the sole consideration of such transfer.

(9) The capital stock of the New York Baker Company was only $10.000, of which $500 only was paid in.

(10) The assets of the Rice Company, at the time of such transfer by it to the New York Baker corporation, were over $100,000, and more than sufficient to pay all the debts and liabilities of the said Rice Company.

(11) All the creditors of the Rice Company, except the plaintiff here, Louis R. Hunter, consented to such transfer and were subsequently paid.

(12) On or about October 13, 1908, a petition in bankruptcy was filed against the New York Baker corporation in the Southern district of New York, and October 14, 1908, a receiver of its property was appointed by the said court.

(13) There came into the hands of said receiver assets of said New York Baker corporation (bankrupt) to the amount of upwards of $40.000.

(14) The claim of Louis R. Hunter, this plaintiff, against the said Rice Company, was about $8,329.75, and he had commenced an action in the Supreme Court of the state of New York against said company and C. B. Rice to recover same, and the action was then pending.

(15) On the appointment of such receiver and the receipt by him of such assets, a motion was made in said bankruptcy court for an injunction restraining the said Hunter from proceeding with or further prosecuting his said action against said Rice Company on the

ground that said New York Baker corporation "is or may be ultimately liable in case a judgment is obtained against the said Rice Company."

(16) Thereupon the said Ohio corporation, to obtain a free sale of the property in the hands of the receiver belonging to the said New York Baker corporation, bankrupt, entered into the said bond or undertaking in the complaint set out in full, with the American Bonding Company as surety, whereby they covenanted and agreed to pay to the said plaintiff "such sum or sums as he, the said Louis R. Hunter, may be entitled in law to receive out of the amount received by James N. Rosenbery, receiver in bankruptcy of the Baker Motor Vehicle Company of New York for distribution to creditors of said Baker Motor Vehicle Company of New York, upon the said Louis R. Hunter's claim as it is set up in a certain suit," etc.—the suit before mentioned.

(17) The complaint alleges, and the demurrer admits, that the said assets of the Rice Company were received by the New York Baker corporation, subject to a first lien for the payment of the creditors of said Rice Company, and that said Hunter was the only creditor not paid, and that therefore said assets which came to the hands of the said receiver were subject to a first lien in his favor to the amount of his claim, subsequently and on February 4, 1909, reduced to judgment, $8,329.75. Execution was issued and returned unsatisfied.

(18) That on the giving of such bond or agreement the said receiver by authority of the court transferred all the assets of the said New York Baker corporation to the said Ohio corporation, the defendant. If such lien existed, the said Hunter claim was a first lien on the said property and assets that came into the hands of the said receiver in his hands, and the claim is that therefore said sum of $8,329.75 was the amount he (Hunter) was "entitled in law" to receive out of the amount that came to said receiver, some $18,000, for distribution to creditors, from the sale of such property, which was subject to such lien in favor of Hunter. If the lien actually existed and was valid, then, as Hunter was a creditor, he was entitled to the full amount out of the property in the hands of the receiver, unless there were liens prior to his, or creditors entitled to priority of payment over him. The complaint alleges the facts forming the basis of such claim or lien to the amount stated. If the claim is well founded, the plaintiff says he is entitled to be paid the full amount of $8,329.75, and that the bond or undertaking is to pay it.

The defendant says: (1) That such claim is not well founded—that the facts alleged show there was no lien; and (2) that the bond or undertaking is simply to pay the distributive share due Hunter as a general creditor of the New York Baker Company, bankrupt, and there are no facts stated from which it can be determined or said what such share was or will be; also that, conceding a lien in Hunter's favor to the amount stated, the complaint fails to show there were no other liens on the property in the hands of such receiver, or no other creditors of the New York Baker Company, entitled to priority of

payment, and therefore there are no facts stated showing that plaintiff is entitled to recover anything.

Under the allegations of the complaint the defendant the Baker Motor Vehicle Company of Ohio organized and controlled the Baker Motor Vehicle Company of New York for the very purpose of taking over all the property of the C. B. Rice Company, also under the control and management of the said Baker corporation of Ohio. The said Ohio company in fact "controlled and directed all its business and corporate affairs," and all it did was approved by the Ohio Company before becoming effective. The result of the allegations of the complaint, taken to be true, is that the Ohio corporation, defendant, for its own uses and purposes, and to serve its own ends, got possession and control of all the property of the C. B. Rice Company on the agreement to pay all its debts, including that owing to the plaintiff. True, it did not transfer the property to itself, but to the New York Baker Company, owned, managed, and controlled by it. True, the Ohio Company did not itself agree to pay Hunter in the first instance; but it had the New York Baker corporation agree to do so, and later either agreed to pay him the full amount of his debt, or his share in bankruptcy, depending on the true interpretation and meaning of the obligation. The agreement in the first instance of the New York Baker corporation was in effect the agreement and obligation of the Ohio corporation, as it in fact owned, controlled, and managed that corporation.

[1] The fact that the stockholders of two corporations, or the greater number thereof, are the same persons, does not operate to destroy the legal identity of either corporation. Nor does the fact that the one corporation exercises a controlling influence over the other, through the ownership of its stock, or through the identity of its stockholders, operate to make either the agent of the other, or to merge the two corporations into one. There are at least two exceptions to the general rule of separate corporate existence and liability which are specifically applicable in this case, under the facts stated and admitted for the purposes of this demurrer, viz.:

(1) "The legal fiction of distinct corporate existence in such cases will be disregarded, when necessary to circumvent fraud."

(2) "It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."

Here the allegations are that the defendant the Baker Motor Vehicle Company, owned and controlled and managed, not only the Baker Motor Vehicle Company of New York (the bankrupt concern), organized by the defendant company to take over the property of the C. B. Rice Company, but the C. B. Rice Company, and which was organized by the defendant corporation for the purpose of marketing its manufactures.

Owning and controlling and managing both companies, the defendant corporation procured the Rice Company to transfer its assets of over $100,000 to the Baker Motor Vehicle Company of New York, having a capital stock of only $10,000, with only $500 paid in, without

the payment of any consideration whatever; the last-named corporation merely agreeing to pay all the debts of said Rice Company. The debt of the Rice Company to the plaintiff has not been paid, and he did not assent to such transfer of assets; and when the Baker corporation of New York went into bankruptcy he was seeking to enforce his claim, and because of the liability of the bankrupt corporation, and to release the property in the hands of said bankrupt company, or its receiver, and permit its transfer to the defendant corporation, the present obligation or agreement was entered into, and thereupon the receiver transferred all the property to the defendant the Baker Motor Vehicle Company of Ohio.

[2] The claim of the plaintiff against the Rice Company was in litigation; but, when determined, it seems clear that the now bankrupt corporation would have been liable to pay it on the agreement set forth to that effect. The claim would have been provable in bankruptcy, and the trustee, under bond, it is presumed, would have paid it. This plaintiff, in the proceedings in the bankruptcy court, was not seeking further security for his share of the estate on an equality with the other creditors, if any, but was alleging a claim in preference to all others, and opposing the transfer of the property in the hands of the bankrupt or its receiver; and hence the bond or undertaking that his claim should be paid when established in the suit mentioned. He then proceeded to judgment, and exhausted his remedy by execution returned unsatisfied. It is clear that Hunter understood he was obtaining, and that the defendant the Baker Motor Vehicle Company (of Ohio) understood it was giving, an obligation or undertaking that Hunter's full claim as established in the suit pending should be paid in case the alleged lien exists. The bond or obligation sued upon is not limited to Hunter's share in distribution in bankruptcy on an equality with other creditors, but is broad, and entitled him to recover the full sum the facts show he is entitled to out of the property in the hands of the Baker Motor Vehicle Company of New York at the time of its bankruptcy. If he had a lien for the full amount of his claim which he could have sustained in the bankruptcy court, he can prove it and recover it here. If not, he can only recover here his share on an equality of distribution with the other creditors of that corporation. The bond or obligation sued on here does not fix any specific sum, nor does it admit that Hunter had a lien to the full amount of his claim; but the complaint asserts that he did.

The defendant says that, admitting each and every fact stated or pleaded, and excluding the conclusions of law that a lien existed, and which must be sustained, if at all, by the facts pleaded, no lien existed, and that Hunter was a mere general creditor. But the bond covers his share as such. The defendant says the complaint, to state a cause of action, must show, not only the amount of the estate, but the amount of all costs and expenses, the amount of all liens, if any, on the fund, and the amount to be paid to those entitled to priority of payment, if any, and also the amount of the proved claims, before it can be said that the plaintiff is entitled to recover anything. This demurrer cannot be sustained. The plaintiff is entitled to recover on

either theory of construction of the bond claimed by the defendant. It is not necessary now to decide the question of lien. If there were or are claims for expenses, prior liens, and claims entitled to priority of payment which exhaust the entire $40,000, of which $18,000 was available for distribution to creditors, as the complaint alleges and the demurrer admits, the answer must so aver, and the defendant must so prove, or the plaintiff will be entitled to recover the full amount claimed, if his lien is sustained on the proof, or his distributive share, if the fund is sufficient for the purpose, or a lesser sum, if his lien is not established and his distributive share of the fund is less. There is no allegation that the plaintiff has gone into the bankruptcy court and proved his claim there, and that the trustee has failed to pay, and, indeed, no such allegation is necessary. The plaintiff, Hunter, stands upon the bond and his right to recover thereon, and not on the fund that came to the receiver and that should be in the hands of the trustee. The bond is not collateral security to the liability of the trustee.

Under the allegations of this complaint the plaintiff may show, if he does not care to rely on his alleged lien, what his share in distribution would be, and recover that. The defendant here, under all the facts, will be compelled to meet the proposition that the transfer of the assets of the Rice Company was in fraud of the rights of Hunter, and that he was pursuing his remedy by seeking to reduce his claim to judgment, so he could proceed against the property in the hands of the New York Baker corporation, and which assets were in the hands of a receiver of that corporation when the bond was given for the purpose mentioned. It is not clear that the defendant corporation is not liable to Hunter for the full amount of his judgment, irrespective of any lien on the assets transferred, on the ground of an original obligation to pay the debts of the C. B. Rice Company, as it may be, if all the allegations of the complaint are true, that the fiction of separate corporate existence should be disregarded here, as the New York Baker Company and the C. B. Rice Company were merely adjuncts or instrumentalities of the defendant corporation.

If an individual forms a corporation for the purpose of doing business in its name, and owns the stock and incurs debts, he is liable, even if the corporation has no assets. Can a corporation do business in that way and escape liability? It is unnecessary to pass on that question, which is better reserved until all the facts are in evidence and before the court at the trial.

The demurrer is overruled, but defendant may answer in 10 days after being served with a copy of the order to be entered pursuant hereto, on payment of the costs of the demurrer, to be taxed by the clerk. If the costs are not paid, and an answer interposed, the plaintiff will have judgment in due course.

THE PRUDENCE.

(District Court, E. D. Virginia. May 16, 1911.)

COLLISION (§ 102*)—STEAM VESSELS—NAVIGATING IN HARBOR.

A collision between two tugs in Norfolk Harbor, one coming up the river and the other having just backed out from a coal pier, *held* due to the combined fault of both vessels, one for giving a signal to the other, and then, without waiting for an answer, a contrary signal, intended for a distant vessel, but which misled the other, and also for signaling without first ascertaining what course the other intended to take after leaving the pier; the latter for moving on an uncertain course, and not being properly manned.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

In Admiralty. Suit by the Merritt & Chapman Derrick & Wrecking Company as owner of the steam tug, Rescue, against the steam tug Prudence for collision. Decree for division of damages.

On the morning of the 12th of January, 1910, about 9:30 o'clock, the tugs Rescue and Prudence were in collision in the harbor of Norfolk, some 300 feet out in the stream, about abreast of the Norfolk county ferry slip. The Rescue was coming up the river, and when nearly opposite the Norfolk and Southern wharf, a distance of some 700 feet below the ferry slip, observed the Portsmouth ferryboat leaving her slip for Portsmouth, and checked her speed to allow the latter to pass; whereupon she rang up, and then saw the Prudence swinging out from the Water Front Coal Company's pier, which was some 100 feet above the Berkley, or eastern, side of the ferry; that the Prudence was navigating so as to pass between the Rescue and the wharf, and that the Rescue thereupon blew to the Prudence a signal of one blast of her whistle, indicating her purpose to pass port to port, and there was ample room for their so doing. Shortly after the Rescue gave the one whistle, her master heard a signal of one blast of the whistle from the Berkley ferryboat, which was at that time leaving her slip on the Berkley side of the river, en route to Norfolk, and soon thereafter heard from the same boat a signal of two whistles, which was promptly answered by two blasts of the Rescue's whistle; that at about this time, the tug Prudence, which had been proceeding as above indicated, was observed bearing to port, as if under her starboard wheel, which course was continued by her, whereupon the master of the Rescue immediately reversed his engine and went full speed astern. The Prudence continued to come ahead under her starboard wheel, and ran into and collided with the Rescue, striking her on the port bow, causing considerable damage. The Prudence admits swinging out from the Water Front Coal Company's pier into the channel, and insists that, as she did, her stern swung to starboard, and she came forward with a view of turning to go up the river, at which time, as she gave the signal to go ahead, the Rescue was observed coming up stream on her starboard hand; that the Prudence continued running slowly, keeping to the port of the Rescue, designing to go under her stern, when the latter vessel gave to the Prudence a signal of two whistles, indicating her intention to pass starboard to starboard; that the Prudence, then put her wheel hard over for the purpose of swinging to her port; when the Rescue gave a signal of one whistle; and realizing that if she proceeded to port, a collision would follow, the Prudence put her wheel to port, endeavored to swing to starboard, and reversed her engines, but too late to prevent the vessels coming together.

Hughes & Little, for libelants.

Edward R. Baird, Jr., for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WADDILL, District Judge (after stating the facts as above). This collision occurred largely as the result of misunderstanding of signals between the tugs as to the courses on which they were respectively proceeding; that is, whether on passing or crossing courses. The Rescue first gave the Prudence a signal of one whistle to pass port to port, and without waiting a reply from her, proceeded to receive from, and give to, the Berkley ferryboat on the opposite side of the river signals which tended to and misled the Prudence. The Rescue insists that the vessels were passing head on, and that upon giving the one signal, the Prudence should have kept to port and so passed; whereas the Prudence insists that the vessels were on crossing and not passing courses, and that the Rescue should have kept her course, and gone to starboard.

The collision could not have occurred had the two tugs seasonably observed the rules of navigation governing them at the time, whether they be treated as on passing or crossing courses. It took place in the quiet harbor, in broad daylight, with the channel unobstructed, within the shadow of the wharves, and each tug could and should have kept herself under such control as to have avoided running into the other. The Rescue is clearly guilty of fault. She gave the first signal to the Prudence to pass port to port, and then two whistles to the ferryboat across the river, entirely out of the way, at a time and in such manner as to mislead the Prudence. There was no reason for this conduct on her part. The ferryboat was entirely out of the way; and to have been engaged in giving to or receiving from her signals at all was unnecessary, and to have done so after having initiated passing signals with the Prudence, without receiving a reply from her, was inexcusable. She was also guilty of fault in initiating passing signals to the Prudence, without first ascertaining the proper movements of the Prudence, whose vacillating course was certainly at the time such as to have warned the Rescue against proceeding either in close proximity to her, or in giving to or accepting signals from her until her course had been determined. In answer to a question on cross-examination, the master of the Rescue stated:

"Q. Were not you acting on the rule I have been talking about, that you did not know the course of the Prudence, and therefore was not giving any signals until you knew what she was doing? A. I said she was circling down the river. Q. And in a position in which her course could not be determined, was the reason that you did not give your signal? A. Naturally, I did not know where he was going. It looked to me he was circling down the river; I. did not know where he was going."

The navigation of the Prudence was likewise at fault on the occasion in question for her failure to properly direct the course of the vessel after backing out in the stream, and for so conducting the same as to confuse and mislead the Rescue; and, moreover, to unduly obstruct the channel for others having the right to use the same. She was also in fault in not having a competent mariner in charge of her navigation, and a proper lookout, or other person, to aid in the same. At the time of the collision, the master and chief engineer of the Prudence were ashore, and the tug's control was in charge of her mate, who admits that he had no license for Norfolk Harbor. This mate, after

stating that upon backing from his dock with his stern swinging to starboard, under a starboard wheel, he received two whistles from the Rescue, and, without answering the same, put his wheel hardstarboard, and swung to port, to the question of what happened then, answered: "A. Being alone in the pilot house—if I had had a man with me, I would have immediately answered his whistle, or if I had not intended for him to pass that way, I would have blown the danger signal. I commenced going by the way he wanted me to do, that is to port. I got my wheel hardstarboard, or nearly so, and was in the act of reaching for the whistle cord to answer the two whistles, when he blew one whistle." And to a further question, after stating that he starboarded after swinging out with his stern to starboard, he said:

"A. After I got straightened out, while I was fooling around the dock, I did not pay any attention to what was coming up."

The witness further stated that in circling out, his purpose was to come down the river, and circle around and pass under the stern of the Rescue; that he had no one on lookout, and no one in the pilot house but himself; that he was acting as lookout and running the boat, and as a matter of fact that he was wheelsman, lookout, and captain.

It may be remarked in this connection that this witness was the only person examined of the officers and crew of the Prudence; and of the officers and crew of the Rescue, only her master was examined. The omission to examine the other persons on both of these tugs cannot fail to be observed by the court.

The conclusion reached by the court is that the collision resulted from the combined negligence of the two tugs, and that consequently the damages resulting should be divided between them.

THE STRATHNAIRN.

THE HERM.

(District Court, W. D. Washington, N. D. April 8, 1911.)

Nos. 4,482, 4,487.

1. MARITIME LIENS (§ 27*)—BREACH OF EXECUTORY CONTRACT.

There is no maritime lien for the damages arising from the breach of a contract, although maritime in its nature, which remains wholly executory.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 41–45; Dec. Dig. § 27.*]

2. ADMIRALTY (§ 13*)—JURISDICTION—BREACH OF CONTRACT.

A contract for the rendition of stevedoring services is maritime, and, if executed in whole or in part, a court of admiralty may take jurisdiction of claims arising thereunder by a suit in personam or in rem, but,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

so long as it remains purely executory, the admiralty jurisdiction is in personam only.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 164–176; Dec. Dig. § 13.*

Admiralty jurisdiction as to matters of contract, see notes to The Richard Winslow, 18 C. C. A. 347; Bontin v. Rudd, 27 C. C. A. 530.]

In Admiralty. Suits by the Washington Stevedore Company against the steamship Strathnairn, Rothschild & Company, agents, claimants, and by the McCabe Company against the steamship Herm, Rothschilds & Company, agents, claimants. On exceptions to libels. Exceptions sustained.

George H. Walker, for libelant in case No. 4,482.

George H. Walker and Richard Saxe Jones, for libelant in case No. 4,487.

John Trumbull, for claimants.

DONWORTH, District Judge. These two libels are in rem, and are substantially identical in their allegations. Like exceptions to the libel in each case have been filed, and the two cases have been argued together and submitted on the same briefs. For convenience I will specifically refer only to the libel and exceptions in the case of the Strathnairn, as the differences in detail between the two cases do not call for any statement.

The first three exceptions go to the point that the facts alleged in the libel fail to show any maritime or other lien against the steamship or any other cause of action against her. The decision which must be rendered on this point will make it unnecessary to consider the other exceptions.

According to the allegations of the libel, at San Francisco on November 22, 1910, the owner of the respondent steamship, a British corporation, "by its duly authorized agents and time charterers, the Java Asiatic Company, entered into an agreement with the libelant as stevedore, providing for the loading by the libelant of said vessel on Puget Sound, at the rate of 85 cents per thousand, board measure, and at the rate of $1.10 per thousand, board measure, if the said vessel should be found to have more than 200,000 feet of long lumber, which sums of money the said Java Asiatic Company did in and by the terms of said agreement promise to pay the libelant." It is further alleged that on the arrival of the vessel at Bellingham, Wash., on or about December 26, 1910, the libelant tendered itself ready to perform and carry out the agreement, and was then and there ready to load the vessel according to the agreement, and then and there had on hand a force of men sufficient for that purpose, employed, instructed, and ready to load the vessel. Written notice of such readiness to perform was duly served upon the master of the vessel, but, notwithstanding libelant's readiness to perform, "the said master and the said Java Asiatic Company did then and there refuse to allow or permit the libelant or its men or any of them to board the vessel or to proceed with the work of loading the same." Damages are

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimed in the sum of $59.24 for incidental expenses incurred in procuring the agreement, $540 for loss of profits and $5,000 for loss in reputation and prestige.

[1] It will be noted that the libelant never in fact rendered any stevedoring service to the steamship, and that the contract remains wholly executory. The authorities are almost unanimous in holding that there is no maritime lien for the damages arising from the breach of a contract, though it be of a maritime nature, where there has been no performance in whole or in part. That such is the rule in the case of unexecuted contracts for the transportation of goods was decided by the Supreme Court in the two cases of Schooner Freeman v. Buckingham, 18 How. 182, 15 L. Ed. 341, and Vandewater v. Mills (The Yankee Blade) 19 How. 82, 15 L. Ed. 554. The same application of the rule has been made by the lower federal courts in the cases of The Ira Chaffee (D. C.) 2 Fed. 401; The Guiding Star (D. C.) 53 Fed. 936; The Habil (D. C.) 100 Fed. 120; The Ripon City, 102 Fed. 176, 42 C. C. A. 247; The Pleroma (D. C.) 175 Fed. 639. To the same effect is the decision of the Circuit Court of Appeals of this circuit in Guffey v. Alaska & Pacific S. S. Co., 130 Fed. 271, 64 C. C. A. 517. The decision of Judge Brown (later Mr. Justice Brown of the Supreme Court) in The Ira Chaffee (D. C.) 2 Fed. 401, is especially full, clear, and convincing. After a careful analysis of the principal cases, it is said:

"From this review of the cases it will be seen that, with the exception of the dictum in the case of The Williams, there is no authority for saying that a court of admiralty has jurisdiction in rem for the breach of a purely executory contract. There is reason as well as authority for the proposition. If the owner of a cargo has a privilege upon the vessel for a breach of his contract, the vessel would be entitled equally to a lien on the cargo for a refusal of the owner to put it on board, and it might be seized upon the dock or anywhere else for the satisfaction of such lien. If the jurisdiction is sustained in this class of cases, it ought also to include cases of contract to repair the vessel or supply her with stores, in which the materialman would be entitled to a lien, though nothing had been done under the contract. I find it impossible to say with Judge Emmons, in the case of The Williams, that the dicta in The Freeman and The Yankee Blade are 'now expressly overruled.' While the point has not been directly adjudicated in the court of last resort, I find no intimation in any of the later cases of a disposition on the part of that tribunal to recede from the doctrine there announced."

In the case of The Eugene (D. C.) 83 Fed. 222, Judge Hanford made an interesting and instructive summary of the cases in which the Supreme Court had referred to this question, and held that there was no lien for damages sustained by a passenger whose contract of passage remained wholly unexecuted; he never having boarded the ship. This decision was affirmed on this point by the Circuit Court of Appeals, 87 Fed. 1001, 31 C. C. A. 345. Contracts of towage and pilotage which have not been executed in whole or in part are subject to the same principle. The Prince Leopold (C. C.) 9 Fed. 333; The Seven Sons (D. C.) 69 Fed. 271; The Francesco (D. C.) 116 Fed. 83. The rule appears to be expressly recognized in the statute recently enacted by Congress in relation to maritime liens (Act June 23, 1910, c. 373, 36 Stat. 604), which gives a maritime lien en-

forceable by proceedings in rem to "any person furnishing repairs, supplies or other necessaries to a vessel, whether foreign or domestic," and supersedes all state statutes purporting to create such liens.

The only case cited by counsel for libelants which holds that performance of a contract in whole or in part is not required for the creation of a maritime lien is The Williams, 29 Fed. Cas. 1342. That case, however, in so far as it asserts such a principle, has been so frequently disapproved, and is so much opposed to the later and more authoritative cases, that it must be regarded as outside of the current of authority. No performance in whole or in part is necessary in order to confer admiralty jurisdiction over suits in personam for breaches of maritime contracts. Boutin v. Rudd, 82 Fed. 685. The jurisdiction in rem, however, fails as to unexecuted contracts because no maritime lien has attached.

[2] Though there are early decisions to the contrary, there can now be no doubt that contracts for the rendition of stevedoring services are maritime contracts. If executed in whole or in part, courts of admiralty may take jurisdiction of claims arising thereunder either by suits in personam or suits in rem. But, as long as they remain purely executory, the admiralty jurisdiction is in personam only. The Allerton (D. C.) 93 Fed. 219.

It follows that the first three exceptions must be sustained in each case, and it is so ordered.

BOWERS v. FIRST NAT. BANK OF MOUNTAINHOME, IDAHO.

(Circuit Court, D. Idaho, S. D. September 30, 1911.)

REMOVAL OF CAUSES (§§ 18, 19*)—FEDERAL QUESTION—PLEADING.

Where a plaintiff's pleading states every fact upon which the solution of a substantial question arising under the Constitution or laws of the United States depends, so that the question of the construction of a constitutional or statutory provision may be presented by a demurrer and may be determinative of the case, it is removable as one arising under such Constitution or laws.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 36–53; Dec. Dig. §§ 18, 19.*]

At Law. Action by William C. Bowers against the First National Bank of Mountainhome, Idaho. On motion to remand to state court. Motion denied.

W. L. Harvey and Claude W. Gibson, for plaintiff.
Richards & Haga, for defendant.

DIETRICH, District Judge. The defendant is a national bank doing business at Mountainhome, Idaho, and the suit is brought by the plaintiff to recover from it damages because of its alleged violation of an agreement, according to the terms of which it was upon specified conditions to deliver to the plaintiff certain papers left with it as escrow holder. Upon petition of the defendant the suit was re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

moved from the state district court, where it was commenced, into this court, upon the ground that it is "one arising under the Constitution or laws of the United States." The theory of the defendant, as disclosed by the petition for removal and in the argument of counsel, is that the agreement relied upon by the plaintiff is void for the reason that it is not within the power of a national bank to obligate itself as an escrow holder.

The cases are numerous involving the question of when and under what circumstances a defendant may remove a case upon the ground that a federal question is involved, and certain rules have long since been fully established.

In Western Union Telegraph Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052, it was held that:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States upon which the result depends, it is not a suit arising under the Constitution or laws; and it must appear in the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the Constitution or some law or treaty of the United States, before jurisdiction may be maintained on this ground."

And in the more recent case of Devine v. Los Angeles, 202 U. S. 313, 332, 26 Sup. Ct. 652, 657 (50 L. Ed. 1046), the same court said:

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States; and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends; and this must appear from the plaintiff's statement of his own claim and cannot be aided by allegations as to the defense which might be interposed."

And in Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144, after reference to the general rule, it is said:

"Hence it has been settled that a case cannot be removed from a state court into a Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear the want of it cannot be supplied by any statement of the petition for removal or in subsequent pleadings, and, moreover, that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the Constitution or law or treaty of the United States or of a state, in conflict with the Constitution."

It is not thought that any useful purpose could be subserved by an elaborate consideration of these principles or a review of the reported decisions in which they have been applied to specific facts. The contention of the defendant is that in alleging its corporate existence as a national bank the plaintiff has impliedly pleaded its statutory charter provisions, and that therefore the question whether it has the power to obligate itself as an escrow holder is made to appear upon the face of the complaint. No controversy in this respect is pleaded in terms by the plaintiff, nor does he suggest in his com-

plaint that such a question will be raised. In the sense, however, that it may be raised by demurrer, the question is fully presented upon the face of the complaint; that is to say, the question of law necessarily arises upon the facts which the plaintiff himself discloses. This, I am inclined to think, is sufficient to enable this court, upon petition of the defendant, to entertain jurisdiction. State of Oregon v. Three Sisters Irrigation Co. (C. C.) 158 Fed. 346; Cound v. Atchison, etc., Ry. Co. (C. C.) 173 Fed. 527; Clark v. Southern Pacific Ry. Co. (C. C.) 175 Fed. 122; State of Minnesota v. Duluth, etc., R. R. Co. (C. C.) 87 Fed. 497.

The opinion in the case last cited closes as follows:

"A federal question is equally presented if it appears from the plaintiff's statement of facts that a construction which may be fairly claimed and contended for, of a provision of such Constitution or statutes, would defeat plaintiff's right to recover. The complainant's right of recovery here depends upon the validity of the legislative act of April 21, 1897 [Laws Minn. 1897, c. 168], when tested by the provisions of section 10, art. 1, of the Constitution of the United States, and section 1, of article 14, of the amendments to that Constitution. Every fact upon which the solution of this federal question depends is stated on the face of the complaint, and apparently the question can be presented by a demurrer to the bill of complaint. The motion to remand is denied."

It is suggested that if this view prevails removal would be possible in every case where a national bank is a party defendant, thus practically nullifying the provisions of section 4 of the Act of August 13, 1888, c. 866, 25 Stat. 436 (U. S. Comp. St. 1901, p. 514), declaring in substance that national banks shall be deemed citizens of the state in which they are respectively located and denying the federal courts jurisdiction of litigation to which such banks are parties, "other than such as they would have in cases between citizens of the same state." But upon reflection it will be seen that such a result does not necessarily follow. An actual federal question must be presented by the record, a substantial controversy involving the scope and meaning of the statutes defining the powers of a national bank. In many suits, indeed in the majority of suits, against national banks, no such question is or can be involved. In some respects the law is too clear to admit of construction, and in others the meaning of its provisions has been declared by the court of last resort. In such cases obviously no substantial controversy arises, and hence removal cannot be had upon the ground that the suit arises under the statutes or Constitution of the United States.

The question here presented is admittedly a substantial one and has never been authoritatively decided. Upon its correct answer may wholly depend the plaintiff's right to recover and the defendant's liability upon the cause of action pleaded. In view of this consideration, the motion to remand is denied.

UNDERGROUND ELECTRIC RYS. CO. OF LONDON, Limited, v. OWSLEY et al.

(Circuit Court, S. D. New York. October 6, 1911.)

1. DOWER (§ 95*)—LIENS—TAXES.
Greater New York Charter (Laws 1901, c. 466) §§ 894, 1017, provide that real estate taxes need not be assessed against the owner, but are a lien until paid prior to all other charges, and Code Civ. Proc. N. Y. § 2719, makes it the duty of the executor to pay "taxes assessed on the property of the deceased previous to his death" next after debts entitled to a preference under the laws of the United States and before all other claims. *Held*, that where taxes on New York lands were assessed to a wife during her husband's life, which should have been assessed to him, and after his death the property was sold in receivership proceedings to preserve the estate pending litigation, the taxes being a lien on the land which the executor was bound to pay, the widow was entitled to have her dower computed in the fund before such taxes were deducted.
[Ed. Note.—For other cases, see Dower, Dec. Dig. § 95.*]

2. LIFE ESTATES (§ 18*)—TENANT'S DUTY TO PAY TAXES.
A life tenant in possession of real estate under a will is responsible for the taxes assessed during such occupancy.
[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 39–51; Dec. Dig. § 18.*]

3. DOWER (§ 112*)—SETTLEMENT AGREEMENT—CLAIMS AGAINST WIDOW.
A widow, given a life estate in real estate by her husband's will, occupied it for nearly two years, and then claimed against the will. Thereafter, in order to promote a sale, she agreed that her dower should be admeasured in a fixed sum to be paid without interest, damages, etc., out of the proceeds of a sale of the property, and that she be permitted to occupy the property without rent or other charges for any period since the death of her husband, subject to the possession of a receiver of his property until sold. *Held*, that such agreement was effective to release all claims against her for occupation during such period.
[Ed. Note.—For other cases, see Dower, Dec. Dig. § 112.*]

4. DOWER (§ 95*)—ADMEASUREMENT—TAXES.
Where by reason of a dower settlement agreement taxes assessed against certain of the real estate after the husband's death did not create any personal liability, but were only a lien on the land, her interest which the agreement provided should be valued as of a date after the taxes had become a lien was subject to the taxes, so that her dower interest in a fund representing such real estate should be computed after the taxes were paid.
[Ed. Note.—For other cases, see Dower, Dec. Dig. § 95.*]

Suit by the Underground Electric Railways Company of London, Limited, against Louis S. Owsley, as executor of the last will and testament of Charles T. Yerkes, deceased, and others. On rule to determine the dower interest of decedent's widow.

Kearny & Dickinson, for executors of Mary A. Yerkes, deceased.
Joline, Larkin & Rathbone, for executor of Charles T. Yerkes.
Jos. P. Cotton, for receiver.

WARD, Circuit Judge. The question in this case is whether the dower right of Mary Adelaide Yerkes, widow of Charles T. Yerkes, should be charged with any part of the unpaid taxes which were a lien upon his real estate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Reference may be had to 169 Fed. 671 for the circumstances which led this court to appoint a receiver for the preservation of the decedent's estate April 5, 1909. Many controversies existed between the widow on one hand and the executors and the heirs of the decedent on the other. To settle them an agreement was entered into November 11, 1909, which established Mr. Yerkes' title to the real estate at the time of his death, December 29, 1905, as against the widow's claim of title thereto, and provided that the gross money value of her dower should be calculated in accordance with the mortality tables at the date of valuation and be paid to her out of the proceeds of sale of the real estate to be sold by the receiver under a decree of this court and the balance to the executor for payment of creditors of the estate.

The material provisions of the agreement upon this subject are the following:

"* * * And the parties further consent that said gross sum shall be the amount that a person of the age of forty-eight years at the time of the admeasurement would be entitled to receive thereunder; and shall be admeasured as of that date; and such gross sum shall be paid forthwith, without interest thereon, and without damages for detention or costs taxed against any party to this agreement, but the disbursements of such proceeding may be paid out of the proceeds of the sale in such manner as the court may direct." (Article 3.)

"It is understood and agreed that the widow shall be permitted, during the receivership in the suit of the Underground Electric Railways Company of London, Limited, against Owsley, to continue to occupy the premises at the southeast corner of Sixty-Eighth street and Fifth avenue and the stable hereinbefore referred to without rent or other charge therefor for any period since the death of said Charles T. Yerkes, subject to the possession of the receiver in said suit, until a sale thereof shall have been made as herein provided. * * *" (Article 10.)

Thereafter and subsequent to the time the taxes became a lien the widow's dower was fixed as 20.18 per cent. of the proceeds of sale of the premises. They were sold by the receiver, the taxes paid out of the proceeds of sale to the amount of $191,379.57, and a further sum equal to 20.18 per cent. thereof was reserved in addition in the hands of the receiver, subject to the future determination of this court as to what portion thereof, if any, should be paid to the widow in settlement of her dower. In New York City taxes on real estate are not required to be assessed against the owner (section 894, Greater New York Charter [Laws 1901, c. 466]), and they "continue to be until paid a lien thereon and shall be preferred in payment to all other charges." Section 1017. The only effect of omitting the real owner's name or of assessing in the name of one not the owner is to confine the city's remedy to a lien upon the land. Haight v. Mayor, 99 N. Y. 280, 1 N. E. 883. Section 2719 of the New York Code of Civil Procedure makes it the duty of the executor to pay "taxes assessed on the property of the deceased previous to his death" next after debts entitled to a preference under the laws of the United States and before all other claims.

[1] The premises were assessed for the years 1903, 1904, and 1905, before the death of Mr. Yerkes, in the name of Mary Adelaide Yerkes. As the settlement agreement and the decree of sale in pursuance thereof determine that Charles T. Yerkes, and not Mary Adelaide Yerkes, was then the owner, the taxes were not assessed against the rightful

owner, there was no personal liability for them on his part, and the city's right was restricted to a lien. The executor cites Krueger v. Schlinger, 19 Misc. Rep. 221, 43 N. Y. Supp. 305, and Lauby v. Gill, 42 Misc. Rep. 334, 86 N. Y. Supp. 718, in which it was held that the taxes mentioned in section 2719 are such as were personally owed by the decedent. The Court of Appeals, however, makes no such distinction, but applies the provision to all taxes assessed against the premises before the decedent's death. In Matter of Gill, 199 N. Y. 155, 92 N. E. 390, Cullen, C. J., saying at page 159:

"Nor is it necessary to inquire whether in Brooklyn at the time of the imposition of these taxes they constituted a personal charge against the testator or not. Throughout all the state, in the case of a tax against the lands of a nonresident, no personal charge is created against any person, but simply a lien on the land. The command of the statute, however, is imperative, and executors and administrators must pay out of the personalty all taxes on the property of the deceased. Therefore the liability of the appellant as devisee of the real estate was not primary, but only secondary."

It follows that the executors of the widow (who has since died) are entitled to 20.18 per cent. of the taxes paid for these years, with any interest that has accrued on the same while in the receiver's hands.

[2] The will gave the widow a life estate in the premises in question, and she did remain in possession after the death of the decedent, December 29, 1905, until May 14, 1907, when she claimed against the will.

During this interval the premises were assessed for taxes in 1906 and 1907 in her name as owner, and, if she was in possession as life tenant under the will, she would be responsible for the taxes of those years, as the executor contends.

[3] But there is nothing to show whether she occupied under the will or under her claim of title, and I think the effect of the settlement agreement was to wipe out claims of every nature against her for occupation during this period.

[4] Therefore we have to consider the taxes for 1906, 1907, 1908, and 1909 after the death of Mr. Yerkes, without reference to her occupation. They were assessed against some of the premises as owned by Mary Adelaide Yerkes and against others as owned by Charles T. Yerkes. In neither case was there any personal liability, because under the settlement agreement and decree Mrs. Yerkes was not the owner during any of this period, and Mr. Yerkes was dead. Consequently for these taxes there was no liability except of the land by virtue of the city's paramount lien. If the premises had gone into the possession of heirs or devisees, they would have been liable as between them and the widow for taxes assessed during their occupation. But the controversy is entirely between the executor on behalf of creditors and the widow. He neither owned nor occupied the premises, and it is established by the settlement agreement that she never owned them, is in no way chargeable because of occupation, and that her dower is to be valued of a date after the taxes had become a lien. The land owed the taxes and the land actually paid them. I think the widow's interest was subject to the lien of the taxes, and therefore the per-

centage retained for these years, with any accrued interest, must go to the executor of Charles T. Yerkes.

It was understood between the parties and the court that this question should be determined within two weeks after the sale of the premises, but because of the delay of the parties the receiver has incurred an indebtedness for another annual premium on his bond to the amount of $125 for payment of which he has no other funds in his hands than the one now being distributed. This charge must be paid first, and the balance distributed in accordance with this opinion.

SPERRY & HUTCHINSON CO. v. CITY OF TACOMA et al.

(Circuit Court, W. D. Washington, W. D. October 11, 1911.)

No. 1,841.

1. COURTS (§ 101*)—FEDERAL COURTS—SUIT TO ENJOIN ENFORCEMENT OF CITY ORDINANCE—"STATUTE."

A city ordinance is not a state statute, within the meaning of Act June 18, 1910, c. 309, § 17, 36 Stat. 557, requiring the presence of three judges for the hearing of an application for an interlocutory injunction restraining the enforcement of such a statute.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 101.*

For other definitions, see Words and Phrases, vol. 7, pp. 6647, 6648.]

2. LICENSES (§§ 7, 35*)—CONSTITUTIONALITY OF ORDINANCE—USE OF TRADING STAMPS.

The use of trading stamps in retail merchandising business is legitimate, and an ordinance imposing an excessive license fee on merchants using such stamps, with the evident purpose of preventing such use, is unconstitutional and void, and a complainant whose contract rights are injuriously affected thereby is entitled to an injunction to restrain its enforcement.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 69; Dec. Dig. §§ 7, 35.*]

3. ABATEMENT AND REVIVAL (§ 12*)—PENDENCY OF ANOTHER ACTION—FEDERAL AND STATE COURTS.

A prior suit pending in a state court, in which the court has not taken into its possession any tangible property, is not ground for abating a subsequent and identical suit in a federal court.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95-98; Dec. Dig. § 12.*

Pendency of action in state or federal court as ground for abatement of action in other, see notes to Bunker Hill & Sullivan M. & C. Co. v. Shoshone Mining Co., 47 C. C. A. 205; Barnsdall v. Waltemeyer, 73 C. C. A. 366.]

In Equity. Suit by the Sperry & Hutchinson Company against the City of Tacoma and others. On application for injunction pendente lite to restrain enforcement of a city ordinance exacting exorbitant license fees for using trading stamps. Injunction granted.

P. P. Carroll and Daniel J. Lyons, for complainant.

T. L. Stiles, for defendants.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HANFORD, District Judge. The object of this suit is to obtain judicial protection of the right to carry on in the city of Tacoma the complainant's business as a merchant and supplier to other retail merchants of trading stamps, which right is menaced, as the bill of complaint avers, by the defendants, who threaten to exact payment of exorbitant license fees from each merchant using trading stamps, and by criminal prosecutions enforce an ordinance of the city which has been heretofore by this court decreed to be void, because it is an unwarranted deprivation of rights guaranteed by the Constitution of the United States. The bill of complaint avers that enforcement of the ordinance will effectually prevent patrons of the complainant from complying with their contracts for the purchase and use of trading stamps, and will cause a loss of revenue amounting to many thousands of dollars annually. The jurisdiction of this court to determine the controversy involved is grounded upon alleged diversity of citizenship of the parties. The case has been submitted to the court upon the complainant's application for an injunction pendente lite and the defendants' exceptions to the bill of complaint.

[1] It is the opinion of the court that the city ordinance which is attacked is not a statute of the state. Therefore the procedure is not controlled by the provision of the act of Congress of 1910 (36 Stat. 557) requiring the presence of three judges for the hearing of an application for an interlocutory injunction.

[2] It is also the opinion of the court that the use of trading stamps in retail merchandising business is legitimate, that the ordinance referred to is designed to prohibit such use and is void, for reasons given in the decision of the Supreme Court of this state in the case of Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879, and of this court in the case of Ex parte Hutchinson (C. C.) 137 Fed. 949, and that the showing made by the complainant is sufficient, prima facie, to entitle it to an injunction pendente lite. In opposition to that showing the defendants have filed a paper in the case, styled "Exceptions to the Bill of Complaint for Impertinence," and affidavits showing that there was at the time of the commencement of this suit and still is another suit, by this complainant against these same defendants, pending in a court of this state, which had and has complete jurisdiction thereof, and that the issues in that suit are identically the same as the issues tendered by the bill of complaint in this case. These are the only grounds of defense so far divulged.

The exceptions can only be considered as a motion to expunge designated parts of the bill, and, being so considered, the court grants the motion as to all of paragraph 18 and that part of 8 to which the exceptions refer, including the repealed ordinances attached to the bill and designated "Exhibit D," and said parts of the bill will be stricken. The other parts of the bill moved against are deemed to be germane to the case and allowable in pleading, and the exceptions thereto are overruled. After so pruning it, the bill is by the court held to be sufficient to entitle the complainant to the relief prayed for.

[3] The jurisdiction of the United States Circuit Courts, in civil suits and actions, is concurrent with the jurisdiction of the state courts,

and the general rule is well settled that a prior suit pending in a state court is no ground for abating a subsequent and identical suit in a federal court. Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; Rawitzer v. Wyatt (C. C.) 40 Fed. 609. This rule applies, even though the prior suit is pending in a state court within the territory over which the federal court in question also exercises jurisdiction. 3 Am. & Eng. Enc. of L. and Pr. 1233; Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383; Standley v. Roberts, 59 Fed. 836, 8 C. C. A. 305; Rejall v. Greenhood (C. C.) 60 Fed. 784.

The rule of comity, founded on necessity, forbids interference by one court with property in the custody of another court of co-ordinate authority, and by this rule a United States Circuit Court will not disturb the possession of property in the legal custody of a state court, nor permit its legal custody of property to be disturbed by a seizure under process from a state court. Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; Rio Grande R. Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400.

This rule of comity is often mentioned in law books as an exception to the general rule of concurrent jurisdiction above stated, but it is rather a limitation of the extent of concurrent jurisdiction than an exception. It is a necessary limitation, because two independent courts cannot have manual possession of tangible property at the same time. That limitation does not affect the question of jurisdiction in this case, because this court is not asked to assume any authority with respect to property in legal custody.

I am fully satisfied that the court has jurisdiction, and that it should be exercised by granting the injunction prayed for; and it will be so ordered.

ROSS v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court, D. Minnesota, Fourth Division. April 13, 1911.)

MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered, in an action by a brakeman against the railroad company to recover for an injury caused by the giving way of a grabiron by which he was climbing to the top of a car received by defendant from a connecting carrier, and *held* such as to require the submission of the case to the jury on the issue as to defendant's negligence in failing to make proper inspection of the car.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

At Law. Action by Alexander D. Ross against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. On motion by defendant for directed verdict. Motion overruled.

The plaintiff in this case, a switchman, while climbing upon a box car, took hold of a grabiron upon the top of the car, and on his attempting to pull himself up it gave way, and he fell to the ground, sustaining the injury complained of. At the close of all the evidence the defendant moved the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to instruct the jury to return a verdict for the defendant, on the ground that the plaintiff had failed to show any negligence on the part of the defendant.

Thomas D. Schall and Francis B. Hart, for plaintiff.
George W. Peterson, for defendant.

WILLARD, District Judge (after stating the facts as above). The defendant in this case has apparently proven that this car was defectively constructed, in that there was no board through which this bolt should have passed. For that defective construction the defendant is in no way responsible. The liability of the defendant must be based upon its failure to inspect the car when it was received from the connecting company. That is so, not only from the law itself, but it is true in this case, from the allegations in the complaint; for they are based, as I understand them, solely upon the failure of the defendant to inspect the car. I entirely agree with those authorities, which have been cited, holding that a company receiving a car from a connecting line is not responsible for a defect which could not have been discovered by a proper inspection. But in this case I think, upon the evidence of the defendant's own witnesses as to the method of inspection, it is for the jury to determine whether, in the exercise of such care as the law imposes upon the defendant in this case, it was the duty of the inspector to have taken hold of the grabiron and determined whether it was loose or not.

There is evidence that the roof of the car was worn. There is evidence that there was a weather crack at the edge of the piece where one end of the grabiron was fastened to the roof. One of the witnesses for the defendant testified that a weather crack was a defect, although he testified that this particular weather crack was not a defect in that car. There is also evidence that this was an old car. Of course, there is evidence to the contrary that it was a new car, and whether it was an old car or a new car is for the jury to pass upon. There is also testimony of a witness for defendant who said that it was the custom and practice of inspectors on this road, if the car was on old one, or if there was a poor-looking roof, to take hold of the grabiron and test it, to see if it was loose; and there is testimony, also, that if the cars were old that it might be the custom or practice, or was the practice, to try the grabirons on the side of the car from the ground.

This evidence, to my mind, as to the condition of the roof of the car, with reference to this weather crack, and that the car was an old car, taken with the testimony of this witness for the defendant, who declared as to what the practice was with reference to the old cars, or cars with poor-looking roofs, makes the case one for the jury to determine whether or not, in the exercise of ordinary care, such care as the law imposed upon the defendant in this case, the inspector should have taken hold of the grabiron and tried it. Of course, it is for the jury to say whether, if he had taken hold of the grabiron and tried it, he would have discovered this defect. Upon that point I think there is no doubt, and I take it that, from all the testimony of the inspectors, it is shown that the condition of the grabiron would

have been discovered if it had been taken hold of and tried. But in any event it is a question for the jury to determine whether, if the inspector had taken hold of that grabiron, he would have discovered its defective condition. Of course, it is also for the jury to say whether this car was defectively constructed.

Upon these three questions, whether the car was defectively constructed, whether, if it was defective, the car was in such a condition as under the defendant's own custom and practice it was the duty of the car inspector to have taken hold of the grabiron and tried it, and whether, if he had taken hold of the grabiron and tried it, he would have discovered the defective condition of the car, I think the case should go to the jury.

Therefore I will deny the motion of the defendant.

UNITED STATES ex rel. GLAVAS v. WILLIAMS, Commissioner of Immigration.

(Circuit Court, S. D. New York. February 8, 1911.)

1. HABEAS CORPUS (§ 96*)—EXCLUSION OF ALIENS—HEARING.
Whether an admission was obtained from an alien on which he was excluded through plying him with liquor and by threats was wholly a question of fact for the executive authorities, with whose decision this court would have no right to interfere.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. § 96.*]

2. HABEAS CORPUS (§ 23*)—EXCLUSION OF ALIENS.
The court on habeas corpus in deportation proceedings can interfere only where the immigrant has been denied a right accorded to him by the statute itself, or when it appears as matter of law that the relator is not an alien; but, if it appears that he is an alien and has been accorded the right to call witnesses, to be represented by counsel, to have a hearing before a designated tribunal, and a chance to present his side, his exclusion cannot be set aside.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

Habeas corpus by the United States, on relation of Georgios Glavas, against William Williams, United States Commissioner of Immigration at the Port of New York. Dismissed. Petitioner remanded.

Daniel Walton, for the United States.
George C. d'Arcy, for defendant.

HAND, District Judge. The affidavits presented by the petitioner upon the return to the writ may be regarded as a traverse to it, but they do not show any ground for the jurisdiction of this court. The relator was given ample opportunity by counsel to appear and present the testimony affecting the admission which was alleged against him, or any other evidence he had to offer, and he chose not to do so.

[1] The question whether the admission was obtained, through plying him with liquor, and by threats, was wholly a question of fact, for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the executive authorities, with whose decision this court would have no right to interfere, had any such evidence been presented.

The alien is deported, among other reasons, as a person likely to become a public charge. Having been accorded a hearing, such as is required under the Japanese Immigration Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721, the court cannot inquire as to whether there is any evidence at all, which would justify the board in coming to that conclusion as matter of fact, or matter of law.

[2] As I understand the decisions of the Supreme Court, the only cases in which a court may interfere are those in which the immigrant has been denied some right accorded him by the statute itself, or in case the facts appear without contradiction from which as matter of law it follows that he is not an alien at all. Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317; U. S. v. Wong Kim, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. Even the determination of that question, if it depends upon disputed facts, seems to be within the control of the executive (U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040), nor do I understand that even an abuse of authority is reviewable, provided that a hearing be given and certain elementary procedural rights are observed in form. The Japanese Immigrant Case, supra, came up on demurrer to a traverse alleging that the hearing was "pretended," and that the relator did not know what the inquiry was about. This I interpret as meaning that abuse of their powers by the authorities is a matter only of executive discipline provided that the requisite forms are not violated. If so, it is quite clear that there is no such review as comes up on motion for a nonsuit in an action at law before a jury, and that the fact that the record has no evidence justifying the result in law is no ground for discharging the alien. Therefore I do not here examine the question of whether there is any evidence whatever in the writ which could possibly justify the Secretary of Commerce and Labor in deporting the relator, either as one admitting that he had committed a crime, or as one likely to become a public charge, because both those questions I hold to be without my jurisdiction. If this be so, it becomes unnecessary to determine whether the admission of having committed a crime involving moral turpitude mentioned in section 2 of the act must take place at the time of the hearing or may occur before. It also renders unnecessary a determination whether the admission actually made upon the hearing by the relator was an admission of the commission of such a crime. It is enough that the relator is an alien and that he has been accorded the opportunity to call witnesses, to be represented by counsel, to be informed of what is charged against him, and to have a hearing before the designated tribunal and a chance to present his side. All these he has, and that takes the matter away from a court.

Writ dismissed. Petitioner remanded.

UNITED STATES v. MEYERS et al.

(District Court, D. Connecticut. October 9, 1911.)

EMINENT DOMAIN (§ 130*)—CONDEMNATION PROCEEDINGS—DAMAGES.

In proceedings by the United States to condemn for a post office site property on which business buildings are situated, tenants are not entitled to recover special damages on account of the cost of removing their fixtures to a new location, nor for loss of profits during such removal.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 130.*

Consequential and indirect damages in condemnation proceedings, see note to High Bridge Lumber Co. v. United States, 16 C. C. A. 468.]

Proceedings by the United States against Morris Meyers, Arthur E. Bernd, Adolph Huber, and the Savings Bank of Danbury to condemn site for post office at Danbury. On report of committee. Judgment on report.

John T. Robinson, for plaintiff.

Canfield, Judson & Pullman, for defendants.

PLATT, District Judge. The committee correctly interpreted the law as I find it to be, disregarding all evidence touching the question of special damage to the tenants Bernd and Huber, which might grow out of taking down, carrying away, and setting up again in a new location, the fixtures in their stores, which they had the right to remove, together with loss of profits during the cessation of business resulting from such removal. What the damage would have been, if said testimony had been taken into account, is therefore immaterial, and the alternative part of the report is of no service to the court.

Let judgment be entered, based upon the original findings of the committee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SOUTHERN PAC. CO. v. DE VALLE DA COSTA.

(Circuit Court of Appeals, First Circuit. October 4, 1911.)

No. 928.

1. DEATH (§ 8*)—WRONGFUL DEATH—STATE STATUTES—APPLICATION—DEATH ON HIGH SEA.

The Kentucky wrongful death act (Ky. St. 1909, § 6 [Russell's St. § 11]), confers a right of action against a corporation, a citizen of that state, for death of another resulting from the corporation's negligence, while operating a vessel on the high seas.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*

What law governs actions for wrongful death, see note to Burrell v. Fleming, 47 C. C. A. 606.]

2. DEATH (§ 35*)—WRONGFUL DEATH—LIABILITY UNDER FOREIGN STATE STATUTE—ENFORCEMENT.

Liability created by Ky. St. 1909, § 6 (Russell's St. § 11), against a corporation, a citizen of that state, for the wrongful death of an employé, will be enforced in the courts of another jurisdiction having a similar statute if there is no violation of public policy of the state wherein the suit is brought.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.*]

3. EXECUTORS AND ADMINISTRATORS (§ 12*)—APPOINTMENT—JURISDICTION—CLAIM FOR WRONGFUL DEATH—"ASSETS."

Ky. St. 1909, § 6 (Russell's St. § 11), authorizing the maintenance of an action against a corporation for death of a servant due to negligence, provides that the action shall be prosecuted by the decedent's personal representative, and that the amount recovered, less funeral expenses and the cost of administration and such cost above the recovery including attorney's fees as are not included in the recovery from defendant, shall be for the benefit of and go to the kindred of deceased in a specified order. *Held* that, under such act, a claim for wrongful death constituted assets of the decedent's estate sufficient to confer jurisdiction on the probate court to appoint an administrator to enforce such liability, and this without reference to the fact that decedent was an alien.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 1, pp. 556–559.]

4. EXECUTORS AND ADMINISTRATORS (§ 11*)—APPOINTMENT OF ADMINISTRATOR—CLAIM FOR WRONGFUL DEATH.

The fact that a cause of action in favor of an alien's administrator for wrongful death did not accrue to the intestate in his lifetime, but accrued only on his death by virtue of statute, was no objection to its being regarded as sufficient basis for appointment of an administrator, since the violation of decedent's right did not die with him, and his right to enforce the same, which did not exist at common law, was preserved by statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. § 11.*]

5. EXECUTORS AND ADMINISTRATORS (§ 12*)—WRONGFUL DEATH—ACTION—PLACE.

In case of wrongful death, either the court of the state wherein the cause of action accrued or the court of the state wherein the defendant resides should recognize the right of action as a sufficient basis for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

grant of letters of administration, and, if there were no assets save the death claim, there would be no necessity for taking out both domiciliary and ancillary administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 12.*]

6. APPEAL AND ERROR (§ 1047*)—EVIDENCE—STATE STATUTES—JUDICIAL NOTICE.

Where an action for wrongful death, under Ky. St. 1909, § 6 (Russell's St. § 11), conferring such right of action, was removed to the federal court sitting in Massachusetts, defendant was not prejudiced by the fact that the Circuit Court took judicial notice of the Kentucky statute, and that it was not introduced in evidence; it appearing on appeal that the statute noticed was identical with that presented by defendant to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1047.*]

7. APPEAL AND ERROR (§ 1031*)—HARMLESS ERROR—FAILURE TO INTRODUCE STATUTE—ASSUMPTION BY APPELLATE COURT.

An appellate court which, in certain cases, is required to take judicial notice of the laws of the various states of the Union and may inform itself by mere inspection of a general statute that the trial court applied the law correctly, should not assume that error in failing to offer formal proof of a general state statute was harmful, when a mere inspection of the law would show that it was not harmful, and that the result would not have been different had the law been formally proved; it being open to the plaintiff in error to show that the error was harmless by exhibiting to the appellate court a statute conforming to that applied at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038–4046; Dec. Dig. § 1031.*]

8. EVIDENCE (§ 12*)—JUDICIAL NOTICE—MORTALITY TABLES.

The court will take judicial notice of the correctness of the standard mortality tables without their authenticity or general use being proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 17; Dec. Dig. § 12.*]

9. MASTER AND SERVANT (§ 201*)—DEATH—JOINT OR CONCURRING NEGLIGENCE.

Where a seaman was killed by the explosion of a steam valve due to the concurring negligence of the master in arranging the pipe to which it was attached in an unsafe manner and the negligence of a servant in opening the valve, the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515–534; Dec. Dig. § 201.*

Concurrent negligence of master and fellow servant, see note to Maupin v. Texas & P. Ry. Co., 40 C. C. A. 236.]

10. MASTER AND SERVANT (§ 285*)—DEATH OF SEAMAN—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a seaman by the explosion of a steam valve, whether the explosion was caused by an unsafe arrangement of the pipe to which it was attached *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

11. MASTER AND SERVANT (§ 265*)—CAUSES OF INJURY—BURDEN OF PROOF.

Where there appears in the proof various and alternative causes, each adequate to produce an injury to a servant, the burden is on plaintiff to solve the uncertainty and show that it was due to a particular cause existing through defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

12. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT—BURDEN OF PROOF.
In an action for death of a servant, the plaintiff's burden of proof to show the cause of the injury is not sustained by showing merely that it was due either to the negligence of the master or of a fellow servant, but he may establish his case by proof of the master's negligence adequate to produce the injury, without negativing all possible suggestions of the existence of other causes; the burden then shifting to defendant to prove other facts and show that the injury was due to causes for which the master was not responsible, or that the actual cause was so uncertain that the master's negligence did not appear with reasonable certainty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Viscount De Valle Da Costa, as administrator of Delfino Rodriguez, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William D. Turner (Reginald Foster and George Hoague, on the brief), for plaintiff in error.

Wendall P. Murray (Charles F. Smith, on the brief), for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This is a writ of error for review of the rulings of the Circuit Court in an action of tort for causing the death of the plaintiff's intestate, Delfino Rodriguez, through negligence.

The case has been before the courts in various aspects. See 160 Fed. 216; 167 Fed. 654; and 176 Fed. 843, 100 C. C. A. 313.

Rodriguez, a subject of the Kingdom of Portugal, was a coal passer on the steamship El Valle. His bunk was in the forecastle, wherein was an auxiliary engine used for moving the capstan and windlass. Steam was supplied to this engine by a steam pipe connected with a steam valve. By the bursting of this valve, Rodriguez, while in his bunk, was so badly scalded that he died in consequence. The vessel was on the high seas at the time of the injury.

Suit was brought in the superior court for the county of Suffolk and commonwealth of Massachusetts by the present defendant in error, as administrator appointed by a probate court of the state of Massachusetts. Upon the petition of the defendant, a corporation of the state of Kentucky, the case was removed to the Circuit Court.

The defendant by plea in abatement denied the validity of the grant of letters of administration. Upon the trial of said plea, it was stipulated as follows:

"It is hereby agreed that, unless the right of action against the defendant is assets in this jurisdiction, the deceased having no other property here, and not having been at the time of his death a resident of the state of Massachusetts, the plea in abatement is to be sustained; but, if such right of action is assets sufficient to give jurisdiction to the probate court to appoint an administrator here, the plea in abatement is to be overruled; and the case is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

submitted to the court for a ruling upon the matter. This agreement is only to apply to this case and not to be evidence in any other proceeding."

The overruling of the plea in abatement is assigned as error. A jury trial was then had, wherein the jury found for the plaintiff and assessed damages in the sum of $5,000.

[1] The statute of the state of Kentucky, whereof the Southern Pacific Company, owner of the steamship, is a citizen, was held by the Circuit Court to give a right of action for a death occurring while the vessel was on the high seas. The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, we think directly supports this ruling; the court saying of a similar statute:

"We construe the statute as intended to govern all cases which it is competent to govern, or at least not to be confined to deaths occasioned on land, etc."

We find nothing in the opinion in La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973, which limits the decision in The Hamilton, or renders inapplicable to the Kentucky statute a like construction. In The Hamilton, 207 U. S. 405, 28 Sup. Ct. 133, 52 L. Ed. 264, there was reserved the question whether the statute was intended to include foreign subjects. Upon this point, however, the opinion of the Circuit Court in Vetaloro v. Perkins (C. C.) 101 Fed. 393, and the opinion in Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, may be regarded as stating the correct view of the law. We are of the opinion that the Kentucky statute renders the defendant liable for the death of an alien occurring on the high seas through its negligence.

[2] This liability will be enforced in the courts of another jurisdiction having a similar statute if there is no violation of the public policy of the state wherein suit is brought. Northern Pacific R. R. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Stewart v. Baltimore & Ohio R. Co., 168 U. S. 455, 18 Sup. Ct. 105, 42 L. Ed. 537.

[3] While there is a general acceptance of this rule, there is much conflict of authority over the question of the proper party to bring suit to enforce the liability. If the statute which gives the right provides for a suit by the personal representative, a question arises whether it is a personal representative appointed by the courts of the state wherein death was caused, a personal representative appointed at the decedent's domicile, or a personal representative appointed in the jurisdiction where the defendant is sued.

It results that, though a defendant's liability may be clear, whatever course may be taken in an attempt to enforce this liability, there arise objections supported by good authority which imperil the substantial rights of those for whose benefit the liability was imposed. If administration is taken out in the place of domicile of the deceased, objection is made that only the state which gives the right of action can appoint a legal representative with authority to enforce that right of action. If a legal representative is appointed in such state, it is objected in the state wherein suit is brought that the authority of an administrator has the territorial limits of the state of his appointment. If suit is brought in the place of defendant's residence, a twofold objection may be made,

that the administrator should have been appointed either at the decedent's domicile or in the state whose statute creates the right of action. If an attempt is made to take ancillary administration, the objection is raised that this right depends upon the existence of assets in the state, and that a claim for damages for death is not assets within the state and does not warrant the appointment of an administrator. See Connor v. N. Y., N. H. & H. R. R., 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252.

The ordinary rule limiting the authority of an administrator to the state of his appointment in many states has been relaxed in actions for causing death on the ground that the personal representative is rather a trustee for the beneficiaries named in the statute than an ordinary administrator; that he is rather a nominal party than the real party in interest; and that his authority is that of a nominal plaintiff.

Without questioning these decisions or the reasons assigned for the recognition of a foreign administrator in such cases, we are of the opinion that cases which support the right of a foreign administrator to maintain the suit are not inconsistent with the right to take out letters of administration in the residence of the defendant.

The right to administration is recognized whenever there are assets within the jurisdiction. Is a death claim assets for the purpose of the appointment of an administrator?

The enactment of a statute giving an action for death, and requiring that it shall be brought by a personal representative, we think should be regarded as a conclusive recognition of the right of administration to enforce such a claim. If a statute designates the personal representative of the deceased as the proper plaintiff, to limit the right to cases in which the deceased left assets other than the right of action would introduce an unreasonable and arbitrary distinction. To hold that suit might be brought in the state of Massachusetts for causing death if the deceased left property in the state, but that it could not be brought if he had no property, would be to make a distinction in favor of persons who have estates against persons who have no estates—to deny the remedy to those most in need of it.

In N. E. Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379, it was held that a policy of life insurance is assets for the purpose of founding administration in another state in which a corporation does business and, as required by the statute, has an agent upon whom process may be served. It was held that the debt on the policy is assets, and the grant of letters of administration was upheld.

If simple contract debts are assets where the debtor resides, and if a corporation debtor may be held to have a domicile to give a situs to its debt at the place where it may be sued, the situs of this obligation, under the circumstances, would be in the state of Massachusetts, where the defendant has an agent, unless the rule is different as to obligations for tort and obligations in contract. For a distinction on this ground there seems to be no sufficient reason.

In Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439, it was said, on a question of situs of the debt, that power over the person of the debtor confers jurisdiction. To hold that by the

law of Massachusetts its courts have power over the person of this defendant to compel it to respond to the obligation created by the statute of Kentucky is inconsistent with the view that there cannot be in Massachusetts a competent plaintiff.

The learned circuit judge dismissed the contention that there were no assets in this jurisdiction, as too artificial. "It is enough that assets and appointment came into being at the same moment."

This is criticised on the ground that assets of the estate of the deceased do not come into being at all. Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, is cited to show that the damages are not part of the estate of the deceased. This was said, however, in connection with the proposition that the plaintiff was simply a nominal plaintiff.

While under certain statutes it may be said that there are no assets of the estate of the decedent subject to the claims of the general creditors of a decedent's estate, yet it should be recognized that the defendant's liability arises out of its wrong to the deceased, and that the right of the beneficiaries is derivative from the right of the deceased.

The provision which makes a legal representative the proper plaintiff to enforce the liability is a recognition that the statute is based upon the rights of the deceased, and that the rule of the common law, which forbade an action if death ensued, being annulled, the right of the deceased remains to be enforced by his personal representative even though the statute provides a particular mode of distribution different from that of ordinary administration. To say that a reasonable compensation for his wrongful death is not to be regarded as assets for the purpose of obtaining administration is to afford a basis for technical objections which ignore the nature of the decedent's right and the principle of justice upon which such a statute is founded. In order that property be assets of an estate, it is not necessary that it follow the ordinary rules of distribution.

In Blagge v. Balch, 162 U. S. 439–463, 16 Sup. Ct. 853, 858 (40 L. Ed. 1032), Chief Justice Fuller observed:

> "It often happens that administrators receive money which is not to be administered as part of the general assets, but is to be distributed in a particular way."

The reasoning of the opinions in Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121, and Walsh v. Boston & Maine R. R. Co., 201 Mass. 527–533, 88 N. E. 12, supports the view that the value of a man's life to his wife or next of kin constitutes, with a certain limitation as to the amount, a part of his estate which he leaves behind him to be administered by his personal representative.

When the statutes of a state provide that an action for causing death may be brought by a personal representative for the benefit of the next of kin, we think it follows that there arises a right to the appointment of a personal representative on this ground alone (see Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121); otherwise, as we have said, an unjust discrimination would follow. If in such state a similar right of action arising under the laws of another state will be enforced, we see no reason why the liability of the defendant in its jurisdiction

should not be regarded as a proper basis for probate jurisdiction and the grant of letters of administration.

A defendant's liability in tort, in the state of Massachusetts, implies a plaintiff capable of enforcing it in the courts and the right to procure the appointment of a legal representative, in cases where the statute designates a personal representative of the decedent as plaintiff. We find no reason for a discrimination between the rights of citizens of the state, citizens of another state, and aliens, in this respect. As the Massachusetts courts have refused to make a distinction between the substantial rights of foreign subjects and of citizens of the state, and have held a defendant equally liable to either (Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309), it should follow, we think, that either has an equal right to letters of administration for the purpose of enforcing the liability.

[4] The contention that, since the cause of action did not accrue to the intestate in his lifetime, but accrued only upon his death by virtue of the statute, it cannot be regarded as a basis for the appointment of an administrator upon the decedent's estate, we cannot accept as a sound argument. A violation of the right of the decedent is the essence of the cause of action. The wrong to the decedent did not die with him, though at common law death absolved the wrongdoer from civil liability. The statute merely removes that absolution, and preserves the wrong to the deceased as a cause of action.

Whether a statute which makes a defendant liable for death by wrongful act is to be regarded as causing a survival of a right of action of the deceased, or as creating a new cause of action, may be a proper question when the principle of compensation, or the rights of creditors, is under discussion; but to apply this distinction for the decision of the question of the right to letters of administration, to enforce a liability based primarily upon a wrong to the deceased when there is no doubt as to the principle of compensation and no possible conflict between creditors and next of kin, can lead only to verbal confusion and unjust discrimination.

The plaintiff in error relies upon Richardson v. New York Central R. R., 98 Mass. 85; but in view of the express reference to this case as "materially modified if not overruled" in the later case of Walsh v. Boston & Maine R. R. Co., 201 Mass. 527–533, 88 N. E. 12, we do not feel bound to follow the reasoning of the earlier case.

The statutes of both states, Kentucky and Massachusetts, in providing that a personal representative of the deceased may sue, adopt the view that the foundation of the action is the right of the deceased, and that the violation of that right by the defendant is to be redressed by one who is the personal representative of the deceased, appointed by the same authority and with the same safeguards that are required of a personal representative to enforce other rights of the deceased after his death. The fact that the personal representative of the deceased is required in the first instance to gain possession, in connection with the nature of the right of the deceased, which is the basis of the cause of action, is a sufficient reason for holding this property to be assets of the estate of the deceased for all beneficial purposes, and for all purposes consonant with the intent of the statute.

In the present case, however, we are dealing with a statute providing that the administrator is to recover money and apply it in part to the purposes of the estate of the decedent. He is to receive assets of the estate of the decedent, using those terms in the strictest sense. By the statute of Kentucky it is provided that the amount recovered—

"less funeral expenses and the cost of administration, and such costs of recovery, including attorneys' fees, as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order." Ky. St. 1909, § 6 (Russell's St. § 11).

The personal representative is to recover what would ordinarily be a charge against the estate of the decedent, i. e., funeral expenses, so that his recovery from the defendant includes what in the strictest sense is to be regarded as an asset of the decedent's estate to be applied by the administrator as in the ordinary course of administration.

Even if we consider the case on narrow grounds, the administrator in this case is suing for assets of the decedent's estate in his right as administrator, and not in the right of the beneficiaries. As there exists an obligation of the defendant to pay into the decedent's estate a sum of money to be applied to the ordinary expenses of an estate, and not to be applied for the benefit of the widow and next of kin, the objection that no assets of the decedent's estate come into being is untenable under this particular statute. But this distinction, though sufficient to meet a technical argument, we regard as altogether too narrow ground to be applied in cases of this character. If the right to compensation for such wrong is the only benefit which the deceased can confer upon his kindred, this should be held sufficient to uphold the action of a probate court even where the statute specifically requires that there shall be assets within the jurisdiction.

[5] We think further that either the court of the state wherein the cause of action accrued, or the court of the state wherein the defendant resides, should recognize the right of action for wrongful death as a sufficient basis for the grant of letters of administration. If there are no assets save the death claim, it should not be necessary to take out both domiciliary and ancillary administration, and especially should the right of action not be defeated through any inability to secure the appointment of a personal representative. The statutes do not create the rights of the beneficiaries as distinct rights proceeding from the statute. This theory would render such statutes of doubtful constitutionality. The beneficiaries take in and through the rights of the deceased, and the wrong is repaired through compensation to his family. The state of the law should be such as not to put the beneficiary to peril of correctly deciding which line of decisions he should follow in securing a personal representative. Whichever course he may take, under the present condition of the law he will be confronted with the objection that he should have taken the other. The common sense solution of this seems to be to hold that either course may be taken, and that we should recognize a right of this character as a sufficient basis for the appointment of legal representatives in the absence of express decision by the state court to the contrary.

There is, of course, the difficulty of a double appointment. Such a difficulty arose in Baltimore & Ohio R. R. Co. v. Evans (C. C. A.)

188 Fed. 6, where administration was taken out both in the domicile and in the state where the cause of action arose; but so far as the statutes provide for assets which, strictly speaking, are those of the decedent's estate, the ordinary principles of domiciliary and ancillary administration will govern. So far as the right is that of the beneficiaries, either court which appoints the legal representative is competent to protect the beneficiaries. Dennick v. R. R. Co., 103 U. S. 11, 26 L. Ed. 439, expressly holds that an administrator appointed elsewhere than in the state where the cause of action accrued may enforce the liability.

[6] The plaintiff in error also objects that the Kentucky statute was not offered in evidence and was not proved at the trial, and cites Union Pacific R. R. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. That case, however, does not support the contention that there was error in taking judicial notice of the laws of the state of Kentucky. The count was so framed as to show that it was based upon a Kentucky statute. In Union Pacific R. R. Co. v. Wyler, the court said that the question involved was one of pleading and was not controlled by the law in regard to judicial notice of statutes, which is a matter of evidence.

The cases in the Supreme Court are somewhat confused by the difference in rule which obtains between cases brought before the Supreme Court on writ of error to a state court, wherein the Supreme Court does not take judicial notice of the laws of all the states, and cases which are properly brought before the United States courts. There the rule seems to be established that the courts take judicial notice not only of the statutes of the district wherein the Circuit Court is sitting, but of the statutes of other states of the Union. Liverpool Steam Co. v. Phenix Insurance Co., 129 U. S. 445, 9 Sup. Ct. 469, 32 L. Ed. 788; Lamar v. Micou, 114 U. S. 218–223, 5 Sup. Ct. 857, 29 L. Ed. 94; Owings v. Hull, 9 Pet. 607–625, 9 L. Ed. 246.

Cases of this character should be distinguished from cases of the class of Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535, and Renaud v. Abbott, 116 U. S. 277, 285, 6 Sup. Ct. 1194, 29 L. Ed. 629.

As the plaintiff in error has presented to this court what it states to be the Kentucky statute, and as there is no difference between this and the statute applied by the Circuit Court, it is apparent that its objection is wholly technical and that by its own showing, if there was error, as is contended, it was harmless error.

[7] We question whether, under ordinary circumstances, informality in proof of a general statute of one of the United States should be a sufficient ground for reversal by a United States court, unless there is the further contention that the statute law was other than it was assumed to be in the trial court. An appellate court which in certain cases is required to take judicial notice of the laws of the various states of the Union, and which may inform itself by mere inspection of a general statute that the court below applied the law correctly, should not assume that error is harmful when a mere inspection of a general statute would show that it was not harmful, and that the

result would not have been different had the law actually applied been presented with formal proof.

In any event, we think that it should be open to a party to show that the error was harmless by exhibiting in the appellate court a statute conforming to that applied as law in the court below. While there may be exceptional cases in which a reversal or a new trial should be had on this ground, a rule which requires proof in order to guard against error should not be made an instrument whereby an appellate court can be compelled to find error, and assume it to be harmful, when it may readily ascertain that it is in fact harmless.

It is further urged that as the declaration contained three counts, and the verdict was general, it cannot now be known on which count it was rendered.

The jury made special findings: That the defendant was negligent, and that the occurrence did not happen within the jurisdiction of the state of Texas (wherefrom it follows under the circumstances that they necessarily found that it was upon the high seas). It conclusively appears, therefore, that the verdict was not based upon the first count; neither is there any reasonable possibility that the jury could have found that the vessel was within the jurisdiction of the state of New York. The main question of negligence was substantially the same under each count, and the jury by special verdict settled the dispute about the place of accident.

We find no such uncertainty in the record as would justify a new trial.

[8] It is urged also that the court erred in permitting the use of mortality tables without requiring any evidence that the tables were authentic or in general use; but this is a matter of judicial notice, and there is no error in this respect. Chamberlayne's Modern Law of Evidence, § 859 C.

[9] The contention that even if there was a defective pipe there could be no recovery if there was negligence in opening the steam valve is without merit. The principle that for joint or concurring negligence of master and servant the master is liable is well settled. Deserant v. Cerillos Coal R. R. Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; Northern Pacific R. R. v. Charless, 162 U. S. 359–364, 16 Sup. Ct. 848, 40 L. Ed. 999.

If the sixteenth request for a ruling and its denial stood alone, we think there would be error in its refusal as an abstract proposition; but the fifteenth and sixteenth requests were presented in connection with the contention that if there was concurrent negligence of master and servant there could be no liability, and counsel expressly stated: "I have framed these two forms of prayer to embody these ideas." We think it clear that the court so treated them in its ruling, and did not pass upon the sixteenth request apart from its application to the contention erroneously made as to the law of concurrent negligence of fellow servant and master.

This is apparent also from other portions of the charge, wherein the judge clearly and repeatedly instructed the jury that, in order to make the defendant liable, the accident must have been caused by the defendant's negligence in an improper arrangement of the pipes.

[10] It is further contended that there was no evidence of negligence which justified the submission of the case to the jury.

The plaintiff contended that there was a drop in the steam pipe, with no drip cock or outlet, and that this was an unsafe arrangement, since it permitted an accumulation of water. There was expert testimony from which the jury was warranted in finding this an unsafe arrangement, likely to cause an explosion.

Upon the fact of the existence of a drop in the pipe the testimony was in conflict. We recognize the force of the argument of the plaintiff in error as to the comparative weight of the testimony on this point; but, as the question was merely of the comparative weight of testimony and involved matters of credibility, we cannot disturb the verdict on this account.

The evidence that such an arrangement would be likely to cause an accumulation of water was supplemented by evidence tending to show that upon the explosion water came out of the pipe; one witness testifying that Rodriguez's berth, opposite the place where the pipe burst, was as wet as if buckets of water had been turned upon it, and wetter than other berths. And it appears that, although the forecastle was filled with steam, other men did not suffer like injury, but escaped.

After the explosion the valve had a hole in it as large as an egg, blown out of one side; the edges of the holes being irregular in outline, with cracks radiating outwards.

There was no direct evidence as to the manner in which steam was turned on. It was the duty of the carpenter or second mate to see to it, and there was evidence that after the explosion the mate had in his hand the iron fork used for this purpose. Negligence in this particular cannot be assumed without proof, and in the absence of proof the jury were entitled to presume that it was done in ordinary course. Moreover, even if the steam were suddenly turned on by a fellow servant, this would not relieve the defendant, since the accumulation of water in the pipe would make the liability to explosion much greater.

[11] Where there appear in proof various and alternative causes each adequate to produce an injury, the burden is upon the plaintiff to solve the uncertainty and show that it was due to a particular cause existing through defendant's negligence. It is true, of course, that it is not enough to show a defective appliance existing through the master's negligence, but it is necessary to establish the causal connection between this negligence and the injury. This rule, however, is not necessarily applicable in this case. The negligence of a fellow servant in admitting steam too suddenly is not proved, and had it been proved would not absolve the defendant if the defect in the pipe concurred with this negligence in the production of the explosion.

It is also contended that a latent defect in the valve was the cause of the accident. The valve was not produced. A single witness stated that he inspected the valve after the accident, and stated the nature of the break, and that a part looked like poor metal. This evidence was not so definite or so conclusive as to require the jury to accept it as proof of a latent defect in the valve. Neither are the expressions of

expert opinion which have been referred to so conclusive as to show that the jury erred in not finding a defect in the valve.

Upon the whole evidence we cannot say that the jury was not justified in finding that but one adequate cause of the accident appeared, and that this was the defective arrangement of the pipe. The jury was not required to find that either of the other causes suggested did exist as a matter of fact, and were entitled to reject as mere suggestions of possibilities the argument as to the existence of other causes.

[12] The burden which rests upon the plaintiff to show the cause of an injury is of course not sustained by showing merely that it was due either to the negligence of the master or of a fellow servant. He may, however, establish his case by proof of the master's negligence adequate to produce an injury without negativing all possible suggestions of the existence of other causes. The plaintiff having produced proof of a cause, and this cause being adequate, the burden rested upon the defendant to prove other facts which would show either that the injury was due to causes for which the master was not responsible, or that the actual cause of the injury was so uncertain that the master's negligence did not appear with reasonable certainty.

Upon a careful consideration of the brief of the plaintiff in error we are of the opinion that, while there may remain doubts as to the correctness of the jury's conclusion upon disputed matters of fact, the verdict cannot be disturbed on that ground. We find no error of law which would justify a reversal of the judgment.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs.

ALLIS-CHALMERS CO. v. CENTRAL TRUST CO. OF NEW YORK.

MULLEN et al. v. SAME.

(Circuit Court of Appeals, First Circuit. September 22, 1911.)

Nos. 923, 924.

1. MECHANICS' LIENS (§ 57*)—CONSTRUCTION OF STATUTE—"OWNER" OF PROPERTY—MORTGAGEE OUT OF POSSESSION.

A mortgagee not in possession is not an "owner" within the meaning of the Maine mechanic's lien statute (Rev. St. Me. c. 93, § 29), which gives a lien for labor or materials only when they are furnished "by virtue of a contract with or by consent of the owner," and he is not required to serve notice of his dissent where he has knowledge that improvements are being made on the property, as is required of the owner, in order to prevent the displacement of his mortgage.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 64–74; Dec. Dig. § 57.*

For other definitions, see Words and Phrases, vol. 6, pp. 5134–5151; vol. 8, p. 7744.]

2. MORTGAGES (§ 151*)—PRIORITY OVER SUBSEQUENT MECHANIC'S LIEN CLAIMS—ESTOPPEL.

The fact that bonds were issued by a corporation for the purpose of raising funds to improve the mortgaged property does not create an equitable estoppel against the mortgagee and bondholders to prevent them

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from claiming that their mortgage gives a prior lien as against mechanic's lien claims subsequently accruing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 309–332; Dec. Dig. § 151;* Mechanics' Liens, Cent. Dig. §§ 358–370.]

3. MORTGAGES (§ 151*)—PRIORITY OF LIENS—MECHANICS' LIENS.
Whoever undertakes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract and upon such liens as the statute grants in definite terms, and has no equity to displace the mortgage lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 309–332; Dec. Dig. § 151;* Mechanics' Liens, Cent. Dig. §§ 358–370.]

4. MORTGAGES (§ 151*)—PRIORITY OF LIENS—MECHANICS' LIENS.
Where a corporation had delivered its bonds, secured by a recorded mortgage, to a contractor for construction work, which in turn had made a valid contract for the sale of such bonds, prior to its entering into a contract with a subcontractor, the mortgage lien attached and was entitled to priority over any lien in favor of the subcontractor, although the bonds were not certified by the trustee until later.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 309–332; Dec. Dig. § 151;* Mechanics' Liens, Cent. Dig. §§ 358–370.]

5. MECHANICS' LIENS (§ 167*)—ACCRUAL OF RIGHT TO LIEN—SUBCONTRACTORS.
Under the Maine mechanic's lien statute (Rev. St. Me. c. 93, § 29), which gives a lien for labor or materials furnished "by virtue of a contract with or by consent of the owner," while the making of a principal contract for improvements by the owner may be taken as a consent to the making of subcontracts by the principal contractor, the right of a subcontractor to a lien cannot date from a time earlier than that on which he acted on such consent by entering into his subcontract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 298; Dec. Dig. § 167.*]

Appeals from the Circuit Court of the United States for the District of Maine.

Suit in equity by the Central Trust Company of New York against the Bodwell Water Power Company and others. Appeals by the Allis-Chalmers Company and Clara E. Mullen and others, executors, mechanic's lien claimants, from a decree denying them priority. Affirmed.

Benjamin Thompson (Martin & Cook, on the brief), for appellant Allis-Chalmers Co.

Moorfield Storey and Robert G. Dodge (Joseph F. Gould, on the brief), for appellants Mullen and others.

Howard R. Ives and Arthur H. Van Brunt (Joline, Larkin & Rathbone and Libby, Robinson & Ives, on the brief), for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The appellants allege error in a decree of the Circuit Court to the effect that a mortgage, dated July 1, 1905, given by the Bodwell Water Power Company to the Central Trust Company of New York to secure an issue of $1,000,000 of bonds, constitutes a first lien on the mortgaged property; and that liens for labor and materials claimed by the Allis-Chalmers Company, and by James B.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mullen's executors, respectively, are subject to the superior lien of the mortgage.

[1] In order that a lien may attach for labor and materials under chapter 93, § 29, Revised Statutes of Maine, they must be furnished "by virtue of a contract with or by consent of the owner."

The appellants contend that a mortgagee not in possession is an "owner" within the meaning of the statute, and that consent may be inferred from knowledge that the work is being done, coupled with the failure to give a written notice that the owner will not be responsible therefor, as provided in section 30 of chapter 93.

Upon these propositions the Circuit Court found against the appellants, and this is assigned as error.

The Circuit Court was of the opinion that:

"A mortgagee out of possession is not in equity, and in the state of Maine, in law 'owner' of the property. The statute does not apply to him by its terms in using the word 'owner.' There is no just reason why it should be extended by construction to apply to him; and the Supreme Judicial Court of Maine has never held directly that it does apply to him. If he takes possession of the property, receives its income, and directs its management, then of course he becomes an 'owner' both in equity and at the common law of Maine. Until he does all that, he holds in fact only a lien, as he would in name under the laws of the state of New York and the laws of other states. For all practical purposes, he is no more than the holder of a lien."

See Atwood v. Paper and Pulp Co., 85 Me. 379, 27 Atl. 259.

The chief reliance of the appellants is Morse v. Dole, 73 Me. 351. A careful examination of this case shows that it does not decide, either directly or by implication, that a mortgagee is an "owner" under the statute. The expression quoted from the opinion—

"At least the knowledge of the mortgagee must in some way appear, before the written notice mentioned in R. S. c. 91, § 28 (amended 1876, c. 140), can be required from him in order to prevent a later claim from taking precedence of the mortgage"

—is by no means a clear reference to a mortgagee as an owner. On the contrary, the words "at least" indicate an intention to reserve the question of how much more than mere knowledge of a mortgagee must be shown.

In Morse v. Dole there was no evidence that the mortgagee had any knowledge of the rendering of services or delivery of materials. The court held that, without knowledge, consent could not be implied. This rendered unnecessary any consideration of the question now before us.

It is urged "the court clearly proceeds upon the assumption that a mortgagee might subject his interest to a mechanic's lien if he consents to the furnishing of the labor or materials." If there is such an assumption, it has not the force of a decision of the state court which this court should regard as establishing the law of Maine. It is an assumption for the purposes of a particular case only; it is not a decision of the court upon the point involved, and it is not even a safe indication that it was the view of the learned judge who wrote the opinion that the law of Maine was established as to this point.

Another expression is called to our attention:

"The lien can hold against such a mortgagee only in cases where he has become a party to the delivery of the materials, or to the work done, by consent tacitly or expressly given."

This is by no means definite. It may be that a mortgagee who has become a party to the contract between owner and mechanic or a guarantor thereof, or who has induced the mechanic or materialman to go on with the work, should be held to subject his own interest as mortgagee to a lien. This we are not called upon to decide. The expression last quoted is after all but dictum which indicates that under conditions indefinitely described as becoming "a party to the delivery of the materials, or to the work done," the statute might give a lien on the estate of a prior mortgagee out of possession.

We are of the opinion that the appellants have failed to establish the proposition that under Morse v. Dole, or any other decision of the Maine court, it has been settled as the law of Maine that a mortgagee out of possession is an "owner" within the meaning of the statute. The examination of the history of section 29, in connection with Morse v. Dole, 73 Me. 351, 353, tends rather to the contrary conclusion. This question, therefore, must be considered as an open question not concluded by the decisions of the Maine court, and not even discussed upon its merits in the Maine decisions. The brief of neither of the appellants suggests that their construction of the Maine statute is supported by other authority than the inconclusive Maine cases.

On the other hand, the brief for the Central Trust Company cites a number of cases to support its contention that, upon a proper construction of the words "consent of an owner," they are inapplicable to a mortgagee out of possession. Howard v. Robinson, 5 Cush. (Mass.) 119; Ettridge v. Bassett, 136 Mass. 314; Tompkins v. Horton, 25 N. J. Eq. 284; Cox v. Broderick, 4 E. D. Smith (N. Y.) 721; Phillips on Mechanics' Liens, §§ 67, 68; Otley v. Haviland, 36 Miss. 19; Reid v. Bank of Tennessee, 1 Sneed (Tenn.) 262; McDowell v. Rockwood, 182 Mass. 150, 65 N. E. 65; Lummus on Law of Liens, § 260.

Upon the brief of the Allis-Chalmers Company are cited the following Maine decisions touching the meaning of the expression "by virtue of a contract with or by consent of the owner": Norton v. Clark, 85 Me. 357, 27 Atl. 252; Shaw et al. v. Young, 87 Me. 271, 32 Atl. 897; Farnham v. Richardson, 91 Me. 559, 40 Atl. 553; Baker v. Waldron, 92 Me. 17, 42 Atl. 225, 69 Am. St. Rep. 483; York v. Mathis, 103 Me. 67, 68 Atl. 746. These decisions show that the words "by consent of the owner" have given rise to much doubt and to much difficulty in their application, but do not support the proposition that a mortgagee out of possession is an owner.

While the expression would doubtless cover implied or quasi contracts between mechanic and owner, yet from the opinion in York v. Mathis, 103 Me. 67, 76, 68 Atl. 746, quoting Huntley v. Holt, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111, it would appear that "by consent of the owner" means something different from an agreement with the owner, not requiring such meeting of minds as would be essential to the making of a contract, but enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense.

It is said:

"That the conduct of the owner viewed in the light of all the circumstances should justify an expectation of a lien."

In Shaw v. Young, 87 Me. 271, 32 Atl. 897, it is said:

"It seems to be assumed by the Legislature that the owner of real estate will be vigilant in caring for it either in person or by agents; that if he leaves it in possession of agents or tenants, making what repairs are necessary to be made from time to time, and makes no provision for them, but leaves them to be made by agents or tenants, and gives no notice of dissent, his consent may be inferred so far as the lien claimants are concerned."

This reason seems entirely lacking in the ordinary case of a mortgagee out of possession. The mere knowledge of a mortgagee that a mortgagor is improving the property, as he has a right to do, makes him in no sense a party to the delivery of the materials or the work done (Morse v. Dole), and there can be no just assumption that, like the ordinary owner, a mortgagee out of possession will be vigilant in caring for it, either in person or by agents. Shaw v. Young. See, also, Hanson v. News Pub. Co., 97 Me. 99, 53 Atl. 990.

The cases of Shaw v. Young, 87 Me. 271, 32 Atl. 897, and Hanson v. News Pub. Co., 97 Me. 99, 53 Atl. 990, are very suggestive as to the meaning which the court attached to the word "owner," as implying at least a relation of immediate control substantially different from the relation of a mortgagee, who is concerned only with the security of the money lent upon the faith of the mortgage, and of his interest. To place upon the ordinary mortgagee a duty to acquire knowledge of the dealings of the mortgagor with the property, or the duty of warning laborers and materialmen that the mortgagee insists upon his rights under his mortgage, would be an innovation of doubtful wisdom. The record of a mortgage is the most practical means of notice of the mortgagee's intent to insist upon his security. To charge him with consent because he fails to give personal notice in writing, in addition to the notice afforded by record of his mortgage, is to unsettle the rights of mortgagees.

While statutes giving liens to laborers and to those who furnish materials are to be liberally construed, yet, in the absence of a clear expression of the Legislature, the courts should not adopt by a construction of doubtful language a rule that would unsettle the rights of mortgagees or impair their security. We concur in the view of the learned Circuit Judge that there is no just reason why the statute should be extended by construction to a mortgagee out of possession. One who contracts with the owner of land to furnish labor and materials, or one who, with his consent, furnishes materials, is assumed to know, if a mortgage is recorded, that the consent of the mortgagor as owner can give a lien only to the extent of the mortgagor's interest. Morse v. Dole. He has no reasonable ground for an expectation or belief that a mortgagee who has advanced money upon the security of the land or on the improvements to be made thereon is willing to forego this security even if the money is advanced for the purpose of placing improvements upon the land.

Nor are the terms of the statute misleading. In ordinary usage the

term "owner" is never applied to an ordinary mortgagee out of possession, and would not be so understood.

These appellants had no contract with the owner, and were well advised by the statute that their right to a lien was dependent, not upon express contract, but upon consent, of the owner.

[2] Apparently the framers of the statute did not contemplate the impairment of the ordinary relation of mortgagor and mortgagee. The fact that the bonds were issued for the purpose of raising funds to improve the mortgaged property does not create an equitable estoppel against the mortgagee and bondholders to prevent them from claiming that their mortgage gives a prior lien. Dunham v. Railroad Co., 1 Wall. 254, 17 L. Ed. 584; Thompson v. Railroad Co., 132 U. S. 69, 10 Sup. Ct. 29, 33 L. Ed. 256; Porter v. Pittsburgh Co., 120 U. S. 649, 7 Sup. Ct. 1206, 30 L. Ed. 830; Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; Jones on Liens, § 1458.

[3] Whoever undertakes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract and upon such liens as the statute grants in definite terms, and not upon the expectation of displacing the priority of mortgage liens. The argument that there is some sort of superior equity in claims for work and materials over liens for money previously advanced upon mortgage is without merit, and the chancellor cannot apply such a principle either to displace vested liens or to broaden a lien statute by a construction which disregards absolutely the rights in a mortgage security. Kneeland v. American Loan Co., 136 U. S. 89, 97 et seq., 10 Sup. Ct. 950, 34 L. Ed. 379.

[4] The next contention is that though the mortgage was recorded upon July 24, 1905, it was of no effect until the bonds were certified and issued, and that by reason of delay between the recording of the mortgage and the issue of bonds the Mullen lien attached prior to the lien of the mortgage. Before the record of the mortgage, however, the Bodwell Water Company and the Milford Construction Company had by contract of July 19th entered into a construction contract which provided inter alia for payment to the Milford Company of $700,000 of the mortgage bonds. On the same date, July 19th, the Milford Company accepted the offer of Farson, Leach & Co. to purchase the $700,000 of mortgage bonds at 90 per cent. and interest. On July 28th the Milford Company voted to forward to the complainant for certification $500,000 of these bonds at which time it had received from the Bodwell Company the entire mass of $700,000 of bonds.

In other words, the Bodwell Company, before any rights accrued to Mullen, had delivered $700,000 of bonds to the Milford Company in pursuance of the contract of July 19th.

The Mullen claimants attach great weight to the decision of the Circuit Court of Appeals for the Eighth Circuit in Reynolds v. Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620, wherein it was held that a recorded railroad mortgage was not superior to mechanics' liens that

attached before any bonds were issued or any mortgage debt was created.

This case, however, does not afford us assistance in deciding whether, upon the facts above set forth, a mortgage debt was created to which the security of the mortgage attached at once. For the purposes of the present case, we need not consider the correctness of this decision, for it is limited to a state of facts where no bonds had been sold and no debt created, and does not discuss the question now before us. We are of the opinion that the record of the mortgage was notice to Mullen of all the substantial equities between the mortgagor and the construction company.

We agree with the learned Circuit Judge that, though lacking in formalities, the sale of the bonds was complete. As the Bodwell Company had parted with all interest in the entire issue of bonds, the trustee held the mortgage title, not as agent of the Bodwell Company, which by the sale had lost all right of revocation which would destroy the subject-matter of the contract, but as trustee for the security of the bonds.

We find no error in the decision of the Circuit Court that the mortgage lien attached prior to the earliest date at which it is claimed the Mullen lien took effect.

The deed of trust securing the payment of the bonds was an incident, and accessory to them. The transfer of the bonds carried with it to the transferees the benefit of the security. New Orleans Canal & Banking Co. v. Montgomery, 95 U. S. 16, 18, 24 L. Ed. 346.

It is contended that Farson, Leach & Co. are not bona fide purchasers because they did not make payment before the Mullen contract was made. It is urged that the fact that they had agreed to purchase is immaterial and does not give priority. Dresser v. Missouri & Iowa Ry. Construction Co., 93 U. S. 92, 23 L. Ed. 815; Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78, are cited. In the first of these cases there was notice of fraud, which made it the duty of the purchaser to withhold further payment. In the second case the bonds were void, and notice given the purchaser before payment and while he might have repudiated the purchase.

But these cases are not in point. There was no invalidity in the subject-matter of the contract and no fraud. Neither was there any right in the Milford Construction Company or in Farson, Leach & Co. to repudiate their contracts.

At the time of the purchase of the bonds there was, of course, knowledge that construction work would be performed; but this affords no reason why a contract for a first lien on all the mortgage property should not be upheld. Here is no element of fraud, nor is there any element of inequity in the fact that the bondholders sought a lien that should precede all possible future liens. A valid obligation arose to pay for the bonds, and the subsequent fact that Mullen entered into a subcontract and began work afforded no ground for repudiating this obligation.

[5] The claim of the Allis-Chalmers Company to priority rests upon its attempt to date its lien, not from the time it entered into its first

contract with the Milford Construction Company, August 16, 1905, but from the date of the main contract between the Bodwell Water Power Company and the Milford Construction Company. It is urged that a lien claim relates back to the day when each contract for labor and materials was made, even though delivery of materials or performance of work is later. See Morse v. Dole, 73 Me. 351; Farnham v. Richardson, 91 Me. 559, 40 Atl. 553.

Whether the doctrine of these cases is here applicable is very doubtful. The Allis-Chalmers Company and Mullen had no contract with the owner, but subcontracts with the construction company. They must stand upon the provision which gives a lien for labor or materials furnished by consent of the owner. As pointed out in Norton v. Clark, 85 Me. 357, 27 Atl. 252, this is "alternative" to a contract with the owner.

If, as is urged, consent is to be inferred from knowledge that the work is being done, coupled with a failure to give the notice provided for in section 30, there is difficulty in carrying the date of the lien back to an earlier time than the beginning of work under the subcontract, unless, perhaps, it can be proved that express consent of the owner preceded and induced the making of a subcontract, a point which we need not decide, for we may assume, for the purposes of this case only, that the right to a lien arose contemporaneously with the incurring of an obligation to furnish labor or materials.

The Allis-Chalmers Company incurred no such obligation until after the mortgage had completely attached, and all questions as to the formalities of the bond issue had disappeared.

That the original construction contract may be regarded as evidence of the consent of the Bodwell Water Power Company is established by Norton v. Clark, 85 Me. 357, 27 Atl. 252. But this decision is to the effect that the subcontractor is not entitled to his lien merely by substitution to the rights of the principal contractor, but that it arises from the performance of the work as a direct right under the statute, a right which overrides a provision in the main contract that no lien should exist.

This seems inconsistent with the reasoning of the court in Glass v. Freeburg, 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335, relied upon by the Allis-Chalmers Company. In Massachusetts the words of a statute, "the contract under which the lien is claimed," were held to mean the contract of the party claiming the lien, and not the contract of a prior contractor for whom the claimant is working. Savoy v. Dudley, 168 Mass. 538, 47 N. E. 424; Batchelder v. Hutchinson, 161 Mass. 462, 37 N. E. 452; Bowen v. Phinney, 162 Mass. 593, 39 N. E. 283, 44 Am. St. Rep. 391; Friedman v. Hampden, 204 Mass. 494, 504, 90 N. E. 851. Neither can the words of the statute, "by virtue of a contract with the owner," be so liberally interpreted as to cover everything done by virtue of subcontracts made with the builder or materialman who has the main contract with the owner. Were the reasoning of Glass v. Freeburg applied to this case, there would be a complete defense in the fact that the Milford Company had been paid in full. The doctrine of subrogation to the rights of an original contractor would not avail

the claimant. Norton v. Clark goes only so far as to hold that the original contract may be evidence of consent.

If we apply the analogy of implied contracts or agreements, as was suggested in York et al. v. Mathis et al., 103 Me. 67, 68, 68 Atl. 746, the earliest date for a lien is the date of action upon the owner's consent. We are of the opinion that both of these appellants entered into their subcontracts with notice of a recorded mortgage, which was a valid security for a debt existing before the date of the earliest subcontract. In point of time, the mortgage has priority over the liens claimed by these appellants. We are further of the opinion that, according to the natural and just interpretation of the Maine lien statute, it does not cut under the rights of a mortgagee out of possession, and that the construction of the statute for which the appellants contend is strained and unnatural.

The adoption of a construction, which makes a mortgagee out of possession an "owner" and also subjects him to indefinite rules as to "consent of the owner," would ignore the substantial difference in the relation to the property of mortgagor in possession and mortgagee out of possession, and tend to unsettle the law as to the rights of mortgagees. We find nothing in the Maine decisions which supports the contention that such a result would be equitable. We agree with the conclusion of the Circuit Court.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

THATCHER et al. v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,911.

MINES AND MINERALS (§ 23*)—MINING CLAIMS IN ALASKA—EFFECT OF FAILURE TO COMPLETE ANNUAL ASSESSMENT WORK.

Act March 2, 1907, c. 2559, 34 Stat. 1243 (U. S. Comp. St. Supp. 1909, p. 552), amending the laws governing labor or improvements upon mining claims in Alaska, and which provides, inter alia, that upon failure of the owner of a claim to perform the required assessment work during any year "such claim shall become forfeited and open to location by others as if no location of the same had ever been made," by implication repealed and superseded, as to mining claims in Alaska, the provision of Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), made applicable to Alaska by Act June 6, 1900, c. 786, § 26, 31 Stat. 329, that on a failure to do the annual assessment work a claim shall be "open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators * * * have not resumed work upon the claim after failure and before such location," and under the law as amended a failure to complete the annual work which has been commenced during a year, before its expiration, works an absolute forfeiture, and the rights of a relocator cannot be defeated by its resumption.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 23.*]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action at law by F. H. Thatcher, administrator of the estate of Cabel Whitehead, deceased, and others, against Elzie Brown. Judgment for defendant, and plaintiffs bring error. Affirmed.

Ira D. Orton, Metson, Drew & Mackenzie, and E. H. Ryan, for plaintiffs in error.

P. M. Bruner, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The plaintiffs in error held under a valid location of the mining ground in controversy made prior to the year 1908, and the defendant in error under a location of the same ground made by her on the first day of January, 1909. The record shows that the plaintiffs in error did not commence to perform the required annual assessment work upon the claim until the 31st day of December, 1908, at which time they commenced the sinking of a hole in the ground, and put up a tent for the workman, who, upon the conclusion of his work for that day, left his tools in the hole with the intention of resuming the work the next morning; and the plaintiffs in error offered to prove upon the trial of this action, which was ejectment, that their work was resumed and $100 worth of work actually performed by them under the location held by them. Acting upon the theory that under the law governing Alaska the plaintiffs in error had no right to continue their work after the expiration of the year 1908, and that their rights had become forfeited by their failure to complete $100 worth of work upon the claim during that year, the defendant in error located the same ground in the morning of January 1, 1909; and in that contention the defendant in error was sustained by the court below in its rulings upon the offer of proof by the plaintiffs in error and in its instructions to the jury, all of which were excepted to by the plaintiff in error, and constitute the grounds of the appeal. The real question, therefore, in the case is: What is the law of Alaska upon that subject?

The general mining law in respect to such locations is that found in section 2324 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1426), which, by section 26, c. 1, tit. 1, of the Act of June 6, 1900 (31 St. Lg. 321), was made applicable to the district of Alaska. Section 2324 of the Revised Statutes provides in respect to the annual labor upon such claims as follows:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work

upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

On the 2d of March, 1907, Congress enacted this statute:

"An act to amend the laws governing labor or improvements upon mining claims in Alaska.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavit be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made."

It will be seen that by both the acts above quoted the annual assessment work is required to be done "during" the year. But by the former act a failure to complete such work within the year, while rendering the ground open to relocation, was not declared to work a forfeiture of the locator's rights; on the contrary, he, together with his heirs, assigns, or legal representatives, was expressly given the right to resume work upon the claim after such failure to complete it, provided no other location be made in the meantime. By its act of March 2, 1907, however, Congress, while conferring upon locators in Alaska a privilege not given by section 2324 of the Revised Statutes, to wit, a provision permitting Alaskan locators to file for record an affidavit showing the performance of the required annual assessment work, which affidavit should be prima facie evidence of such performance, expressly declared that, upon the failure of the locator or owner

of any such claim in Alaska to comply with the provisions of the act as to the performance of work and improvements, "such claim shall become forfeited and open to location by others as if no location of the same had ever been made."

It is true that the act of March 2, 1907, contains no express repeal of any previous provision of the statutes, and it is also true that implied repeals are not favored. Still the courts are not at liberty to ignore a purpose to repeal clearly indicated by irreconcilable provisions. Here we have an old mining statute, made applicable to Alaska by the act of June 6, 1900, expressly providing that while a failure on the part of the locator to complete the required annual assessment work would render the ground covered by the location open to relocation, yet such work might be resumed by the locator or his legal representatives, provided no other location had intervened, and then a later act to amend the law upon the subject in so far as mining claims in Alaska are concerned, which in terms declares that upon the failure of the locator to perform the required amount of work upon the claim within the year "such claim shall become forfeited and open to location by others as if no location of the same had ever been made."

Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one.

We are of opinion that the court below was right in its rulings, and its judgment is accordingly affirmed.

WOLVERTON, District Judge, concurs.

THE INDRAPURA.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1911.)

No. 1,878

1. SHIPPING (§ 132*)—SEAWORTHINESS OF VESSEL—METHOD OF CONSTRUCTION. While, in determining whether or not the construction of a vessel rendered her unseaworthy, it is proper to consider evidence of the usual custom of shipowners and the usual method of construction of ships and their appliances, such evidence is not necessarily conclusive, and should be considered in the light of what would appear to be the pru-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dent method of construction, and may be rejected entirely where the construction is obviously defective.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS—SEAWORTHINESS OF VESSEL.

A finding that the placing of the filling pipe extending from the engine room to the trimming tank in the forepeak of a steamship upon the floor of the intermediate hold, boxed in, without a valve within or immediately without the tank to shut off the water in the tank from the pipe in case of a break in the pipe to prevent the flooding of the hold, rendered the vessel unseaworthy as to cargo in such hold, will not be reversed by an appellate court where there was expert testimony that such construction was faulty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

3. SHIPPING (§ 132*)—LIABILITY OF VESSEL FOR INJURY TO CARGO—SEAWORTHINESS.

The fact of the breaking of one of the sections of cast-iron pipe extending from the engine room of a steamship to a tank in the forepeak along the floor of the hold, allowing water to escape into the hold and injure the cargo therein, in the absence of evidence to the contrary, authorizes an inference that the ship was unseaworthy as to the cargo placed in the hold at the beginning of the voyage, by reason either of defects in the pipe or the boxing, and the burden rests upon the vessel to overcome such inference.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.*]

4. SHIPPING (§ 121*)—CARRIAGE OF GOODS—IMPLIED WARRANTY OF SEAWORTHINESS.

In every contract for the carriage of goods by sea, in the absence of agreement otherwise, there is an absolute implied warranty that the ship is seaworthy at the time of the beginning of her voyage, and reasonably fit to encounter the ordinary perils to be expected, and her liability for loss or injury to cargo from a latent defect in vessel or appliances is not affected by the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901 p. 2946]).

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 121.*

Implied warranty of seaworthiness, see notes to The Carib Prince, 15 C. C. A. 388; Neilson v. Coal, Cement & Supply Co., 60 C. C. A. 177.]

Appeal from the District Court of the United States for the District of Oregon.

Suit in admiralty by Gilbert Palache and others, partners as H. M. Newhall & Co., against the steamship Indrapura, the Portland & Asiatic Steamship Company, claimant. Decree for libelants (178 Fed. 591), and claimant appeals. Affirmed.

W. W. Cotton, A. C. Spencer, and Zera Snow, for appellant.

C. E. S. Wood, Stuart B. Linthicum, and Isaac D. Hunt, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. The Indrapura was a British steam vessel for the carriage of freight, and was of the type known as "water

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ballast" vessels. Water was supplied to and discharged from her peak ballast tank by means of a pipe extending therefrom aft through the holds of the ship to the engine room, where it was fitted with a stopcock, and where the operation of filling or discharging was carried on. There were also means for filling the tank from the deck. The pipe, at the time of the voyage in question, which was in 1903, had been in service some two years. It was a 3½ inch cast-iron pipe, ⅜ to ⅝ of an inch thick. It was put together in sections of some six to eight feet in length; the joints being connected by lead in order to ease the same with the roll of the ship. The pipe was laid on the floor of the vessel above the ceiling. It was boxed in a wooden case made of two-inch lumber to afford it protection against heavy cargo. It contained no valve either inside the tank or abaft the collision bulkhead. The vessel had been built five or six years previous to the voyage under a Lloyd specification, and she had an A-1 rating and carried an A-1 certificate, which had been issued on the inspection and survey made just prior to the voyage. Just before the voyage, the filling pipe had been tested by a pressure test of 300 pounds, according to the testimony of the ship's engineer, and 400 pounds, as testified by the master. She left Yokohama March 12, 1903; her destination being Portland, Or. On her voyage she met with stormy weather, which continued for three or four days, during which she pitched and tossed heavily, and shipped water fore and aft. On March 23d her screw was racing all day, and on the following day the usual daily soundings disclosed that the peak ballast tank was leaking. The tank was pumped out, and, on arriving at Portland, it was found that the filling pipe had broken off between joints, letting water into hold No. 1, where the appellees' gunnysacks were stored, causing injury thereto for which the libel in this case was filed.

The question presented to the District Court on the libel was whether the vessel was seaworthy as to cargo by reason of the fact that the filling pipe was not fitted with a valve either inside the peak ballast tank or stopcock abaft the collision bulkhead, or the fact that the filling pipe was not placed beneath the false bottom. Upon the evidence the court found the ship liable, and said:

"A reasonable precautionary measure would have been to fit the pipe with a valve to be operated by a rod from the deck or at some convenient point above the cargo. For the want of such a valve, I hold the vessel was unseaworthy as to cargo in hold No. 1."

[1] The question whether the vessel was unseaworthy in carrying the filling pipe through the hold or for want of means for excluding water from the pipe, either immediately within or immediately without the peak ballast tank, is one which should be considered, not only in the light of the evidence given by expert witnesses as to the usual and accepted construction of ballast tanks and their fittings, but also in the light of what would appear to be the obvious and prudent method of construction.

The expert testimony was more particularly directed to the question of the proper location of the filling pipe—whether it should be above or below the false bottom—than to the question of the necessity and

feasibility of a valve within or immediately without the tank. The expert testimony as usual was conflicting. For the appellee there were shipyard superintendents and engineers who testified that it is not proper marine construction to permit the drain pipe to run through the cargo; that it should be carried beneath the false bottom, so that in case of breakage the water would not reach the cargo; that, if it is placed above the false bottom, there should be a valve within or immediately without the peak ballast tank to shut off the water in the tank from the pipe. On the other hand, witnesses equally qualified testified that it was recognized as proper marine construction to place the pipe as it was placed in the Indrapura, and there was evidence that many freight ships were so constructed. One witness testified that it was highly improper to fit a valve forward of the collision bulkhead because of the difficulty of getting down to it in case it became obstructed, which he testified was likely to occur. Upon this conflicting testimony some difficulty is met in arriving at a conclusion. The fact must not be lost sight of that the seaworthiness of the ship Indrapura is to be measured by the standard of the time of the voyage in question. There is evidence that it is not unusual at that time to construct and locate the drain pipe as it was in the Indrapura. In Tidmarsh v. Washington Fire & Marine Ins. Co., 4 Mason, 439, 441, Fed. Cas. No. 14,024, Judge Story remarked that the standard of seaworthiness had been greatly raised within the last thirty years and in Burges v. Wickham, 3 B. & S. 693, Blackburn, J., said that the "standard of seaworthiness must rise with the improved knowledge of shipbuilding and navigation." Judge Brown, in The Rover (D. C.) 33 Fed. 515, said:

"Seaworthiness does not require perfection in machinery more than anything else. Perfection is unattainable. Only a reasonable fitness for the service designed is required."

And in The Lizzie Frank (D. C.) 31 Fed. 477, it was said:

"Where a vessel is constructed and equipped in the mode usual and customary with other vessels of like character, and in a mode approved by competent judges and previous experience, then, in case of an accident happening by reason of a latent defect in the equipment and construction, there is no negligence on the part of the owner."

In The Titania (D. C.) 19 Fed. 101, 102, Judge Brown said that the question of seaworthiness "is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters." But, while it is proper to consider evidence of the usual custom of shipowners and the usual method of construction of ships and their appliances, such evidence is not necessarily conclusive. It may be rejected altogether where the construction is obviously defective. Gilroy Sons & Co. v. Price & Co. (1893) A. C. 56.

[2] There is also to be taken into consideration the judgment of prudent and competent persons versed in such matters. In view of the testimony of such persons, which is found in the record here, to the effect that the construction and maintenance of the filling pipe above the false bottom without a valve was faulty, and in consideration of

the existing conditions and what appeared to the trial court to have been the obviously prudent thing to do, that court found that a valve in the pipe would have been but a reasonable precautionary measure. The case comes to us with this finding in favor of the appellees; and, although if the question were now first presented to us upon the evidence there might be serious doubt as to the proper answer thereto, we are not convinced, in view of the fact that such pipes in the holds of vessels have not infrequently been broken, as must have been well known to navigators, that common prudence did not demand the insertion of a valve to prevent injury to cargo in case of such breakage, or that the conclusion of the district judge should be set aside.

[3] But, irrespective of the question of the unseaworthiness of the ship on account of the location of the drain pipe or the absence of a valve therein at the bulkhead, we are of the opinion that the Indrapura was unseaworthy as to the cargo in the hold in which the appellees' goods were carried for latent defects in the structure of or the protection to the pipe. Although the pipe was found to be broken immediately following a succession of stormy days, the evidence does not show that the weather was exceptionally stormy or more so than was ordinarily to be expected upon such a voyage. The pipe was inclosed in a wooden case constructed of stout planking two inches in thickness rising ten inches above the false bottom, and measuring a foot across the top. On arriving at the vessel's destination this casing was found to be intact, bearing no marks of strain or of collision with any article of the cargo. When it was removed, it was discovered that one of the lengths of the cast-iron pipe, eight feet in length, was broken in twain. This fracture having occurred as it did, with the consequent injury to cargo, the burden was cast upon the shipowner to prove that the vessel was seaworthy when she started on her voyage, and that the pipe was properly constructed and attached and was securely incased. One witness testified that in his opinion if some of the bales of gunnysacks had got against the casing a heavy lurch of the vessel might have sprung it some, enough to break the pipe, "I say that it might, you know, I am not saying that it did." But, if it is true that the pipe was broken in the manner so suggested, it was for the shipowner to show that the casing was reasonably sufficient for the purpose for which it was intended, and that it was securely fastened. No such evidence was offered. There was no testimony as to the manner in which the casing was fastened in place, and no proof that it was securely replaced after its removal at Yokohama. There can be no question that such a pipe could be, and ought to be, so securely protected by casing that no blow upon the casing from shifting cargo could so spring it as to break the pipe. From the fact that the pipe broke as it did it would seem clear, in the absence of proof to the contrary, that there must have been a defect in the pipe or that it was improperly mounted or placed, or that it was insecurely incased. If from either cause the pipe broke, the ship was unseaworthy as to the cargo. In The Glenmavis (D. C.) 69 Fed. 472, Butler, District Judge, in a similar case, said:

"I cannot avoid the conclusion, however, that the casing was imperfect and unsafe at that time. Casing was essential to the safety of the pipe.

Without it the latter would clearly have been insecure, and the ship have been subject to condemnation on that account. Any shifting of the cargo, such as might result from settling, or the motion of the ship in ordinary weather, would be likely to break it, if exposed. The sole object of the casing is to afford protection against such danger. It is necessary to this end, therefore, that the casing shall be very substantial, and be securely fastened in place."

[4] There was in the bill of lading no exception of liability for loss or damage from latent defects of the ship, her machinery or appliances. The owners therefore are not entitled to the benefit of the Harter act. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. In that case it was held that the Harter act did not exempt the vessel from liability for injury caused by a latent defect in the peak ballast tank consisting of a defective rivet which upon the voyage broke, leaving a hole through which water entered and injured the cargo, and that the ship was unseaworthy at the commencement of the voyage. In the Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688, the court approved the language of Mr. Justice Gray in his opinion in The Caledonia (C. C.) 43 Fed. 685, in which he said:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

On the appeal from the decision in the case of The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, the court said:

"In our opinion the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

And the court cited the case of The Glenfruin, 10 P. D. 103, where a steamship laden with cargo became disabled at sea in consequence of the breaking of her crank shaft resulting from a latent defect in the shaft, a flaw in the welding, which it was impossible to discover, and it was held that under his implied warranty of seaworthiness a shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage, and that as, when the Glenfruin started, the shaft was not reasonably fit for the voyage, she was unseaworthy. In the case of McFadden & Co. v. Blue Star Line (1905), 74 L. & J., K. B. 423, it was shown that, owing to the pressure of water, a joint in the tube communicating with the ballast tank which was insufficiently packed before the loading of a vessel was commenced, gave way and water flowed into the stoke holes, then into the bilges and then into a cargo hold. It was held that insufficient packing was itself a breach of warranty of seaworthiness.

The decree is affirmed.

BOLEN-DARNALL COAL CO. v. HICKS.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1911.)

No. 3,513.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 695*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—SUFFICIENCY OF EVIDENCE.

It is indispensable to a review of a ruling that there was substantial evidence to sustain a verdict or a finding of fact that the bill of exceptions shall contain all the evidence at the trial, or all the evidence upon the specific issue found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2915; Dec. Dig. § 695.*]

2. APPEAL AND ERROR (§ 697*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—SUFFICIENCY OF EVIDENCE.

But the omission of evidence which does not appear to have been material from a bill of exceptions which recites that it contains all the evidence and bears the "O. K." of the objecting party, and the signature of the judge, is not fatal to the review. A party may not avail himself of an error he has himself induced the judge who tried the case to commit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2918–2927; Dec. Dig. § 697.*]

3. EVIDENCE (§ 597*)—MASTER AND SERVANT (§§ 265, 276*)—INJURIES TO SERVANT—WEIGHT OF EVIDENCE.

Conjecture will not sustain a verdict.

The burden is on an employé to prove that his injury was caused by the negligence of his employer which he charges, and where the evidence leaves the matter uncertain, and shows that any one of several causes, for one of which the employer and for some of which the employé might have been responsible, may have produced it, and there is no substantial evidence that the negligence of the employer was the real cause of it, the employé fails in his testimony, and a verdict for him cannot stand. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 664, 21 Sup. Ct. 275, 45 L. Ed. 361.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. § 597;* Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. §§ 265, 276.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

The plaintiff charged that he was burned in a mine by an explosion caused by the negligence of a miner in leaving an open keg of powder in an entry from 50 to 75 feet distant from shots the plaintiff fired. The defendant claimed that the explosion and burning were caused either by a windy shot caused by conflicting shots which it was the duty of the plaintiff to inspect before firing and not to fire if they conflicted, or by his firing shots in different rooms at the same time, contrary to a rule of the company. Three witnesses testified that in their opinion the explosion was caused by the conflicting shots which produced a windy shot. Two witnesses testified that it was possible for fire from a properly prepared shot to reach and explode the powder in the keg and one that it might be probable in the particular case, but no witness testified that it was probable, or that in his opinion the explosion was caused by fire from a properly prepared shot reaching the powder in the keg.

Held, there was no substantial evidence to sustain a verdict that the explosion was caused by the negligence of the miner who left the keg of powder in the entry.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Action by J. B. Hicks against the Bolen-Darnall Coal Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Vincent M. Miles, for plaintiff in error.

John T. Hunt and James B. McDonough, for defendant in error.

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

SANBORN, Circuit Judge. This writ of error challenges a judgment in favor of J. B. Hicks, a shot firer, employed by the Bolen-Darnall Coal Company, on account of numerous alleged errors of law, one of which is that the court refused to instruct the jury to return a verdict for the company. The only charge of negligence of the company submitted to the jury was that John Oiler, a miner in the employ of the company whose negligence was imputable to it under the laws of Arkansas where the accident happened, was guilty of negligence which caused the injury of Hicks, in that he left black powder in an open keg in an entry in the mine near to the mouth of one of rooms 8 and 9 in which Hicks fired four shots. The question which conditions the correctness of the ruling submitting this charge to the jury therefore is, Was there any substantial evidence to sustain it?

[1] But counsel for the plaintiff below object to the consideration of this question, and insist upon an affirmance of the judgment because the bill of exceptions does not contain a map of the mine which the court of its own motion refused to admit in evidence, but which was used for illustration in the examination of witnesses, and because the bill, after reciting that the first witness examined by reference to the map was requested to step down and explain it and "did so by saying here and there and his statement would not be intelligible in print," related that another witness who was requested to step down before the jury and explain on the diagram how his shot was placed "did as requested," and "explained to the jury on the map," that a third witness was requested to step down before the jury a minute and show what portion of each shot had not split the coal and had blown out and "did as requested," and that a fourth witness was asked to point out to the jury on the diagram the shot that was in room 8 and "did as requested," and also because the bill contained numerous other references of witnesses to the map and to marks on it which are not more intelligible.

It is a general rule that it is indispensable to a review of a ruling that there was substantial evidence to sustain a verdict or finding of fact that the bill of exceptions shall contain all the evidence in the case or all the evidence on the specific issue of fact found. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 52 C. C. A. 95, 105, 114 Fed. 133, 143.

[2] But this bill contains a statement at the close of the evidence that it contains all of it and it bears at the foot of the certificate of the

judge the letters "O. K." and the signature of the leading counsel for the defendant in error. When the bill was presented to counsel for the defendant in error, and then to the judge for his signature, the former had the opportunity to suggest defects and mistakes therein which, if material, the judge would undoubtedly have corrected, and, if he had failed to do so, an exception to that failure would have presented the matter to this court. The fact that counsel then made no suggestion of any defect or omission confirms the impression that no material evidence was omitted which the bill produces. But counsel for the defendant in error went still further. He placed his "O. K." on the bill, and thereby doubtless induced the judge to sign it as it was. If there was material evidence omitted, it was error for the judge to sign this bill with the statement in it that all the evidence appeared therein, counsel for the defendant in error by his "O. K." and signature induced the judge to commit this error, and he ought not now to be permitted to take advantage of it. A party may not avail himself of an error which he has himself induced the judge who tried the case to commit. National Loan & Investment Co. v. Rockland Co., 36 C. C. A. 370, 372, 94 Fed. 335, 337; Walton v. Railway Co., 6 C. C. A. 223, 225, 56 Fed. 1006, 1008; Chase v. Driver, 92 Fed. 780, 34 C. C. A. 668; Long v. Fox, 100 Ill. 43, 50; Nitche v. Earle, 117 Ind. 270, 275, 19 N. E. 749; Dunning v. West, 66 Ill. 366, 367; Noble v. Blount, 77 Mo. 235; Holmes v. Braidwood, 82 Mo. 610, 617; Price v. Town of Breckenridge, 92 Mo. 378, 387, 5 S. W. 20; Fairbanks v. Long, 91 Mo. 628, 633, 4 S. W. 499. Because, if any evidence was omitted from the bill of exceptions, it appears to have been immaterial, and, because counsel for the defendant in error by his "O. K." induced the judge below to certify the bill with the statement therein that it contained all the evidence, the court declines to affirm the judgment on the ground that this statement was erroneous.

[4] We return to the question of the existence of substantial evidence that the injury of Hicks was caused by the location of the open keg of powder. There was indisputable proof that Hicks lighted at the same time four fuses to fire four shots in rooms 8 and 9, that Oiler had left some black powder in the keg in the eleventh south entry outside the rooms, not opposite the mouth of either of the rooms, but a few feet distant from the mouth of one of them and on the opposite side of the entry, which was from 7 to 12 feet wide; that Hicks left his fuses burning, went out to the face of the entry, which was from 150 to 281 feet distant from the mouth of the nearest of these rooms, and while he was there an explosion occurred that seriously burned him. There was not such a quantity of gas in either room as made it dangerous to fire practical shots in those rooms with reasonable care. A practical shot is one the hole for which has been drilled in a direction selected with reasonable care, and that has been filled with powder tamped with the same degree of care. It was the duty of Hicks before firing shots to inspect for gas the rooms in which he fired them, and to refuse to fire them if there was so much gas that it was dangerous to do so. It was his duty, before firing shots, to inspect them to see whether or not they would conflict, and to see if they were prac-

tical shots in other respects, and if they would conflict, or if they were not practical shots in other respects to refuse to fire them. He had been firing shots for 10 months, and was familiar with his duties. The distance of the keg of powder in the entry from the nearest shot to it that he fired was variously stated, but no witness stated it less than 50 feet. At the close of the trial, the real controversy in the case was whether the proximate cause of the injury was the negligence of Oiler in leaving the keg of powder in the entry or (1) the negligence of Hicks in firing four shots at the same time in more than one place in violation of the rules of the company; or (2) his negligence in firing conflicting shots which produced a windy shot. A windy shot is one which is not properly directed or loaded. Such a shot throws fire a much greater distance than a practical shot, sometimes, one of the witnesses testified, 300 feet, and often causes an explosion of the dust or gas in the mine which a practical shot would not disturb. There was much evidence tending to show that two of the shots, one in the rib of room 8 in a break in the partition between the rooms and one in the same partition in room 9, were so directed and drilled that they conflicted, and that this conflict caused a windy shot and the explosion. Four witnesses who qualified themselves to give an opinion upon the subject and who had examined the mine after the accident testified that in their opinion the explosion and the burning of Hicks were caused by a windy shot which resulted from the conflict of the two shots in the partition. The miner who tamped the shot in the partition in room 9 testified that he examined the rooms after the explosion, and that, if his shot was fired first, it might have struck the shot in the rib of 8 between the toe and the heel, and the only evidence to the contrary was that the miner who tamped the shot in the rib in room 8 testified that he did not see how this could happen.

There was evidence that one of six rules of the company posted in public places about the mine was that a shot firer should not fire shots in more than one place at the same time, and that the manager of the mine orally instructed Hicks not to fire shots in more than one place at the same time, but Hicks denied that the manager so instructed him, and, while he admitted that he was aware of three of the six posted rules, denied that he ever heard of this one. He testified, however, that it was dangerous to set off shots in more than one place at a time, but that, if it was done in rotation, it was all right. One witness testified that it was possible for a practical shot to throw fire 75 feet, another that it might be thrown approximately 100 feet, and that it was possible, but not probable, that fire could have been thrown from the shots in room 8 to the keg of powder outside the room, and possible that it might have been so thrown from the shots in No. 9. The witness who put the shot from room 9 into the partition between the rooms testified that it was just a rough guess, that he did not really have much idea, that he judged it was between 50 and 60 or 65 feet maybe from his shot to the keg of powder in the entry, but that he was not positive about that, and then he testified in this way:

"Q. From what you know of the handling of powder and the shooting of shots throwing fire, is it possible or probable that fire ignited this room from

your shot from the switch (where the powder was) that leads into that No. 9 room? A. Well, sir, not certainly, but it is possible for it to be done. Q. Now it is possible, but is it probable? A. It might have been at that particular time."

And this is the strongest evidence, and the foregoing testimony and the fact that the powder was burned as it would have been by a cyclonic explosion from a windy shot is all the evidence that the location of the powder was the proximate cause of the explosion. The plaintiff himself testified that he did not know what the cause of it was, and he did not give any opinion upon that subject. No witness came to say that in his opinion fire from practical shots first ignited this powder in the entry outside the rooms and caused the explosion. None came to say that it was probable that the location of this keg of powder was the proximate cause of the explosion, while, on the other hand, four qualified witnesses testified that in their opinion the proximate cause of it was a windy shot.

[3] The plaintiff below alleged, and the burden of proof was upon him to establish by substantial evidence, that the proximate cause of the accident he sustained was the location of the powder on the opposite side of the entry from the rooms in which he fired the shots. At the close of the trial, there was evidence sufficient to sustain a finding that the accident was caused by his firing of conflicting shots at the same time which produced a windy shot and an explosion, or that it was caused by his firing two shots in each of two rooms in violation of the rule of the company never to fire shots in more than one place at a time, but there was no substantial evidence, there was nothing in this case but conjecture, to sustain a verdict that the explosion was caused by the location of the keg of powder, and juries may not transfer property from one citizen to another by guess. The case falls under the decision of the Supreme Court in Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 277 (45 L. Ed. 361), in which Mr. Justice Brewer said that, where an employé charges his employer with causative negligence, "it is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Counsel for the defendant in error seek to escape from the conclusion which the facts and law that have been considered compel, on the ground that, even if the cause of the explosion were the windy shot, the cause of that shot was the negligence of the miners who

drilled and tamped the conflicting shots, and this negligence was imputable to the coal company. But no such charge of negligence was set forth in the pleadings, no such charge was tried below, and there is no substantial evidence of the negligence of the miners, because there is no substantial evidence that either of them before the explosion knew, or that it was his duty to know, the location, direction, or depth of the hole the other drilled.

The judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

NORTHAM et al. v. BOSTON & MONTANA CONSOL. COPPER & SILVER MINING CO.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,949.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—NEGLIGENCE—WHEN QUESTION FOR JURY.

While mere proof that a rock fell through one of the floors of the stope of defendant's mine and killed an employé might not be sufficient to establish defendant's negligence, when it is shown, not that there was a defect, but that the strength of the lagging composing the floor was insufficient to sustain the rocks which fell, and which had fallen at different times previously, a prima facie presumption of negligence is raised, which is not overcome by the testimony of witnesses that the lagging was such as was customarily used in other mines, or that it was reasonably safe, which is a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010–1050; Dec. Dig. § 286.*]

2. NEGLIGENCE (§ 5*)—EVIDENCE—PROOF OF CUSTOM.

Evidence of custom may be admissible on the question of negligence, but cannot establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons to whom there was a duty to be careful.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 7; Dec. Dig. § 5.*]

In Error to the Circuit Court of the United States for the District of Montana.

Action at law by Hedley Northam, by Myrtle Jones, his guardian ad litem, and Myrtle Jones, against the Boston & Montana Consolidated Copper & Silver Mining Company. Judgment for defendant, and plaintiffs bring error. Reversed.

On October 29, 1907, John Northam, while working in the mine of the defendant in error, received injuries which resulted in his death. The accident occurred on the ninth floor of a large stope, which was about 100 feet in height, 36 feet long, running east and west, and about 20 feet wide. The stope had been almost entirely filled with square sets of timbers, on which floors were placed, leaving a space between the floors of about 7 feet 10 inches. Beneath the ninth floor the stope was filled with waste rock; the ore having been taken out through an ore shute at the east end of the stope. Northam was working on the ninth floor with a pick and shovel and wheelbarrow, and was engaged in taking ore to the chute. On the tenth floor

*For other cases see same topic & § NUMBER in Dec. & Digs. 1907 to date, & Rep'r Indexes

Bullock and Waters were engaged in completing the flooring, and were placing set timbers on the east end thereof. To make room therefor, they proceeded to excavate certain of the rock and earth, which they found in their way. There was a large rock, 250 or 300 pounds in weight, imbedded in the wall and projecting therefrom. Bullock sounded the rock by striking it with a pinch bar. He then inverted the bar and inserted the prying end, whereupon the rock, as soon as it was touched, came loose, fell to the floor, broke through it, and fell upon Northam, inflicting the injuries which caused his death. The plaintiffs in error, the widow and infant son of the deceased, in their complaint alleged negligence in three particulars: First, that the defendant in error negligently permitted a large rock to hang loose on the foot wall, which fell through the floor; second, that it negligently used lagging too thin for the floor above Northam's head; third, that the rock was negligently permitted to fall, that the defendant in error knew of the dangerous condition of the place in which Northam worked, or would have known it, had it used reasonable and ordinary care, and that it neglected to make the place safe, or to warn the deceased of the danger thereof, which danger he was not aware of, nor in the exercise of ordinary care would he have known it. At the close of the testimony, the court directed a verdict for the defendant in error, ruling that Bullock, who was in charge of the work on the tenth floor, was not the vice principal of the defendant in error, but was a fellow servant with the deceased. The floor through which the rock fell was composed of planks or lagging two inches in thickness. It was placed there for the men to walk on; also to keep the rock from going below while they were taking out the ore. There was evidence that prior to the accident rocks had gone through the lagging "at different times." On the trial the court excluded evidence offered by the plaintiffs in error for the purpose of showing that three-inch planking could have been used for flooring, and that, if it had been used, the accident would not have occurred. Bullock testified that in the Mountain View mine three-inch lagging was regularly used for flooring in the drifts, but that two-inch lagging was used in the stopes, and that it was reasonably safe.

J. O. Davies and Maury & Templeman, for plaintiffs in error.

Kremer, Sanders & Kremer, C. F. Kelley, L. O. Evans, and D. Gay Stivers, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiffs in error contend that the facts shown on the trial were sufficient to carry to the jury the question of the negligence of the defendant in error on the ground of its failure to inspect the mine, and in permitting a large rock projecting from the wall to remain for several days, where it was in danger of falling as soon as it was touched. We are not convinced that there was evidence sufficient to show negligence in that particular. The rock, imbedded as it was in the side of the wall, projecting, as witnesses variously testified, from three inches to a foot, would not necessarily import danger to the employés working as they were in a stope which was furnished with a series of floors, each constructed with a view to arrest upon its surface any rock that was likely to fall from the sides of the stope. There was little or no danger to the employés from rocks falling from the stope, unless the rocks went through the lagging. In view of the protection against injury which the lagging was intended to furnish, we doubt whether the duty of inspection should have gone further than an in-

spection of the lagging to see that it was sufficient for the purpose intended.

But a workman, engaged in working in a stope such as that in which the deceased was at the time when he was killed, is entitled to the protection of a reasonably safe roof over his head. Bunker Hill & Sullivan Mining Co. v. Jones, 130 Fed. 813, 65 C. C. A. 363. Of the obligation of the master to provide a safe place to work, it was said in Patton v. Texas Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361:

"He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done, and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery."

[1] Mere proof of an accident resulting in injury to a servant while in the service of his master, through a defect in machinery, structure, or appliance, is not of itself sufficient to establish the master's negligence; and where the evidence shows that the accident might have occurred from one of several causes, for some of which the master is responsible, and for others of which he is not, the jury is not permitted to say that it resulted from a cause for which the master was liable, unless there is in the evidence satisfactory foundation for that conclusion. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. And mere proof that a rock fell through one of the floors of the stope of the defendant in error's mine and killed an employé might not be sufficient to establish negligence on the part of the employer. In such a case, ordinarily, the rule of res ipsa loquitur does not apply. Such an accident might result from an unknown and undiscernible defect in the lagging. But when it is shown, not that there was a defect, but that the strength of the lagging was insufficient to sustain the rocks which fell, and which had fallen at different times in the progress of the work, a prima facie presumption of negligence arises, and it is not overcome by the oral testimony of witnesses who testified that it was reasonably safe. No amount of testimony of that nature can avail to prove a working place to be safe which is obviously unsafe. In the testimony, therefore, that rocks had fallen upon and gone through the lagging at different times, and that the deceased was killed in the manner proven on the trial, there was evidence tending to show negligence on the part of the defendant in error, negligence in failing to furnish and use flooring of sufficient strength. Westland v. Gold Coin Mines Co., 101 Fed. 59, 41 C. C. A. 193; The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 C. C. A. 58; The Yoxford (D. C.) 33 Fed. 521; McFarland v. The J. C. Tuthill (D. C.) 37 Fed. 714. In Westland v. Gold Coin Mines Co. a workman was killed by the breaking and falling of a stull in the defendant's mine. The stull was erected by placing lagging on timbers running across a fissure in which it was built, and it was intended to be of sufficient strength to sustain a

weight of 20 feet of earth and rock. It broke and fell when there were but 9 feet of rock upon it. Said the court:

"The fact that the stull fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. The case in hand, then, is not of that kind of which it may be said that the occurrence of the accident affords no evidence of negligence."

[2] It was not a conclusive answer to the negligence in furnishing insufficient lagging, as charged in the complaint, to show that the lagging was such as was usually used in that mining camp, or to produce the testimony of witnesses that it was reasonably safe. The question whether it was reasonably safe was for the jury to answer. The evidence of the custom in other mines was admissible for the value which it might have in informing the jury, but it could not be held conclusive of the question of the master's negligence. "Customary negligence, either on the part of himself or others, is no defense to the master." 26 Cyc. 1108. In Indermaur v. Dames, L. R. 1 C. P. 274, Willes, J., said:

"No usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe as against persons to whom there was a duty to be careful."

In Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, the court said:

"What usually is done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

In Sawyer v. J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333, the court said:

"Ordinary care is such care as persons of ordinary prudence would have exercised under like circumstances. It does not depend upon custom. It would be no excuse for a man for a want of ordinary care that carelessness was universal about the matter involved, or at the place of the accident, or in the business generally"—citing Mayhew v. Mining Co., 76 Me. 100.

In Siversen v. Jenks, 102 App. Div. 382, 92 N. Y. Supp. 382, the court held that the fact, if established to the jury's satisfaction by the evidence, that the scaffolding furnished plaintiff for his use as an employé by the defendant was, through negligence in its construction arising from the omission of the use of spreaders, or from any other cause, unsafe, unstable, and improper, and not so constructed, placed, or operated as to give a proper protection to the life and limb of the plaintiff, warranted a verdict in his favor, without reference to the question of an established custom among dock builders as to their use or omission. Of similar import are Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Austin v. Chicago, R. I. & P. Ry. Co., 93 Iowa, 236, 61 N. W. 849; Reichla v. Gruensfelder, 52 Mo. App. 43; Colorado Midland Ry. Co. v. Brady, 45 Colo. 203, 101 Pac. 62; Lyon v. Bedgood, 54 Tex. Civ. App. 19, 117 S. W. 897; McCormick Harvesting Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. 588; Chicago, M. & St. P. Ry. Co. v. Carpenter, 56 Fed. 451, 5 C. C. A. 551.

The judgment is reversed, and the cause is remanded for a new trial.

In re GILL.

In re FARMERS' & MANUFACTURERS' BANK OF RICH HILL, MO.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1911.)

Nos. 112, 113.

(Syllabus by the Court.)

1. BANKRUPTCY (§§ 224, 288*)—ADVERSE CLAIM—JURISDICTION—PLEA.

A response by a bank to an order of a referee to show cause why it should not pay over to the trustee $3,424.60 deposited with it by the bankrupt three days before the filing of the petition in bankruptcy, that the money was deposited without solicitation or agreement in a long-standing general deposit account which the bankrupt had with the bank subject to check and that at the time of the deposit the bankrupt owed the bank on an overdraft and on past-due notes $3,153.20, which it claims to offset against its liability to the bankrupt and the trustee, states an adverse claim and a good plea to the jurisdiction of the referee and the District Court summarily to determine the validity of that claim under section 23b of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 383, 447; Dec. Dig. §§ 224, 288.*]

2. BANKRUPTCY (§§ 224, 288*)—EXTENT AND MANNER OF INVESTIGATION OF SUBSTANTIALITY OF ADVERSE CLAIM NOT PRESENTED BY ORDER OVERRULING SUCH PLEA.

An order overruling such a plea in the absence of a denial of any of its averments and without the framing, investigation, or decision of the issue whether the adverse claim pleaded thereby is substantial or colorable presents no question of the manner or extent of the summary investigation of that question permitted to the bankruptcy court or the referee.

The only question it presents is whether or not the facts set forth in the plea, if true, show that the District Court and the referee are without jurisdiction summarily to try and determine the controversy between the trustee and the adverse claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 383, 447; Dec. Dig. §§ 224, 288.*]

In the matter of the bankruptcy of Susan L. Ames. Original petitions of Charles S. Gill, as trustee, and of the Farmers' & Manufacturers' Bank of Rich Hill, Mo., to review a decision of the referee in bankruptcy. Petition of bank granted, and order of District Court modified.

Adrian F. Sherman, for petitioner in No. 112, and for respondent in No. 113.

George Templeton, J. R. Hales, Frank W. Yale, and Ernest S. Ellis, for petitioner in No. 113, and for respondent in No. 112.

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

SANBORN, Circuit Judge. In October, 1910, the trustee in bankruptcy of the estate of Mrs. Susan L. Ames presented to the referee a petition in which he alleged that on April 20, 1910, three days before

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the petition in bankruptcy was filed, Mrs. Ames sold her stock of merchandise for $3,424.60 and deposited the proceeds in the Farmers' & Manufacturers' Bank of Rich Hill, Mo., as a special deposit to be distributed pro rata among her creditors; that this money was still in the possession of the bank; that he had demanded it, but the bank refused to pay it to him, and he prayed that the bank might be ordered to show cause why it should not pay this $3,424.60 over to the trustee. The referee granted his prayer, and, in response to the order to show cause, the bank filed a verified answer wherein it denied that the $3,424.60 was deposited with it by Mrs. Ames as a special deposit to be distributed pro rata among her creditors, and alleged that Mrs. Ames had for many years had a general deposit account with the bank in which she deposited moneys from time to time and against which she drew her checks; that on April 20, 1910, she owed the bank on account of an overdraft of $80.70, and on account of her five past-due promissory notes, which were described, $3,153.20 and interest; that on that day, without any solicitation, contract, agreement, or special terms, she deposited her $3,424.60 to the credit of her general account in the bank subject to her check, and that the bank had and claimed the right to set off against its indebtedness for the $3,424.60 Mrs. Ames' indebtedness to it for $3,153.20 and interest under section 68a of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]); that under this state of facts it was an adverse claimant, and neither the referee nor the District Court had jurisdiction summarily to hear and decide the controversy between it and the trustee. No challenge by reply or otherwise of the averments of the plea was filed, and on these two pleadings the referee considered whether or not he had jurisdiction summarily to grant the application for the order that the bank pay the money over to the trustee, found that he had "jurisdiction to consider such application and to make such order," and overruled the bank's plea to the jurisdiction. Thereupon the bank filed a petition for review. After that petition was filed and on the same day, the trustee made a motion before the referee that he require the bank to further answer the order to show cause on the merits. The bank refused to do so. The trustee moved for judgment on the pleadings and for an order that the bank pay over to him the $3,424.60, and these motions were denied by the referee, and further proceedings were stayed by him until there should be a final decision upon the review sought by the bank. The trustee then filed his petition for a review of the denial of his motions. The District Court sustained the rulings and orders of the referee, and each party filed a petition for a revision of the distasteful portion of its order.

[1] The plea to the jurisdiction was good. It asserted possession in the bank before the filing of the petition in bankruptcy and ever thereafter and a lawful claim adverse to the trustee to set off the indebtedness of the bankrupt to the bank against the trustee's claim for the money the bankrupt had deposited with it. The District Court so held, but it sustained the order overruling the plea on the ground that the referee had jurisdiction summarily to investigate and determine whether the bank's adverse claim was substantial or frivolous

and baseless. Mueller v. Nugent, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; In re Rathman, 106 C. C. A. 253, 258, 183 Fed. 913, 918. The briefs and arguments of counsel discuss the question whether or not a referee may take evidence, and how much evidence he may take in such an investigation. But the decisions of the Supreme Court are as illuminating upon that question as this court could hope to be, and we decline to enter upon a discussion of it because the record does not present it. If the referee had held that the plea to the jurisdiction was good, and upon a pleading that the claim it set forth was colorable, or in any other regular way had proceeded over objection, or over objection had refused to proceed to take evidence to determine whether the claim was substantial or frivolous and that ruling had been challenged, the question might have been presented. But the referee did nothing of this kind. He never decided that he would, or that he would not, investigate the substantiality of the adverse claim. [2] The plea to the jurisdiction was presented without denial or challenge of the truth of its averments, and he overruled it and found that he had jurisdiction to consider the application for the order on the bank to pay over the money "and to make such order." That was a decision that, admitting all the averments of the plea to be true, he had jurisdiction summarily to try the controversy between the trustee and the adverse claimant on its merits and to render judgment thereon whether the bank's claim was substantial or colorable, and that decision was a plain error.

There was no error in the denials of the motions of the trustee to compel the bank to answer on the merits and to grant him judgment in his favor on the pleadings nor in the order of the referee staying further proceedings because in the face of the plea to the jurisdiction, and, in the absence of any issue or investigation of the issue whether the adverse claim it set forth was substantial or colorable, and of any finding that it was colorable, the referee was without jurisdiction to proceed or to require any of the parties to proceed further toward the trial of the controversy between the trustee and the adverse claimant.

The litigation over the validity of the plea to the jurisdiction in this case has occupied so much time and the probability that the bank's claim is colorable is so slight that it seems to us that the better course for the officers below to pursue in this case is to dismiss the petition of the trustee for the order to pay over the money and to let the parties litigate their controversy in a plenary suit.

The petition of the bank must therefore be granted and the order of the District Court must be so modified as to direct the reversal of the order of the referee overruling the plea to the jurisdiction and to direct the dismissal of the petition of the trustee for the order on the bank to pay over $3,424.60 on the ground that the District Court and the referee are without jurisdiction summarily to try the controversy between the trustee and the bank, and the petition of the trustee for revision must be dismissed.

It is so ordered.

THE CASCADES.

THE LURLINE.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,885.

COLLISION (§ 100*)—STEAM VESSELS MEETING IN FOG—MUTUAL FAULTS.

A collision on the Columbia river at night in a fog between the steamer Cascades, passing down from Portland, and the steamer Lurline, passing up, *held* due to the fault of both vessels; the Cascades being in fault for being out of her course and on the wrong side of the river, in violation of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring steam vessels in narrow channels to keep to that side of the fairway which lies on their starboard side, whereas she was heading across the river, and the collision occurred within 250 feet of the Oregon shore, and both vessels being in fault for running at full speed until nearly the time of collision, although each heard the fog signals of the other, in violation of article 16 of such rules.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. § 100.*

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

Appeal from the District Court of the United States for the District of Oregon.

Suit in admiralty for collision by the Vancouver Transportation Company, owner of the steamer Lurline, against the steamer Cascades, the North Pacific Lumber Company, claimant, and cross-libel against libelant. Decree (178 Fed. 726) against both vessels, and both claimants appeal. Affirmed.

Thomas N. Strong, for appellants.

W. W. Cotton and Dolph, Mallory, Simon & Gearin, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These are cross-appeals. The case shows that in the early morning of November 26, 1906, a collision occurred during a fog on the Columbia river, between the stern-wheel steamers Lurline, owned by the Vancouver Transportation Company, and Cascades, owned by the North Pacific Lumber Company, resulting in the sinking of the Lurline and a slight injury to the Cascades. By its libel the owner of the Lurline sought to recover from the Cascades $11,791.16, as alleged damages, and by cross-libel the owner of the Cascades sought to recover from the Lurline $589.45, its alleged damages. After trial the court below found both boats in fault, and divided the damages, giving judgment against the Cascades and her sureties in favor of the owner of the Lurline for $4,811.15. We have examined the record with care, and are of the opinion that the judgment should be affirmed.

The evidence shows that the Cascades left Portland shortly after 12 o'clock of the night in question for points down the river, and that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Lurline was making her regular nightly run from Astoria to Portland. It shows, further, that the regular course of the passenger boats running upstream was near shore and parallel thereto, and for those going down further instream. The point of collision was near Rainier, which is on the Oregon side of the river. The Lurline usually stopped at that place for passengers, and always ran within hailing distance of it in order to stop there if occasion demanded. Cowlitz is a stopping point a short distance below Rainier. Blanchard's dock is about 950 feet above, and about 1,400 feet above that dock is Smith's Mill. The pilot of the Lurline testified that, when he reached Cowlitz, there was a slight haze on the water, but not sufficient to make it necessary to sound his fog signal; that at that point the Lurline was put on her course for Rainier and proceeded to within about 200 feet of the landing place, and, not having been hailed from the shore, proceeded upstream, running parallel with the shore, and that at the lower end of Blanchard's dock she was put on her regular course, east half south, past Smith's mill; that he continued on that course up the river parallel with the shore and from 200 to 250 feet therefrom, being able to see the lights at all the places mentioned; that, before reaching Rainier, he heard a steamboat above him blowing fog signals, and that he therefore blew his signals as he proceeded; that, after passing Blanchard's dock, he saw the masthead light of a steamer coming downstream well outside of his boat; that he kept his course, and, when he had nearly reached the lower end of Smith's mill, he again saw the light, then almost abreast of him, and then paid no further attention to it; that very shortly thereafter his lookout gave warning that a boat was running into the Lurline, seeing which he at once reversed his engines and backed, and as his headway was checked the Cascades struck the Lurline about amidships, causing her to sink.

The Lurline, according to her pilot's own testimony, was running at full speed up to the time the Cascades' colored lights were seen almost immediately before the collision, notwithstanding the latter's masthead light had been previously observed. The Cascades also, according to the testimony, was going downstream at her usual rate of speed of about 12 miles an hour, on her fog course, given by her pilot as south by west one-half, and which at the place in question would take his boat from about 600 to 800 feet from shore. That speed, according to the testimony of her pilot, was maintained until he had heard three or four signals from the other boat, when he stopped his engine and permitted his boat to drift; that, after drifting three or four minutes, he saw the red light of the Lurline across his starboard bow, whereupon he immediately reversed his engines, but before the Cascades could be stopped she came into collision with the Lurline. It is evident from the result that the pilot of the Lurline was in error in supposing when he first saw the masthead light of the Cascades that she was "well outside of his boat," and that when he again saw that light that the Cascades was "almost abreast of him." Equally evident it is from the result that the Cascades was far out of her proper course, for it is certain that in some way she got over to within about 250 feet of the Oregon shore and there collided with the Lurline,

which was pursuing her right course, although at an improper speed under the existing conditions. We think the court below was quite right in holding that the Lurline was in fault in the particular last indicated, and that the Cascades was in fault both in respect to excessive speed and in failing to keep her proper course. Article 16, Act Cong. June 7, 1897, c. 4, 30 Stat. 99 (U. S. Comp. St. 1901, p. 2880), which is applicable to the case, provides:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The judgment is affirmed.

UNITED STATES v. ONE BOX OF TOBACCO, "FOOT PRINTS."

(Circuit Court of Appeals, Fourth Circuit. October 10, 1911.)

No. 1,028.

LOTTERIES (§ 3*)—INCLOSING PRIZE TAGS IN PACKAGES OF TOBACCO—CONSTRUCTION OF STATUTE.

Under the provisions of Rev. St. § 3394 (U. S. Comp. St. 1901, p. 2221), as amended by Act Aug. 5, 1909, c. 6, § 33, 36 Stat. 110 (U. S. Comp. St. Supp. 1909, p. 861), that no packages of manufactured tobacco shall be permitted to have packed in them "any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in, or dependent upon, the event of a lottery," the definition of a lottery is not limited to a scheme whereby the value of the certificate or ticket is dependent upon lot or chance, but includes as well a scheme, whereby the possession of a certificate or prize, having a fixed value, is made to depend on lot or chance, and the statute is violated by concealing in 1 out of each 100 five-cent cuts of plug tobacco a tag redeemable by the maker for 50 cents.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4245–4252; vol. 8, pp. 7710–7711.

What constitutes a lottery, see notes to MacDonald v. United States, 12 C. C. A. 346; Waite v. Press Pub. Ass'n, 85 C. C. A. 580.]

In Error to the District Court of the United States for the Western District of North Carolina, at Statesville.

Libel by the United States against One Box of Tobacco, "Foot Prints"; F. M. Bohannon, claimant. Judgment for claimant, and the United States brings error. Reversed.

The claimant, F. M. Bohannon, is a manufacturer of tobacco in the city of Winston, N. C., and among other brands of tobacco manufactured by him is a brand called "Foot Prints," one box of which was seized under the libel filed in this case. The brand of tobacco was put up in 6-pound, 12-pound, and 18-pound boxes, containing, respectively, 20, 40, and 60 plugs or pieces of tobacco, each plug having imprints for 5 cuts, thus making the number of cuts in a 6-pound box, 100, in a 12-pound box, 200, and in an 18-pound box, 300. These cuts were to be separated, as they might be sold, by the retail dealer, but the lines of separation were superimposed upon the plugs, in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

factory. Within one of the 100 cuts in a 6-pound box was imbedded (concealed from view) a small tin tag in the shape of a human foot, having thereon the words "Foot Prints," and in the 12 and 18 pound boxes the number of cuts containing such tags was proportionately increased; that is to say, in a 12-pound box there were two cuts and in an 18-pound box three cuts containing such tags. A purchaser buying a cut of tobacco containing a tin tag was entitled to have said tag redeemed by the manufacturer for the sum of 50 cents. The cuts of tobacco were all of equal size and quality, and are said to have been worth at retail the sum of five cents, at which they were sold.

The libel was filed under the provisions of section 2, Act July 1, 1902, c. 1371, 32 Stat. 715, afterwards re-enacted as section 33, Act Aug. 5, 1909, c. 6, 34 Stat. 110 (U. S. Comp. St. Supp. 1909, p. 861), amending section 3394, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2221), which act reads as follows: "Sec. 2. That the last paragraph of section thirty-three hundred and ninety-four of the Revised Statutes, as amended by the tenth section of the act of July twenty-fourth, eighteen hundred and ninety-seven, is hereby further amended so as to read as follows: 'No package of manufactured tobacco, snuff, cigars, or cigarettes, prescribed by law, shall be permitted to have packed in or attached to, or connected with them, nor affixed to, branded, stamped, marked, written, or printed upon them any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in, or dependent upon the event of a lottery, nor any indecent or immoral picture, representation, print or words; and any violation of the provisions of this paragraph shall subject the offender to the penalties and punishments provided by section thirty-four hundred and fifty-six of the Revised Statutes.'"

The claimant duly filed his answer setting up the facts in relation to the packing and sale of his tobacco and the issue as framed at the trial was, "Is the property described in the libel forfeited to the United States for the causes alleged in the libel?" which issue was decided by the jury under instructions from the court in the negative, and judgment was thereupon entered in favor of the claimant, from which judgment the present writ of error was allowed.

A. E. Holton, U. S. Atty. (A. L. Coble, Asst. U. S. Atty., on the brief), for the United States.

J. E. Alexander and C. B. Watson (Watson, Buxton & Watson, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and KELLER, District Judge.

KELLER, District Judge (after stating the facts as above). The only question arising on this writ of error is as to whether the methods of the claimant are violative of the act of Congress above quoted.

It is strenuously contended that inasmuch as the claimant conducts no lottery or drawing for the redemption of any of his tags, but, on the contrary, stands ready to redeem any and all of them at the uniform value of 50 cents per tag, such tags cannot be held to be "any instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery." He says in his argument:

"The act evidently in its very letter comprehends a ticket (instrument) which shall depend for its value upon or participate in a lottery conducted somewhere else."

If this premise be granted, the conclusion would follow that the plan of the claimant was not violative of the act. But we think the

premise cannot be granted. The assumption is that to be violative of the act the value of the instrument or ticket must be dependent upon the event of a lottery, or, in other words, upon chance. We know of no warrant for thus construing the act. It cannot matter whether the methods used make the value of the instrument dependent upon chance or its possession (it having a fixed value) dependent upon chance.

Suppose, instead of placing a redeemable tag in the cut of tobacco, the claimant had placed therein a silver half dollar. The absolutely decisive contingency would lie in the choice of cuts, and the prize would be his who selected the cut containing the coin. Could it be said that the possession of the coin was not dependent upon the event of a lottery? Under this very clever scheme the lottery is conducted in the shop of the retailer. The tickets are the 5-cent cuts of tobacco, each of which, under the testimony in the case, is worth at retail the price charged for it, and one of which out of every 100 is worth 50 cents in addition. The possession of this prize is determined by chance, and the case seems in principle not different from that of Reg. v. Harris, 10 Cox's C. C. 352. Still more nearly in point is the case of Taylor v. Smetter, 11 Q. B. D. 207, where packets, each containing a pound of tea, were sold at so much per packet. In each packet was a coupon entitling the purchaser to a prize; said prizes varying in value and in character. The tea was admittedly worth the money paid for it. In this case the purchaser of each packet was entitled to a prize, the nature and value of which was determined by the coupon hidden in the packet. It was held that this was a lottery. It would assuredly not have been less so had only one packet of tea in every 100 contained a coupon calling for a definite value.

In our view, it will not do to limit the definition of a lottery to a scheme whereby the value of the certificate is dependent upon lot or chance. It does, and should equally include, a scheme whereby the possession and enjoyment of the prize is made to depend on lot or chance however compassed. The rule of construction in such cases, while properly strict, should not be such as to emasculate the true meaning of the provision, and we are entirely sure that the prohibition was aimed against the use in connection with the packing of tobacco of any device for the distribution of prizes, to be effected by the aid of lot or chance, and was entirely indifferent to the particular means used to accomplish the result.

The fact that the scheme adopted by the claimant was a simple and effective one, obviating the necessity for any subsequent drawing of prizes by making the event of the lottery depend on the successful selection of a cut of tobacco in the shop of the retailer, does not place it outside the prohibition of the law, but, on the contrary, by its very simplicity and practical effectiveness, makes it all the more attractive as an inducement to the prospective purchaser.

The decree of the District Court for the Western District of North Carolina, dismissing the libel, must be reversed, and a new trial awarded.

Reversed.

LAMON et al. v. SPEER HARDWARE CO.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1911.)

No. 3,530.

APPEAL AND ERROR (§ 324*)—NECESSARY PARTIES—JOINT DEFENDANTS.

A general judgment rendered against the original defendants in the case and the sureties on a supersedeas bond given by them is joint, and such original defendants cannot alone review the same by writ of error, without summons and severance as to their codefendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1806-1809; Dec. Dig. § 324.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action at law by the Speer Hardware Company against W. A. Lamon and J. W. Wallace, partners as W. A. Lamon & Co. Judgment for plaintiff against such defendants and others as sureties on their supersedeas bond, and defendants bring error. On motion to dismiss writ of error. Motion sustained.

N. B. Maxey (J. B. Campbell and W. O. Beall, on the brief), for plaintiffs in error.

James F. Read (James B. McDonough, on the brief), for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

ADAMS, Circuit Judge. In 1906, before the Indian Territory became a part of a state, Speer Hardware Company, the defendant in error, recovered a judgment in the United States Court for the Western District of that Territory for some over $8,000 against W. A. Lamon and J. W. Wallace. From this judgment a writ of error was secured from the Court of Appeals in the Indian Territory, where the case was pending at the time Oklahoma was admitted into the Union of states. Pursuant to the provisions of the enabling act, the case, by operation of law, went to the Supreme Court of the state. Afterwards, in the exercise of the right of removal given by that act, the case was taken to the United States Circuit Court for the Eastern District of Oklahoma, where it was tried on the record made in the original trial court. The judgment of the United States Court for the Western District of the Indian Territory was in all respects affirmed, and a new judgment was entered against Lamon and Wallace, and also against A. C. Miller, Fred Walker, B. A. Brunson, John W. Gibson, and William C. Edwards, who were sureties on a supersedeas bond originally given by Lamon and Wallace when they secured their writ of error from the United States Court of Appeals in the Indian Territory.

This judgment, after making the requisite findings, reciting the proceedings which brought the case into that court and the giving of the supersedeas bond by the principals and their sureties, concluded thus:

"Now, therefore, it is considered, ordered, and adjudged by the court that the said Speer Hardware Company have and recover of and from the said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. A. Lamon and J. W. Wallace, appellants herein, and A. C. Miller, Fred Walker, B. A. Brunson, John W. Gibson, and William C. Edwards, sureties on said supersedeas bond, the sum of $11,039.72, together with the costs of this appeal, to be taxed by the clerk of this court, and may have execution therefor. Execution stayed for 60 days from this date."

This judgment was manifestly joint. There was nothing distributive as between the judgment debtors, or nothing making the sureties only secondarily liable. A general judgment was rendered, and an execution was awarded, against all alike. The two first-mentioned judgment debtors, who were the principals in the supersedeas bond, alone sued out this writ of error. There was neither summons and severance, nor any notice given to the other judgment debtors, nor any other equivalent proceeding requiring them to join in the writ or be foreclosed of their right of review. On these grounds the defendant in error moves the court to dismiss the pending writ of error.

This motion must be sustained, on the authority of Estes v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437, Inland, etc., Coasting Co. v. Tolson, 136 U. S. 572, 10 Sup. Ct. 1063, 34 L. Ed. 539, Mason v. United States, 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 545, Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933, Inglehart v. Stansbury, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76, Davis v. Mercantile Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563, and Beardsley v. Ark. & Louisiana Railway, 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919, and cases cited.

It is so ordered.

BOSWELL NAT. BANK v. SIMMONS.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1911.)

No. 3,514.

APPEAL AND ERROR (§ 1022*)—REVIEW ON APPEAL—FINDINGS OF FACT.

Where the court, in a suit by a trustee in bankruptcy to recover an alleged preference, has considered conflicting evidence, and made findings of fact which render the preference voidable and entitle the complainant to recover, such findings must be taken as presumptively correct by the appellate court, and this presumption is materially strengthened by the master's prior findings to the same effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. § 1022.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Suit in equity by O. A. Simmons, trustee in bankruptcy of the Boswell Mercantile Company, against the Boswell National Bank. Decree for complainant, and defendant appeals. Affirmed.

William T. Hutchings and William P. Z. German, for appellant.

A. C. Markley (C. B. Stuart and J. H. Gordon, on the brief), for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

ADAMS, Circuit Judge. This suit was instituted by the trustee in bankruptcy of the Boswell Mercantile Company to recover an alleged voidable preference, and also to declare a trust in certain real estate standing in the name of the president of the bank in favor of the trustee in bankruptcy. The bankrupt company paid to the bank, less than four months prior to the filing of the petition in bankruptcy, the sum of $4,471.67 in satisfaction of a then existing debt due the bank. If the mercantile company was then insolvent, and if the bank then had reasonable cause to believe its debtor intended to give it a preference, and if the payment under such circumstances had the effect to enable the bank to obtain a greater percentage of its debt than any other creditor of the same class, the payment constituted a voidable preference, and the trustee was entitled to recover it from the bank.

Upon issue joined the case was referred to a special master, to take the evidence and report it, with his findings of fact, to the court for its consideration and judgment. The master found the facts which we have just specified, entitling the trustee to recover, and the court below, on exceptions duly taken after a full hearing, approved the findings of the master and entered a decree in favor of the trustee for both the money and the real estate. When the trial court has considered conflicting evidence and made its findings of fact thereon, they must be taken to be presumptively correct (Hussey v. Richardson-Roberts Dry Goods Co., 78 C. C. A. 370, 148 Fed. 598; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; Id., 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772); and this presumption is materially strengthened by the master's prior findings to the same effect. Concluding, after a careful consideration of the proof in this case, that there was substantial evidence to sustain the findings below, and discovering no obvious error of law or serious mistake of fact in such findings, the presumption of their correctness must be indulged.

The decree is affirmed.

GREEN v. WILBRAHAM.

(Circuit Court of Appeals, Third Circuit. November 6, 1911.)

No. 19 (1,487).

MONEY RECEIVED (§ 18*)—ACTION—SUFFICIENCY OF EVIDENCE.

An action founded solely on a common count for money had and received *held* not sustainable on the evidence.

[Ed. Note.—For other cases, see Money Received, Dec. Dig. § 18.*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Action at law by Thomas W. Green against Thomas C. Wilbraham. Judgment of nonsuit, and plaintiff brings error. Affirmed.

See, also, 190 Fed. 274.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Peirce Mecutchen, for plaintiff in error.

Walter H. Bacon (William D. Lippincott, on the brief), for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. This action is founded solely on a common count in the declaration for money had and received by the defendant for the use of the plaintiff. Originally the declaration contained, besides the common count referred to, a special count on an express contract, which was stricken out as irregular and defective under the practice authorized in New Jersey. No error has been assigned on that action of the trial court. Consequently the case comes before us, as stated, on the common count only. The writ of error brings up for review a judgment of nonsuit.

We find no error. The common count relied on charges nothing but a mere failure by the defendant to pay money to the plaintiff. Had there been proof that money belonging to the plaintiff had passed into the hands of the defendant, it might possibly have been sufficient to support an implied undertaking on the part of the defendant to pay the same to the plaintiff. But no such proof was made or offered. The express contract on which the special count was based was offered in evidence, but it does not support an implied contract to pay money to the plaintiff. It is a contract fixing, inter alia, the salary to be paid to plaintiff and defendant by a third party. There is nothing in the evidence offered inconsistent with the theory that that third party (a corporation) still has in its possession what the plaintiff now claims from the defendant. These were the views expressed by the Circuit Court when considering the motion to strike out the special count, and we deem them sound and equally pertinent to the present situation of the case.

The judgment is therefore affirmed.

NORFOLK SOUTHERN R. CO. v. TALBOTT.

(Circuit Court of Appeals, Fourth Circuit. October 10, 1911.)

No. 1,029.

APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR.

A decree in equity, which does substantial justice between the parties, should not be reversed by an appellate court on technical objections.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540–4545; Dec. Dig. § 1170.*]

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

Suit in equity by the Trust Company of America against the Norfolk Southern Railway Company. The Norfolk Southern Railroad Company, purchaser at foreclosure sale herein, moved for an injunction against J. F. Talbott to restrain a sale of the property on execu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion from a state court. From an order (183 Fed. 803) overruling such motion, the Railroad Company appeals. Affirmed.

E. R. Baird, Jr., for appellant.
E. F. Aydlett, for appellee.

Before GOFF, Circuit Judge, and BOYD and KELLER, District Judges.

PER CURIAM. The record of this cause clearly discloses that as between the parties thereto substantial justice permeates the decree complained of. With great force technical objections have been presented by counsel for appellant as to the method of procedure adopted by the appellee in his efforts to collect the judgment rendered in his favor; but when we consider all of the circumstances involved in this litigation, it would not accord with the rules that do and should attend the administration of justice to reverse the said decree. The court below in a learned and forceful opinion, has fully stated the facts, and has reached a conclusion in which we concur. (C. C.) 183 Fed. 803.

Affirmed.

HOWE et al. v. PARKER et al.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1911.)

No. 3,580.

(Syllabus by the Court.)

1. PUBLIC LANDS (§§ 106, 128*)—LAND DEPARTMENT OF THE UNITED STATES—PATENTS AND DECISIONS OF—HOW DIRECTLY ASSAILED.

Patents and decisions of the Land Department of the United States may be avoided and the legal title under them charged with a trust in favor of the rightful owner of the equitable title to the land on account of an error of law or a gross mistake of fact, or a fraud upon the officers of the department, by a direct suit in a court of equity for this purpose.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302, 344; Dec. Dig. §§ 106, 128.*]

2. PUBLIC LANDS (§ 106*)—ERROR IN DECIDING WHETHER OR NOT THERE IS EVIDENCE TO SUSTAIN A CHARGE, REMEDIABLE.

Whether or not there is any evidence to sustain a charge, a claim, or a finding of fact in a controversy before the Land Department over the title to the public land is a question of law, and an error in the decision of that question which results in the issue of a patent to the wrong party is remediable in equity.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

3. PUBLIC LANDS (§ 97*)—LAND DEPARTMENT—JURISDICTION MAY BE EXERCISED IN ACCORDANCE WITH LAW AND ESTABLISHED RULES, AND NOT OTHERWISE.

The Land Department has jurisdiction upon legal notice to divest entrymen of their equitable titles to lands within its power for fraud before the final order for the patent in accordance with the settled rules, practice, and decisions of that department.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

But the equitable title to land acquired by a lawful entry cannot be divested or affected by subsequent decisions of the Land Department or subsequent rules of practice therein contrary to a long line of decisions, or an established rule, or a settled practice at the time.

Neither the general nor the supervisory jurisdiction of the Commissioner or the Secretary is so arbitrary or unlimited as to permit such a course of action.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 288, 289; Dec. Dig. § 97.*]

4. PUBLIC LANDS (§ 106*)—LAND DEPARTMENT—SECOND CONTEST BARRED BY ADVERSE ADJUDICATION ON SAME CHARGE IN FIRST CONTEST.

It was a rule of reason, of law, and of property in 1898 established by a long line of decisions of the officers of the Land Department that, in the absence of fraud and of collusion between the parties, an adjudication that an informer's charge against a homesteader was unfounded was a bar to a contest against him by another informer on the same charge, and a decision to the contrary in that state of the law was an error of law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 301, 302; Dec. Dig. § 106.*]

5. PUBLIC LANDS (§ 103*)—LEGAL NOTICE TO HEIRS OF DECEASED ENTRYMAN INDISPENSABLE—FIRST PUBLICATION LESS THAN THIRTY DAYS BEFORE HEARING A FATAL DEFECT.

Where the equitable title to land based on an adjudicated homestead entry of their ancestor and five years occupation and improvement rests in heirs of the entryman, it is indispensable to a divesting thereof by the Land Department that legal notice of the charge against them and its hearing be given them.

The publication of a summons or notice for the first time less than 30 days before the day of hearing is insufficient to give such legal notice by publication under rule 13 of the Land Department (31 Land Dec. Dept. Int. 530).

Statements of the appearance of parties in opinions of officers, in recitals of the proceedings, or by attorneys on pleadings and other documents in a case in which their appearance and authority to appear for them was never questioned or in issue, will not prevail on a demurrer over the averment of the parties that they never received legal notice of the proceedings, and never appeared or authorized an appearance therein in a direct proceeding to litigate the issue thus tendered.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298, 299, 307; Dec. Dig. § 103.*]

6. PUBLIC LANDS (§ 30*)—ACTS OF MARCH 1 AND 2, 1889 (25 Stat. 759; 25 Stat. 1005) OPENING CREEK LANDS IN OKLAHOMA—DISQUALIFICATION OF HOMESTEADERS UNDER.

The Act of March 1, 1889, and Act March 2, 1889 (Act March 1, 1889, c. 317, § 2, 25 Stat. 759; Act March 2, 1889, c. 412, § 13, 25 Stat. 1005), which prohibited entry upon and occupancy of any of the lands ceded by the Creek Nation by their agreement of January 31, 1889, until noon of April 22, 1889, and disqualified any one who violated this inhibition from entering any of the lands as a homestead, did not disqualify one who entered upon the ceded land after March 2 and prior to noon of April 22, 1889, but who made the race for the tract he sought from outside the ceded land after noon of April 22, 1889, unless it be shown that manifest disadvantage in the race for the land resulted to some qualified entryman from such entry.

They did not disqualify such an one who learned outside the ceded land from one who had acquired all the information he had or communicated prior to March 1, 1889, the description, character, and location of the tract of land therein which he subsequently entered and the best way to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

go to it so that he could go directly to and identify it without further aid or information.

They did not disqualify such an one with whom his informant agreed to meet him near the land and go with him to it and did so, where the entryman could as well have gone to and recognized the land from his previous information without the meeting and accompanying and the meeting and conduct gave him no advantage and subjected no qualified entryman to any disadvantage in the race for the land.

These acts of Congress may not be construed after the entries of lands thereunder to include within their prohibitions and disqualifications classes of persons or of acts that were not clearly within their unambiguous terms when the entries were made.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 48–50; Dec. Dig. § 30.*]

(Additional Syllabus by Editorial Staff.)

7. WORDS AND PHRASES—"SOONER."

A "sooner" in the parlance of Oklahoma is one who to the injury of other intending settlers enters on and claims land as his homestead before such entry and claim are effective to initiate a valid homestead under the acts of Congress.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6552.]

Appeal from the United States Circuit Court for the Western District of Oklahoma.

Bill in equity by Arthur Bruce Howe and others against Milton E. Parker and others. From a decree sustaining a demurrer and dismissing the bill, defendants appeal. Reversed and remanded.

Milton Brown and James M. Challiss (Waggener & Challiss and Flynn, Ames & Chambers, on the brief), for appellants.

J. H. Everest (T. F. McMechan, R. M. Campbell, and C. F. Smith, on the brief), for appellees.

Before SANBORN and SMITH, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree which sustained a demurrer to and dismissed the bill of the complainants. On this demurrer the question whether or not the averments of the bill are true is, of course, not open to consideration, and the only question is whether or not the facts alleged state a cause of action for equitable relief. This is the case they state: Henry Howe, an aged minister of the gospel, made a homestead entry of the S. E. ¼ of section 27, township 12 N., of range 3 W., of the Indian Meridian, in Oklahoma, on April 23, 1889, built himself a house upon, and with his daughter, Sarah J. Howe, occupied and improved it as his homestead until, hounded by sooners under Act March 1, 1889, 25 Stat. 759, § 2, and Act March 2, 1889, 25 Stat. 1005, § 13, and 1006, § 14, and by informers under Act May 14, 1880, c. 89, § 2, 21 Stat. 141, and fought by the lawyers he had retained to defend him, he died intestate on June 17, 1893.

[7] A "sooner," in the parlance of Oklahoma, is one who, to the injury of other intending settlers, enters upon and claims land as his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

homestead before such entry and claim are effective to initiate a valid homestead under the acts of Congress. The act of Congress of March 1, 1889, provided that the lands in the western half of the domain of the Creek Nation, where the land in controversy is situated, which were acquired by the United States by the Creek Nation's agreement and cession of January 31, 1889, should be disposed of in accordance with the laws regulating homestead entries, but that:

"Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened for settlement by act of Congress, shall not be permitted to occupy or make entry of such lands or lay any claim thereto." 25 Stat. 759, § 2.

Congress on the next day by the act of March 2, 1889, opened the land for settlement and prescribed terms on which homestead claimants might acquire it. That act provided that the land should be disposed of to actual settlers under the homestead laws only, and that:

"Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto." 25 Stat. c. 412, § 13, page 1005.

On March 23, 1889, the President issued his proclamation that this land would be opened for settlement at noon of April 22, 1889. His proclamation contained these words:

"Warning is hereby expressly given that no person entering upon and occupying said lands before said hour of 12 o'clock noon of the twenty-second day of April A. D. one thousand eight hundred eighty-nine hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any right thereto." 26 Stat. 1546.

About 2 o'clock and 30 minutes in the afternoon of April 22, 1889, Howe first entered upon the land here in dispute. He then claimed it as his homestead, and thereafter continued to reside upon and improve it. Two sooners, Miss Robb and Mr. Woodruff, had previously entered upon and claimed the land as their homesteads, respectively, but Howe made his homestead entry at the land office on April 23, 1889, and on May 9, 1889, and on May 21, 1889, respectively, these sooners filed affidavits that they were, respectively, the first to enter upon and occupy the land after noon of April 22d, and that Howe entered upon and occupied it before that time. Howe employed one John Burton, a practicing lawyer at Oklahoma City, to defend his claim against Robb and Woodruff, and disclosed to him as his lawyer the facts of his case, and thereupon Burton on September 6, 1889, turned informer and filed an affidavit of contest for himself under section 2 of the act of May 14, 1880, which gives the successful informer a preference right to enter the land of a homestead claimant. Burton set forth in that affidavit the charge which he and subsequent informers, Milton E. Parker on February 18, 1891, John T. Hornor on April 10, 1901, and others enlarged, that Charles Howe, the son of Henry Howe, entered upon and occupied the tract of land in question before noon of April 22, 1889, wrote Henry Howe that he had selected and was holding this tract for him, and when Henry Howe arrived at Oklahoma City on April 22, 1889, he, Charlie Howe, met and accom-

panied him to the land, and Henry Howe made his homestead entry with the knowledge of these facts.

There are attached to the bill in this case copies of the records and papers relating to the various contests against Howe and his heirs in the land office from which it appears that the proof was that the register and receiver found, and that the Commissioner of the General Land Office and the Secretary of the Interior affirmed the finding, that "Burton was a practicing attorney, and the conversation," in which Burton claimed that Howe admitted facts tending to support this charge, "took place in his office after he had been engaged as attorney for Howe to advise him in the case then pending against him by prior contestants. Burton took advantage of the information obtained in his professional capacity, and based a contest upon the same and attempted to procure the cancellation of his client's entry for his own benefit."

Chester Howe was a practicing attorney at Oklahoma City. He was no relation to the entryman, Henry Howe, and, after Burton filed his contest against the latter, he employed Chester as his attorney, and the latter tried on February 17, 1891, before the register and receiver, and won for him the cases of Robb, Woodruff, and Burton against him. The decision of the register and receiver in favor of Howe was rendered on June 19, 1891. On May 20, 1892, the commissioner reversed that decision, and awarded the land to Woodruff. Howe and Burton appealed. Burton also moved for a review. The Secretary considered the entire case and all the evidence offered by Burton, Robb, and Woodruff upon the merits, and on February 3, 1894, decided that Howe was not disqualified by the acts and communications of his son and himself, and that his homestead entry was valid. Burton moved the Secretary for a review and a rehearing of his case on the grounds that each of the Secretary's findings of fact and rulings of law were erroneous, and that he had just discovered that Henry Howe and Charles Howe, who was at that time a violator of the Act of March 2, 1889, and had selected the tract in controversy prior to April 22, 1889, agreed in the presence of Emile Bracht and Watson Bracht that Charles should hold the land until after the hour of opening, that he should put Henry Howe in possession thereof, that he should furnish money to improve it and that he should receive a deed of half of it from Henry Howe, that Henry Howe told these facts to W. T. McMichael and Fannie McMichael, that Henry Howe entered the ceded territory on April 21, 1889, and that James Shaw and John Jones saw him. Burton supported this motion by his own affidavit and the affidavits of Emile Bracht and Watson Bracht to the agreement, of W. T. McMichael and Fannie McMichael that Henry told them that Charles Howe directed him how to reach the land, and of James Shaw and John Jones that they saw Henry Howe go into the ceded territory on April 21, 1889. But on October 22, 1894, the Secretary denied the motion and closed the case. Burton had subsequent opportunity to present the testimony of the witnesses named in these moving affidavits. Emile Bracht and Watson Bracht were subsequently sworn and examined, but they refused to testify to the agree-

ment between the Howes which they and Burton set forth in these moving affidavits. Burton did not avail himself of his opportunity to call as witnesses W. T. McMichael, or Fannie McMichael, or James Shaw, or John Jones. The bill avers that the affidavits of these witnesses were untrue, and the subsequent course of the record sustains the averment.

When Secretary Hoke Smith denied this motion for review and rehearing and closed the case in favor of Howe on October 22, 1894, the sooners ceased, but the informers pursued the chase. The old minister, while alive, had established his integrity, his veracity, and the validity of his entry. But he was dead. His heirs had indeed succeeded under Rev. St. § 2291 (U. S. Comp. St. 1901, p. 1390), to his rights, but the defense of those rights had fallen on his unmarried daughter, Sarah J. Howe, who still lived upon his homestead, and section 2 of the act of May 14, 1880, seemed to the informers still to offer the land to those who might prove the dead clergyman a violator of the law and a perjurer, and they swarmed forth to blacken his memory and seize the prize. On June 7, 1897, when Sarah J. Howe made final proof of her homestead, three of them, Parker, Norman, and Fakes, had filed affidavits of contest on the same grounds which had been proved baseless in the lifetime of Henry Howe in the cases of Burton, Robb, and Woodruff, and the register and receiver refused to receive and forward her final proof because none of these informers had moved for a hearing or proved his alleged case.

There is an averment in the bill that Chester Howe, the attorney of Henry Howe in the trial of the cases of Robb, Woodruff, and Burton against him, before the register and receiver on February 17, 1891, conspired with Milton E. Parker, the patentee, to file Parker's affidavit on February 18, 1891, the next day after that trial, that he concealed the fact of this filing from Henry Howe, his client, until March, 1893, when Henry discovered it and charged him with it, that Chester then replied that Parker's affidavit was filed at his request, and that Parker's contest was a friendly one and would be dismissed, but that Henry doubted this statement, discharged Chester Howe as his attorney, and employed J. H. Everest who thereafter conducted his case, and that of some of his heirs through the contests in the land office and is now the leading attorney for Parker and other defendants in this suit. Chester Howe is not a party to this suit, and this charge against him, if it were unsupported by the records of the land office and he had had no opportunity to meet it, should not receive much consideration here. But the copies of the records in the land office which are presented with the bill disclose these facts: Burton made some charge of this nature against Chester Howe. Chester then made an affidavit in 1902 that he married a half sister of one of the contestants of Henry Howe, that he called Henry into his office and suggested that he retire from the case, and that Henry employ some other attorney on account of that relationship and that Henry at his suggestion, and not at Henry's request and without any indication of dissatisfaction, made the change of attorneys, and that he, Chester, had no connection with the case of Parker from that time until May or June, 1898, when, aft-

er a statement had been made by Mr. Everest, the attorney for some of the heirs of Howe, and Mr. Dilley, the register, that there was no objection to that course, he argued for Parker the motion to dismiss the latter's contest which some of the heirs of Howe had made. But whether Chester retired from Henry's employment at his own or at the latter's request, the records conclusively show that he was Henry's attorney; that he must necessarily have learned through that confidential relation the facts and the law of his case; that he was on intimate friendly terms with Milton E. Parker; that the day after he tried Henry's case against Robb, Woodruff, and Burton Parker's contest affidavit was filed; that this affidavit of Parker made the charge of the disqualification of Henry Howe to enter the land which had been made in the amended contest affidavit of Burton and had been tried by Chester Howe the day before; that Chester remained attorney for Henry Howe until March, 1893, but made no move to dismiss, or to try, or to dispose of in any way, Parker's latent claim; that he ceased to be the attorney of Howe in March, 1893; and that when the first motion was made to dispose of Parker's contest in May or June, 1898, he carried the information and knowledge of the facts and of the law upon the issue which Parker tendered that he had gained as attorney for Howe to the side of the identical issue he had been retained to defeat and used it to sustain the charge the contestants urged. He succeeded in defeating the motion to dismiss Parker's contest, he prepared Parker's petition to intervene in Burton's contest, and, after the two contests were consolidated, he acted as Parker's attorney in Washington. The vice of so gross a breach of trust cannot be extracted, nor can so perfidious a course be rendered fair, just, or right by the absence of objection by local land officers, or the silence of its helpless victims. Henceforth in this case the first two attorneys of the old clergyman were united in an endeavor to prove that their dead client was a perjurer and a violator of the law, and that the cause they had formerly espoused was unjust and unlawful.

On June 7, 1897, Sarah J. Howe, as a part of her final proof, had filed her affidavit that Ed Howe of Atchison, Kan., Charles Howe of Atchison, Kan., Nora Howe, a minor, of Oklahoma City, O. T., Sarah J. Howe, of Oklahoma City, O. T., Bruce Howe, of Council Bluffs, Iowa, Arminda Howard, of Grand Forks, N. D., Della Sullivan, of Chicago, Ill., and Olive Howe, of Omaha, Neb., were the sole heirs of Henry Howe. On March 29, 1898, Parker suggested the death of Howe, and on that day and on April 12, 1898, filed affidavits for and caused the publication of a summons to the heirs of Henry Howe, whose names were not specified, signed by the receiver of the land office, to appear on May 24, 1898, and furnish testimony concerning Parker's allegation that Henry Howe had made an illegal homestead entry of the land in question. Parker caused publication of these summonses to be made once in each week for four weeks commencing on April 28, 1898. On April 9, 1898, Sarah J. Howe, Charles Howe, and Ed Howe moved to dismiss the charge that Henry Howe had made an illegal entry under a collusive agreement with his son Charles, upon the ground that the issue on that charge was rendered res ad-

judicata by the decision of the cases of Robb, Burton, and Woodruff in 1894. 18 Land Dec. Dept. Int. 31. But this motion was denied. Complainants alleged that no notice of the hearing or trial, or of the subsequent proceedings in this case, except the publication of the summons in the manner hereinbefore stated, was ever given to Bruce Howe, Arminda Howard, Della Sullivan, or Olive Howe, four of the heirs of Henry Howe, and that neither of them ever personally appeared, or authorized any one to appear for them, in any contest proceedings subsequent to the death of Henry Howe. The three heirs, Sarah J. Howe, Ed Howe, and Charles Howe, appeared in those proceedings by J. H. Everest, after they had specially appeared and challenged them and their motion had been dismissed, and J. S. Jenkins appeared as attorney for Nora Howe, the minor. Parker's contest case was tried between him and the four heirs who appeared in November, 1898, and on April 18, 1899, the register and receiver decided that Howe was disqualified to make his entry by his relations with his son, Charles, when he entered upon the land. Sarah J. Howe, Nora Howe, Ed Howe, and Charles Howe, appealed to the commissioner, and this appeal was pending when in June, 1900, Parker was permitted on his motion to intervene in the case of Burton v. Howe, in which a rehearing had been granted on March 6, 1900, and thereupon the contests of Parker and Burton were consolidated. Burton's case had been decided and subsequently his motion for a review and a rehearing had been denied on October 22, 1894, by Secretary Hoke Smith. A change of administration had followed, and Secretary Bliss had succeeded Secretary Smith. Thereupon Burton presented to Secretary Bliss on the same affidavits the same motion for a rehearing which Secretary Smith had denied on October 22, 1894, and on March 6, 1900, that motion was granted.

The consolidated contests of Burton and Parker then proceeded to another trial before the register and receiver, who on March 22, 1902, decided that Howe was disqualified, and awarded the preference right to the land to Parker. The four appearing heirs of Howe appealed to the commissioner, and on August 2, 1902, he reversed the decision of the register and receiver, and awarded the land to the heirs of Howe. From this decision Parker appealed, and on August 5, 1903, the Secretary decided that Howe was disqualified, and awarded the preference right of entry to Parker. Thereafter Howe's entry was canceled. Parker entered the land as his homestead. It was patented to him on June 21, 1909, and is now held by him and the other defendants, all of whom took their rights to it after full notice of the claims and equities of the heirs of Howe. The complainants have succeeded to the rights of Henry Howe. They have set forth in their bill all the evidence that was presented to the Secretary when he rendered his final decision, and they pray that the defendants be decreed to hold the lands in trust for them on the grounds that upon the facts established by the evidence without dispute the Secretary fell into clear errors of law applicable to the case which caused him to issue the patent to the wrong party, and that through fraud or gross

mistake he also fell into a misapprehension of the facts proved before him which had the same effect.

The history of this case has been recited at length because one of the issues it presents is whether or not there was any evidence before the Secretary of the Interior to sustain his final decision that Henry Howe had violated the prohibitions of the acts of Congress, and disqualified himself from making a homestead entry of this land. In the absence of all evidence, the legal presumption in his case, as in that of every other man, was that he obeyed the law, that he was upright, honest, and truthful. The charge against him was tried in his lifetime and found to be baseless. The record of the final trial contains both competent and incompetent testimony. Of course, the Secretary disregarded the latter and gave heed only to the former. And when, under such circumstances a court must decide more than 10 years after his death in the face of the legal presumption of his honesty and truth and in the face of his successful refutation of the charge in his lifetime whether or not there was any evidence that he violated the law and attempted to perpetrate a fraud upon his government, it is important that the court should see clearly in the beginning the true purpose and meaning of the law, the circumstances surrounding the original defendant, the character of the parties to the controversy, the nature of the charge, the motives that induced the informers to make it, as well as the evidence to which they resorted to accomplish their purpose.

[1, 2] Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and quasi judicial tribunal a question of law. Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; United States Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 151, 76 C. C. A. 114, 121; Laing v. Rigney, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; Southern Pacific Company v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; Delaware, Lackawanna & Western R. Co. v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213. And an injurious error of the Secretary in finally deciding that question presents good ground for relief in equity. The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure, the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue

a patent to the wrong party by an erroneous view of the law or by a gross mistake of the facts proved, or by a decision induced by fraud, the rightful claimant is not remediless. He may in a court of equity avoid the effect of the decision and the patent and charge the legal title derived from it with a trust in his favor. Lytle v. State of Arkansas, 22 How. 193, 203, 16 L. Ed. 306; Smelting Co. v. Kemp, 104 U. S. 636, 647, 26 L. Ed. 875; Moore v. Robbins, 96 U. S. 530, 536, 538, 24 L. Ed. 848; Bogan v. Edinburgh American Land M. Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130; United States v. Winona & St. Peter R. Co., 67 Fed. 948, 958, 15 C. C. A. 96, 106; U. S. v. Northern Pacific R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Cunningham v. Ashley, 14 How. 377, 14 L. Ed. 462; Barnard's Heirs v. Ashley's Heirs, 18 How. 43, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Johnson v. Towsley, 13 Wall. 72, 85, 20 L. Ed. 485; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152.

A complete copy of all the evidence before the Secretary at the final hearing is made a part of the bill in hand, and the first question to be considered is, Was there any evidence that Henry Howe violated the acts of Congress of 1889 and disqualified himself as a homesteader? What was the purpose of Congress in adopting these acts? Their primary object was to give the ceded land to homesteaders, who should settle upon and occupy it, and not to subsequent informers, who had never sought to enter or to live upon it. Their secondary purpose was to prescribe such a method of initiating the homesteads that all intending settlers would have a fair chance to make them.

[8] What were the prohibitions of the acts that Henry Howe was charged with violating? That no person should enter upon any part of the ceded lands prior to noon of April 22, 1889 (Act March 1, 1889, 25 Stat. 759, § 2), that no one should "enter upon and occupy" any of those lands before that time (Act March 2, 1889, 25 Stat. 1005, § 13, and President's Proclamation, 26 Stat. 1546), and they declared that any person who committed either of these forbidden acts should be disqualified from entering any of the lands as a homestead, and they contained no other prohibition, or declaration of disqualification. Moreover, the true construction of these acts is not that it was the intention of Congress thereby to disqualify, and they did not disqualify all who entered the ceded land between March 1, 1889, and noon of April 22, 1889, but that "one who took part in the race for the land on the day of the opening was not prohibited from taking land because of a prior entry into the territory unless it be shown that manifest advantage resulted to the entryman from his previous going into the territory." Potter v. Hall, 189 U. S. 292, 300, 23 Sup. Ct. 545, 549 (47 L. Ed. 817), and cases there cited. In other words, the only prohibition of the acts was of an entry into the territory or upon the land by the homesteader between March 1 and noon of April 22, 1889, which should be shown to have placed some other qualified entryman at a manifest disadvantage in the race to enter the land on the latter day.

What was Parker's charge against Howe? It was that Charles F. Howe, the son of Henry Howe, entered upon and occupied a part of the ceded lands prior to noon of April 22, 1889, "and by virtue of said settlement fraudulently and illegally settled upon and held possession of the above described tract" (the tract in controversy) "until some time in the afternoon of April 22, 1889, when he delivered possession of the same to said entryman, thereby giving said entryman an advantage, and preventing settlement and occupation of other and qualified settlers."

In the examination of the testimony these facts must be borne constantly in mind. This is a charge that Henry Howe disqualified himself from making this homestead entry by disobeying the acts of Congress, and no act or statement of Charles Howe which Henry Howe did not authorize or did not adopt as his own could disqualify him. The acts of Congress did not forbid the communication of information relative to the character, the location and the best way speedily to go from the lines of the ceded territory to each tract therein, nor did they prohibit any one from receiving such information, or disqualify any one from entering any of the lands who after their passage obtained such information from those who had acquired it before their passage. They did not disqualify any one who had entered the ceded territory, learned the character of the land and selected choice tracts for future lawful entry by themselves or others, and learned how to go to them from the lines of the land prior to March 1, 1889, from entering one of those tracts as a homestead, provided he entered the ceded territory from without and went to the tract and entered upon it as his homestead after noon of April 22, 1889. They did not disqualify one who entered the ceded territory and passed along the traveled routes through it from entering a part of the land as a homestead, provided he was outside the lines of the ceded land at noon April 22, 1889, and there was no proof that his prior entry upon the ceded lands resulted in manifest disadvantage to some qualified entryman. Potter v. Hall, 189 U. S. 292, 299, 300, 23 Sup. Ct. 545, 47 L. Ed. 817.

Now, let us turn in the light of these undoubted rules of law and of fact to the testimony before the Secretary. These facts were established without any conflict of testimony: Henry Howe was living at Manhattan, in the state of Kansas, in April, 1889, when he received from his son Charles a letter advising him to enter some of the land in the ceded territory as his homestead. Thereupon about April 16, 1889, he went from Manhattan on a railroad train through the ceded land to Purcell, a town south of the ceded land, and then in the Indian Territory, where he remained until after noon of April 22, 1889. He did not enter upon or occupy or see the tract in controversy on this journey, nor did his passage through the ceded land give him any advantage over other intending settlers in obtaining it. During his stay at Purcell his son Charles met and camped with him there a part of the time. The tract in dispute was about a mile and a half northeast of Oklahoma station. It had a grove on or near it,

and was the only tract in that vicinity that had a spring upon it, so that it was easily described and recognized. Charles was a photographer, and he went to Oklahoma station the last of January, or the 1st of February, 1889, became one of about 100 boomers who were seeking land about that station, and remained there until the acts of Congress of March 1st and 2d opening the land were passed, and went out of the ceded territory. Prior to March 1, 1889, he had learned all that he ever knew about the character, the location, and the best way to go to this land from Purcell. Prior to March 1, 1889, he had selected this land for a homestead claim, had commenced to make a dugout and had placed some logs upon it, but the dugout was destroyed by the soldiers, and he never occupied the land or made any mark or improvement upon it between March 1, 1889, and his father's entry upon it about 2:30 in the afternoon of April 22, 1889. During his stay with his father at Purcell before April 22, 1889, he so clearly described to his father the tract in question and told him so accurately how to go to it from Oklahoma station that Henry Howe could and did go directly to it from that station, recognize, enter upon and claim it as his homestead without need of any further direction or assistance. Henry Howe took the first train from Purcell on the afternoon of April 22, 1889, arrived at Oklahoma station about 2:10 p. m., walked directly to the tract, entered upon, and claimed it as his homestead. When he was about half way from the station to the land Charles met him and went with him to the tract, but his meeting and accompanying him gave Henry Howe no advantage or assistance, because the information that Charles had given him at Purcell was ample to enable him to go directly upon, to enter, identify, and claim it as his homestead. When Henry Howe arrived upon the land, the two sooners, Miss Robb and Mr. Woodruff, had already entered upon, staked, and claimed it for themselves, respectively, and there was no evidence whatever before the Secretary tending to show that any qualified entryman, except Henry Howe, ever sought or desired to enter this land, or was prevented or hindered by the entry or occupancy of Henry Howe, or by any other act of Henry Howe or Charles Howe from so doing on April 22, 1889, or at any time thereafter prior to Burton's perfidious filing of his contest affidavit on September 9, 1889. Between January 15, 1889, and March 1, 1889, there were about 100 boomers at Oklahoma station seeking land. Of this company were Charles Howe, Emile Bracht, Watson Bracht, Harry Bacon, George Sebastian, and Henry Ridenour. Each of them investigated the lands in the vicinity of that station and selected his claim or claims before March 1, 1889, and they agreed among themselves prior to that time not to take each other's claims, but to protect them. The testimony is conflicting whether the land here in question was known among them as the claim of Charles or as a claim he had selected for his father, but the proof is positive, and there is no evidence to the contrary, that after March 1, 1889, Charles made no mark or improvement on the tract, and neither he nor his father did any act to prevent any other person from taking it on April 22, 1889, before Henry Howe entered it at 2:30 in the afternoon of that day, and the fact that Miss Robb and Mr.

Woodruff had then entered upon and taken possession of it confirms the testimony of Charles Howe and Watson Bracht that Charles Howe did not mark or improve this tract after March 1, 1889. They testified that Charles selected another tract of land for himself, which cornered on the tract in dispute, that Bracht had selected a tract half a mile farther north, that they camped together at Purcell until about the 20th of April, and then returned to the vicinity of their claims where they concealed themselves until noon of April 22d, when they entered upon these tracts, respectively, claimed and commenced to improve them. They testified that Charles Howe did not between April 19th and 2:30 p. m. April 22d, enter upon, stake, or do any other act to hold the land entered by Henry Howe, and no witness came to testify that he did.

But Burton, Henry Howe's first attorney, after his contest had been decided against him in February, 1894, by Secretary Smith, in his affidavit for a review and rehearing which was made on March 14, 1894, about nine months after Henry Howe had died, swore that Henry Howe had shown him in March, 1890, a written statement of facts which Howe said was a true statement, that this statement was signed by Howe, and that after stating that Charles Howe, who was called "Doc" in the alleged statement, had given him specific instructions how to go to the tract so that he "could as well have gone there without him as with him"; that after he had gone a mile from the station he saw "Doc" 30 yards from him facing him; that "Doc" started off eastward and he followed him, but did not overtake him until they got within a few rods of the west line of the claim, proceeded in this way:

"Doc stopped to talk with a man who thought he had a flag upon the claim, but the line was a few rods east of where the flag was up. Then Doc and that man, a stranger, walked to the spring. Doc then went to a lady on horseback and pulled up his stake and read the name on it. Doc said she was Miss Robb, and that she pulled up 'my (Doc's) stake and took it away and put her stake in the same place that I had mine.' Doc then went four rods north and pulled up another stake and read the name, Frank Woodruff, and said, 'He is a sooner.' Doc then said, while standing on the rock near the spring, that he had been down there before those other stakes were stuck and stuck his stake with the intention of holding the claim, and Doc then said to me, 'Father, I will not try to hold this claim, but will see what I can do with my own.'"

Winn, a lawyer and partner of Burton, had also made an affidavit for Burton on March 10, 1894, that he was present when Howe presented that statement; that Burton copied it; that the copy was correct; and that the copy of Burton's copy in Burton's affidavit was correct. This old affidavit of Burton was fished out of the records of the Land Office at the final trial below and shown to Burton, and he then testified that he lost his copy of the original statement long ago, and that he cared nothing about it after he had made this affidavit. He was then asked if the purported copy in his affidavit was a true copy of the original, and, over objections, answered, "Yes, sir," and thereupon over objections Howe's alleged statement in this old affidavit of Burton was introduced in evidence. Winn was shown the alleged copy of Howe's statement found in Burton's old affidavit, and, after testifying that he did not know where the original or the copy of

it made by Burton was, was asked if the statement in Burton's affidavit was a copy of the original, and over objections answered that it was. Thereupon over similar objections the agreement in Howe's affidavit was introduced in evidence. It is clear that the testimony regarding this alleged statement of Henry Howe and the statement itself were not competent evidence (1) because the original of the agreement, if there ever was one, was not produced, no proof was offered that it was lost or that any demand for it had ever been made on the heirs of Henry Howe who Burton swore last had it, or that any search for it among them where it would be most likely to be found had ever been made; (2) because Burton and Winn could not lawfully first refresh their memories by reading an alleged copy of a copy of the original and then testify simply whether or not it was a true copy of the original, but they could lawfully refresh their memories only from memoranda made by them at the time the original was before them, and then could only testify orally from their recollection thus refreshed; and (3) because the purported statement of Howe was made by the decedent personally to Burton, then a party to the contest against him, and the adverse parties at the trial were the heirs of that decedent. Compiled Laws of Oklahoma, § 5841, p. 1263; Rev. St. U. S. § 858 (U. S. Comp. St. 1901, p. 659); Mather et al. v. Hackley's Heirs, 19 Land Dec. Dept. Int. 48, 57. The testimony concerning this purported statement of Howe therefore does not rise to the dignity of evidence and that statement should be disregarded.

If, however, it were conceded that this statement was evidence of the truth, it contains no evidence tending to disqualify Henry Howe. The proof is uncontradicted that at 2:10 p. m. April 22, 1889, Charles Howe had entered upon, occupied, and was claiming another tract as his homestead. Concede that he had been on Henry Howe's claim and placed his stake there before those of Robb and Woodruff were established, and Mrs. Wilkerson, formerly Miss Robb, testified that she found a stake there marked "Charlie Howe" two or three minutes after noon of April 22d, when she entered upon the tract. When did Charles Howe put that stake there? Not on April 22d, for Miss Robb was there two or three minutes after noon and Emile Bracht and Charles Howe both testified that Howe was not within one-third of a mile from that tract before 2 p. m. on that day, and that he never marked or improved that tract after March 2, 1889, and there is no evidence to the contrary. His stake and his intention to hold Henry Howe's tract were therefore prior to March 2, 1889, when the testimony is that he marked and started to improve it. And those acts could not disqualify Charles himself, much less Henry Howe, who, according to the evidence, had no part or lot in and knew nothing of this staking or holding until after he had lawfully entered upon the land. That they gave Henry Howe no manifest advantage over others in the race is demonstrated by the prior entries of Robb and Woodruff, by the fact that Charles Howe was a sooner and disqualified, and by the absence of any evidence that any qualified entryman was hindered by them. Charles Howe's removal of the stakes of Robb and Woodruff and his public declaration that he would not, and that his father might,

take the tract, were equally immaterial. He had no claim to the tract because he was disqualified by his soonerism and by the fact that he had already made and was maintaining a homestead claim to another tract. And the removal of the stakes of Robb and Woodruff had no effect whatever because their rights vested when they set those stakes and entered upon the land, and no subsequent removal of them by a stranger could destroy or diminish them.

The following testimony is also cited and relied upon as evidence of Henry Howe's disqualification:

Emile Bracht testified that before March 1, 1889, it was understood between him and Charles Howe that the land in controversy was to be occupied by his father; but the fact, if it were a fact, and Charles Howe testified that it was not, that Charles selected this tract for his father and started to build a dugout on it before March 1, 1889, could not disqualify his father from entering it because the latter did not enter in violation of the prohibition within the inhibited time. There is no evidence that he authorized or was aware of these acts of Charles which were all prior to his arrival at Purcell, and because selections and markings before the acts of March 1st and March 2d were passed, disqualified no one who complied with those acts after they were passed. Emile Bracht also testified that the boomers at Oklahoma station prior to March 2, 1889, agreed to protect each other's claims; that they kept no one off of the land in controversy on the opening day; that he and Charles Howe were together near the northeast corner of the N. W. ¼ of section 27, which is about a half a mile north of the S. E. ¼ of section 27, which is here in controversy, at noon of April 22, 1889, and that each then stepped onto the land he claimed and commenced to put up a tent; that Charles claimed the N. W. ¼ of section 27, and was not on the S. E. ¼, the land in question, that forenoon; that they stayed at their tents until the first train from Purcell whistled, about 2 o'clock p. m., and then Charles said he must go to meet his father and started south.

George M. Sebastian testified that it was about 14 or 15 miles from the east line of the ceded land to the tract in controversy; that he made the race from the east line on horseback to the quarter section half a mile north of the northwest corner of the land in dispute, and arrived there about 2 p. m.; that there were plenty of people there when he arrived, and that a man could ride on horseback from the east line to the land in controversy in from an hour and a half to two hours. He also testified that Henry Howe told him that Charles located him on his claim; that he was to meet him at the land, and did meet him about half way from the train to the land; that he went with him to the tract, and that Charles told him some time after the opening that he guessed he would give up his claim, but that he had his father located on one all right; that his father came in on the train and he met him about half way from the depot to the grove and took him up there and located him. F. M. Ridenour testified that in 1893 Henry Howe told him that he got off on the east side of the train and started in a northeasterly direction as near as he could to comply with the understanding he and Charles had as to the direction to get to the

claim in question; that it had been so minutely described to him that he knew he was on it before he was 50 yards from the west side; that he went on down the hollow to the spring; that after he had gone a mile or more from the station toward the land, or nearly to the grove, he saw Charles coming towards him, but he kept his direction straight ahead, when Charles turned and went and met him about the center of the grove. H. S. Summers testified that he was one of the boomers who were in Oklahoma three months before the opening; that they then all had claims picked out, and knew each other's claims and respected each other's rights, and were organized so far that they would not go on another man's claim; that he knew Charles Howe three months before the opening and Charles had selected the land in controversy as his claim; that he was with Charles at Purcell a week before the opening, and that he left Charles there, and that on April 24, 1889, he asked Charles why he did not go up to file, and he said that he did not have to go up; that he had got his father on his claim, and that he could take care of it for himself. Harry Bacon testified that he was one of the boomers; that some weeks before the opening the land in question was selected by Charles Howe and was generally known by the boomers to be selected for his father, Henry Howe, and Charles made improvements on the claim for his father; that he was a sooner and concluded he could not hold his claim about 2 in the afternoon of April 22d, and that he would go to town and get some town lots; that Charles Howe went with him, and, when about half way, Charles stopped suddenly and said he must go to meet his father; that he had made arrangements to meet him and show him the claim in question; and that the next time he saw him he said he got his father there all right. Charles Howe testified that he selected this land for himself prior to March 2, 1889, dug a hole in the bank and hauled some logs for a dugout, but that he never made any marks on it between March 2 and noon of April 22, 1889; and that he never kept any one from settling upon or laying claim to the land on or after that day. He testified that he learned all he knew about the land and the way to it prior to March 2, 1889, and that he so described it and the way to go to it to his father at Purcell between April 16 and April 22, 1889; that his father needed no further assistance to go to it and to identify it; that his father gained no assistance directly or indirectly by his presence on the ceded land between March 2 and noon of April 22, 1889; that he thought his father could comply with the law and secure this claim, and he could go in sooner and get a more valuable claim for himself, and so he left his father at Purcell and went into the ceded territory and near to the line of his claim, the northwest quarter of section 27, before noon of April 22d and just after noon entered upon it, claimed it as his homestead, and commenced to put his tent up; that about 2:15 p. m. he was walking to town with Bacon, saw his father go to his claim and went to and with him to it, but that he never told Bacon he had to meet his father to show him the land.

All the evidence that counsel claim tends to show a disqualifica-

tion of Henry Howe has now been recited. Much of it was contradicted, but we disregard all conflict and concede for the purposes of this decision that the statements of the witnesses against the heirs of Howe were true, but where in all these statements is there any evidence that Henry Howe was disqualified?

He was not disqualified by the acts of Charles Howe in selecting, staking, and improving the tract in controversy prior to March 1, 1889, (1) because those acts could not disqualify any person who made the race for the land from without the ceded territory after noon of April 22, 1889, and Henry Howe made that race in exact conformity to the acts of Congress; (2) because there is no evidence that he knew of or authorized those acts when they were done, or that he afterwards ratified them as his own; and (3) because those acts were not shown to have conferred any manifest advantage upon him or to have subjected any qualified entryman to any disadvantage in the race for the land.

He was not disqualified by his acquisition from Charles after April 15, 1889, and before April 22, 1889, of an accurate description of the land, and the way to go to it (1) because Charles acquired all that information prior to the passage of the acts of Congress and those acts contained no prohibition of the acquisition of such information or the communication of it, but their purpose was to spread such knowledge to all who desired to make homesteads on the land to induce them to do so; and (2) because such information gave Henry Howe no manifest advantage over other intending settlers who were free to acquire like information from all who had it.

He was not disqualified by the presence and acts of Charles Howe within the ceded land after March 1, 1889, and before 2 p. m. of April 22, 1889, (1) because the evidence is positive that during that time he made no mark or improvement on this land, and did no act to prevent, and no act that did prevent or hinder, others from entering or occupying the land after noon of April 22, 1889, there is no evidence to the contrary, and the verity of this evidence is demonstrated by the entries and occupancy of the land as a homestead by Robb and Woodruff immediately after noon of April 22, 1889; (2) because the law prohibited any intending settler from entering and occupying the tract between March 1, 1889, and noon of April 22, 1889, and no prevention of such entry and occupancy during that time could under that law have placed any intending settler at a disadvantage or given any intending settler an advantage; and (3) because there is no evidence that Henry Howe derived any advantage, or that any qualified entryman suffered any disadvantage, in the race from the presence or acts of Charles Howe during this time, and there is affirmative proof to the contrary both in direct testimony and in the established facts that Robb and Woodruff entered and occupied the tract before Henry Howe arrived upon it.

He was not disqualified because Charles Howe agreed with him at Purcell after April 16 and prior to April 22, 1889, that after he should arrive at Oklahoma Station Charles would, and he did, meet him and conduct him to the land, (1) because the evidence is positive and un-

contradicted that that meeting and conduct gave him no aid or advantage in the race; that prior to March 2, 1889, Charles Howe acquired all he ever knew about the land and the way to go to it, and after April 16, 1889, and before April 22, 1889, out of that store of information described to Henry Howe the tract so graphically and the way to go to it so accurately that Henry could go to it as directly and identify it as readily without as with the meeting and conducting; (2) because the only effect of the agreement to meet, of the meeting, and of the conducting was to communicate to Henry Howe information about the location and the best way to go to the land which Charles had acquired prior to March 1, 1889, and which he might lawfully communicate and Henry Howe might lawfully receive without disqualification; (3) because the evidence is positive and uncontradicted that Charles was not sent into the ceded land by his father prior to April 22, 1889, to meet or conduct him, but that he went on his own motion to enter and claim another tract of land for himself; and (4) because there is no evidence that any qualified entryman or intending settler suffered any disadvantage or that Henry Howe obtained any advantage from this agreement to meet, the meeting, or the conducting, but there is positive evidence to the contrary and undisputed proof that Miss Robb and Woodruff entered and occupied the land after noon of April 22, 1889, before Howe, that equestrians could have reached it from the east line of the ceded land between noon and 2 in the afternoon, and that Howe did not arrive upon it until about 2:30 in the afternoon of April 22d.

There is no evidence that he is disqualified in any other way. All the evidence in this case has been read and reread, analyzed, digested, and searched by each of the members of this court. All of it that is material has been recited and reviewed here to the end that its character and effect might be clearly perceived, and for the reasons which have now been stated at length this court is unanimously of the opinion that there was no evidence before the Secretary of the Interior or the officers of the Land Department at the final trial there of the fraud or disqualification of Henry Howe, and that the Secretary in the press of his official duties unwittingly fell into an error of law when he failed to so hold and to give to Henry Howe his patent upon that ground.

In Smith v. Townsend, 148 U. S. 490, 497, 13 Sup. Ct. 634, 37 L. Ed. 533, the Supreme Court declared that the acts of Congress under consideration here were not penal statutes, and that the portions which described the disqualifications for entry should be liberally construed in order that no one be permitted to avail himself of the bounty of Congress unless evidently of the classes Congress intended should enjoy that bounty. But in the case at bar the attempt is to extend the disqualifications to a new class of persons and acts not specified in the statutes and to punish with disqualification an entryman who falls clearly within the qualified classes described in the statute because he is alleged to have violated prohibitions and incurred disqualifications which the acts of Congress do not contain. Because any extension of the disqualifications prescribed by these acts to classes not there

clearly specified has the like effect as the extension of a penal law to persons and acts not within its terms, the prohibitions and disqualifications of these statutes should be interpreted by the familiar rule that, where the statute is before the event plain and unambiguous, the courts may not lawfully extend it to a class of persons who are excluded by its terms, nor by interpolation or construction after their commission make acts violations thereof which were not clearly such by the expressed will of the legislative department when they were done. United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37; United States v. Germaine, 99 U. S. 508, 510, 25 L. Ed. 482; United States v. Ninety-Nine Diamonds, 72 C. C. A. 9, 12, 13, 139 Fed. 961, 964, 965, 2 L. R. A. (N. S.) 185; Martin v. United States, 168 Fed. 198, 202, 93 C. C. A. 484, 488; Field v. United States, 137 Fed. 6, 8, 69 C. C. A. 568, 570; United States v. Clayton, Fed. Cas. No. 14,814; In re McDonough (D. C.) 49 Fed. 360; Maxwell v. State, 40 Md. 293; Alexander v. Worthington, 5 Md. 472; Smith v. State, 66 Md. 215, 7 Atl. 49; Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Lake County v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13; St. Louis Merchants' Bridge T. Ry. Co. v. United States (C. C. A.) 188 Fed. 191, 193. The actual decisions of the Supreme Court are in accord with this construction. That court has never extended, but has restricted, the expressed disqualifications. By the terms of the acts any one who entered the ceded land between March 1 and April 22, 1889, was disqualified, but the Supreme Court has held that one who entered on or passed through the ceded land during the inhibited period was not disqualified if on the day of the opening he made the race for the land from without and his prior entry was not shown to have given him a manifest advantage. Potter v. Hall, 189 U. S. 299, 300, 23 Sup. Ct. 545, 47 L. Ed. 817. Howe passed through the ceded lands on a railroad train about April 16, 1889. But he never otherwise entered upon or occupied any of them prior to 2:30 in the afternoon of April 22, 1889. He did not violate any express prohibition of the acts nor incur any express disqualification thereof. He acted, he was compelled to act, under the statutes as they read in 1889, without the benefit of subsequent interpretations, and they ought not now to be construed to disqualify him for acts which they did not then plainly forbid.

In reality the charge against the old entryman was that he attempted to defraud his government of this land, a charge that clear proof alone could sustain. That charge was founded in and carried through the Land Department by the avarice, zeal, and perfidy of those whom he had retained to defeat it. They raked together and produced a volume of testimony and records, but no evidence to sustain the charge that Charles F. Howe "fraudulently and illegally settled upon and held possession of the above described tract until some time in the afternoon of April 22, 1889, when he delivered possession of the same to said entryman, thereby giving said entryman an advantage and preventing settlement and occupation by other and qualified settlers," none that Henry Howe ever defrauded or attempted to defraud his government, and we find no fault in him.

[3] Henry Howe died on June 17, 1893, and his right to his homestead was then granted to his eight heirs by section 2291 of the Revised Statutes. Burton's case against Howe had been tried and was pending before the Secretary, and on February 13, 1894, he decided it in favor of Howe, and on October 22, 1894, he denied Burton's motion for a review and a rehearing and closed the case. Howe and his daughter had lived upon and occupied the tract more than five years when this motion was denied. Conceding the general jurisdiction of the Land Department over the disposition of the tract in question thereafter until patent, and that the successor of Secretary Smith had the same power to review and rehear Burton's case that his predecessor had, nevertheless the equitable title of these heirs to this land had then vested in them by reason of their father's adjudicated entry and the requisite occupation and improvement thereof for five years. The officers of the Land Department had jurisdiction to divest that equitable title for fraud by proceedings and decisions according to law after legal notice to all the heirs and an opportunity for them to be heard upon the charges made against them, and not otherwise. Neither the general jurisdiction nor the supervisory power of the commissioner, or of the Secretary is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order, and the uniform application of the established rules and practice of the department to all litigants alike are as essential to the administration of justice in the Land Department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard. Germania Iron Co. v. James, 89 Fed. 811, 817, 818, 32 C. C. A. 348, 354, 355; James v. Germania Iron Co., 107 Fed. 597, 602, 46 C. C. A. 476, 481; Shreve v. Cheesman, 69 Fed. 785, 792, 16 C. C. A. 413, 419; Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Love v. Flahive, 205 U. S. 195, 199, 27 Sup. Ct. 486, 51 L. Ed. 768.

[4] In 1898 it was a rule of reason of law and of property established by a long line of decisions of the Secretary of the Interior and subordinate officials that an adjudication by the Land Department after trial without collusion between the parties that a charge made by an informer against an entryman was unfounded was a bar to a contest against the latter by another informer on the same charge. Parker v. Gamble, 3 Land Dec. Dept. Int. 390; Reeves v. Emblen, 8 Land Dec. Dept. Int. 444, 445; Samuel J. Bogart, 9 Land Dec. Dept. Int. 217, 218; Busch v. Devine, 12 Land Dec. Dept. Int. 317; Gray v. Whitehouse, 15

Land Dec. Dept. Int. 352; Ferguson v. Daly, 14 Land Dec. Dept. Int. 245, 247; Joseph A. Bullen, 8 Land Dec. Dept. Int. 301, 303; George F. Stearns, 8 Land Dec. Dept. Int. 573, 576; Gage v. Lemieux, 8 Land Dec. Dept. Int. 139; Drury v. Shetterly, 9 Land Dec. Dept. Int. 211; United States v. Alexander, 11 Land Dec. Dept. Int. 507. The Secretary fell into a controlling error of law when he disregarded this rule and sustained the denial by the register and receiver in April, 1898, at a time when the case of Burton stood, and had stood for more than three years, adjudicated and closed against him, of the motion of some of the heirs of Howe to dismiss the charge of collusion and agency in the contest affidavit of Parker on the ground that it was the same charge, as it was in fact, that had been made by Burton and, after trial on the merits, had been adjudicated in favor of Howe. In Brooks v. McBride, 35 Land Dec. Dept. Int. 441, 443, Secretary Hitchcock himself, after stating that former adjudication could not be pleaded as a bar to the jurisdiction of the Land Department to re-examine and to inquire into any question affecting the right to the public lands when necessary to protect the rights of the government or of parties seeking to acquire title thereto, said: "The Department will, however, apply the doctrine of former adjudication as an equitable bar between parties to a controversy who are seeking to acquire title to the public land, where equity and justice demand it, and to prevent vexatious litigation." Where did equity and justice ever demand it more forcibly, where was it ever more necessary to prevent vexatious litigation than in the case in hand? The Land Department had previously repeatedly applied it in such cases. The opposite rule which the officers followed renders it impossible for a homesteader ever to procure title to a tract of land which rapidly increases in value after its entry because under it successive informers in turn may make and try the same charge against him until time shall be no more. The case in hand well illustrates the error and injustice of such a ruling. It was about five years after Howe's entry before the contest of the first informer, Burton, was decided against him by the Secretary. Then Parker pressed the same charge, and it was about 14 years after Howe's entry when the Secretary sustained it. It is perhaps fortunate for the heirs of Howe that he did so, for, if the Seeretary had decided in their favor, his decision would have been of no benefit to them under this ruling, for there were at least three more informers waiting to try this charge against them in turn and doubtless many more would have followed. The reasonable rule, the established rule of law and of property on this subject was that applied in the cases cited above, and it was error to refuse to apply it to this case.

[5] Legal notice to, or the authorized appearance of, each of the heirs of Howe in the subsequent proceedings after the death of their father was indispensable to the requisite jurisdiction of the Land Department over the persons and property here in question to enable it to divest or affect the equitable title or rights of the heirs to this land. The complainants allege that Burton by false statements and affidavits that newly discovered evidence had been found by him and by deceiving a subsequent Secretary into the belief that Charles

Howe's deposition had not been considered by Secretary Smith when he decided Burton's case, procured a rehearing of that contest from a subsequent Secretary about six years after a like motion on the same affidavits had been made before and decided adversely to him by the former Secretary in 1894, and that all this was done after the death of Howe without notice to his heirs of the motion or of the rehearing thereon. There is in the record an affidavit of Burton that he served his motion papers on Eugene Everest, and that Eugene was attorney for Sarah Howe, the administratrix and the heirs of Howe, and there is a written acceptance of service signed by "J. H. Everest, Atty. for Sarah J. Howe, Ed Howe and Chas. Howe, a part of the heirs of Henry Howe, dec'd." But the statement in an opinion of an officer or on a pleading or other paper by an attorney that he appears for a party or the affidavit of the opposing party that he served a notice on the attorney for a party in a case in which the question of the attorney's authority is not questioned or litigated is insufficient to overcome the positive averment of the party himself in a direct proceeding to question the authority that he had no notice and did not appear in the case, and the record in this case fails to satisfy that the averments of the bill in regard to this motion are not true and material. A denial at least is requisite to meet them and to avoid the serious results to which they lead.

The complainants also alleged that they were not legally notified, that five of them never appeared or took any part in the proceedings in Parker's contest, and that the other three appeared only after their special appearance and challenge of the proceedings was overruled. The records of the Land Department disclose the fact that Parker instituted proceedings to obtain service on the heirs of Howe by publication, but that he failed to do so because the notice was not first published "at least thirty days prior to the day fixed for the hearing" as required by rule 13 of the Department (31 Land Dec. Dept. Int. 530), which was in force in 1898. Counsel for the appellees insist that all the heirs of Howe appeared in the subsequent proceedings in those cases, and they call attention to various places in the record where attorneys before the commissioner and the Secretary signed their briefs "Attorneys for Defendants" and "Attorney for the heirs of Howe," and the places in the record and in the opinions of officers where there are recitals that counsel for the defendants or counsel for the heirs of Howe took some action. All these recitals, however, were made in the absence of any question of the authority of these attorneys, and they are certainly not sufficient to overcome the positive averment of the bill that the heirs Arthur Bruce Howe, Della Howe Sullivan, Ollie Howe Cole, and Minnie Howe Howard never received notice and never appeared in any of the proceedings in these cases after 1894. Support for this allegation is derived from the fact that the record shows that in the commencement of the proceedings after 1894 Mr. Everest, who conducted the trial, expressly limited his appearance to an appearance for "Sarah Howe, Ed. Howe and Chas. Howe, a part of the heirs of Henry Howe," and that he appeared specially for them to oppose proceedings on the ground that jurisdiction had not been obtained over

all the defendants. There are other places in the record where he limits his appearance to one for these three heirs and none where he expressly appears for the four who have been mentioned. After proceedings had been instituted and were proceeding, it was not unnatural for attorneys to sign for the defendants or for the heirs of Howe, relying upon the limitation in their first appearance to determine what defendants and what heirs they represented.

Attention is called to an averment in the bill that these four heirs conveyed their interest in the land to Sarah J. Howe between June 7, 1897, and July 30, 1908, when she died, but there is nothing in the bill to show that they conveyed this interest before the final decision in favor of Parker in 1903, and the averment that the Land Department never acquired jurisdiction of the four heirs mentioned must be sustained until it is denied by answer or by proof. Whether or not the averments of the bill are sufficient to overcome the recitals of appearance of the other four heirs is immaterial now and is reserved for consideration and determination, if that should be necessary, after the hearing on the merits.

The case presents other questions of law, but none which will become material if the views already expressed are sustained by the evidence at the hearing, and it is unnecessary to prolong this opinion by discussing them. The bill states a good cause of action in equity, and the decree below is reversed, and the case is remanded to the Circuit Court, with directions to permit the defendants to answer

---

PELTON WATER WHEEL CO. v. DOBLE.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1911.)

No. 1,970.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HYDRAULIC NOZZLE.
The Doble reissue patent, No. 12,460, for an improvement in nozzles for impact water wheels, was not anticipated, covers a true combination, and discloses patentable invention; also *held* infringed.

2. PATENTS (§ 26*)—PATENTABLE COMBINATIONS—ESSENTIALS.
It is not necessary to constitute a patentable combination that each element in performing its own function shall also modify the function performed by the others, but it is generally sufficient if there be such coaction that a result is produced which is new, and the result is new if it is substantially a better result than that which has been accomplished by other combinations.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

3. PATENTS (§ 26*)—PATENTABLE COMBINATIONS.
That there is novelty in one of the elements does not justify a claim to a patentable combination of the elements, unless there is coaction be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tween them to produce a new result, but a combination is not unpatentable merely because the result might have been accomplished by other combinations.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit in equity by May E. Doble against the Pelton Water Wheel Company. Decree for complainant (186 Fed. 526), and defendant appeals. Affirmed.

N. A. Acker, Wm. F. Booth, and Frederick S. Lyon, for appellant.
John H. Miller and William K. White, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. [1] This appeal brings under review the interlocutory decree of the Circuit Court granting a perpetual injunction against the further infringement of the eight claims of reissue letters patent No. 12,460, granted on February 27, 1906, to William A. Doble for an improvement in "nozzles for impact water wheels." The suit was brought by the appellee as owner of the patent against the appellant as the infringer thereof. Infringement is not denied. The defenses of the appellant in the court below and here are want of invention, anticipation, and that the patent covers a mere aggregation of elements, and not a true combination. The purpose of the invention is to make more sensitive and place under instant control the water jet directed under high pressure upon the buckets of a tangential water wheel. The evidence shows that in operating that class of water wheels, especially those used in driving electric generators, the load upon the wheel varies from time to time due to an increased or lessened use of the electric current through the system supplied by the power plant, the result being that, if the load on the wheel is suddenly reduced and the jet of water is not simultaneously reduced in volume or partly deflected off the buckets of the wheel, the wheel will rotate at too great a rapidity, or, if the load upon the wheel is suddenly increased and the jet of water is not at the same time increased or turned more directly upon the buckets, the wheel will slow down. There are other causes of variation, and it becomes essential that the speed of the generator shall remain as near constant as possible. Economy in the use of water also enters into the problem. There can be no doubt of the value of the appellee's invention. Its value is conceded in the evidence. It has gone into general use, and it has superseded all prior combinations. The evidence is convincing that it does, in practice, instantly deflect the jet either from or to the buckets, according to the variation of the load, and that it embodies means for varying the volume of the jet so as to secure economy in the use of the water. Figure 1 is a plan view, and figure 2 is a side

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

view, of the nozzle, which is the distinguishing feature of the Doble invention.

Fig. I.

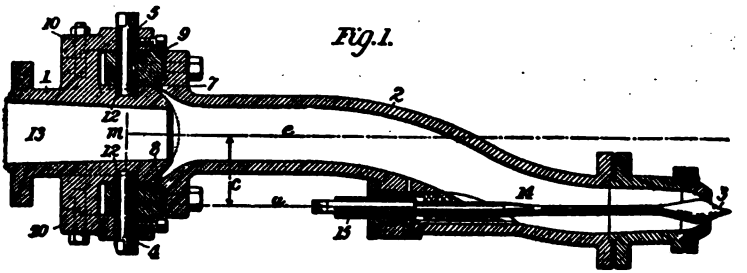
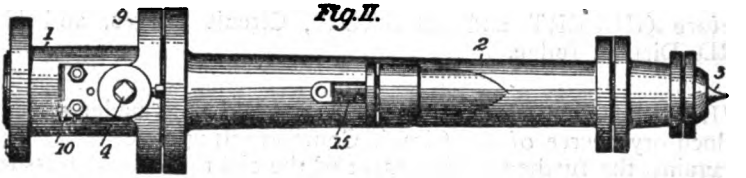


Fig. II.



In both these views 1 is the water supply pipe, and 2 the curved nozzle provided with the needle valve, 3. The nozzle is pivoted to the supply pipe in the plane of the nozzle's sinuosity. It is curved so as to permit the insertion of the stem 14 of the needle valve 3. The needle valve stem in extended through the nozzle casing in order to permit the use of external means for moving the needle valve back and forth. In order to permit the insertion of the needle valve, it is apparent that the nozzle must be curved, but in the use of a curved nozzle there necessarily results a reactive force from the outer curve, tending strongly, and proportionately to the pressure of the jet, to turn the nozzle in the opposite direction. Said the patentee in his specifications:

"The nozzle illustrated is drawn from an example intended for a pressure of eight hundred pounds per inch of area, and a jet two inches in diameter would produce a reactive force of more than two thousand five hundred pounds, which would produce a turning strain if there was a vertical axis at right angles to the axis in figure 1. * * * I overcome this by placing the pivot pin at right angles to the line of discharge from the supply pipe, and in the plane in which the nozzle is bent."

This last sentence discloses the distinctive feature of the appellee's patent. Curved nozzles with needle valves had been used before, but they had always been hinged to the supply pipe at right angles to the plane of the nozzle's curvature. Sometimes the curvature was downward and sometimes upward, but in either case the jet struck the curve creating a strong reactive force which tended to turn the nozzle upward or downward on the axis in accordance with the direction of the curve. Various devices were resorted to to overcome this. In some cases heavy counterbalancing weights were used, but, as the force of the jet was variable, there was nearly always a considerable resistance or inertia to be overcome by the governor, resulting in

slowness of deflection of the nozzle from or to the buckets of the wheel, and want of sensitiveness and responsiveness of the jet to changes of pressure on the generator. To overcome this, Doble conceived the idea of turning the nozzle so as to place the axis in the plane of the nozzle's sinuosity.

It is urged that the addition of this feature to the combination does not show invention; that it was to do the obvious thing, that which any mechanic would have done when called upon to remedy the known defects of prior devices. To this it is to be said, among other things, that although the defects of the nozzles which had been in use for many years prior to Doble's invention were well known and recognized, and mechanics and engineers had been called upon to remedy them, no one prior to Doble thought of the simple expedient of changing the axis of the pipe from the horizontal to the perpendicular. That one step in the art marked success in the combination. It was obvious that the reactive force in a curved nozzle could be counterbalanced by counterweights, and that, if the force were constantly uniform, it would be possible to adjust the weights so nicely as to counterbalance the same perfectly, and render the nozzle sensitive to the deflecting force of the governor. But the use of the needle valve made such counterbalancing impracticable, for the reason that the needle valve was intended to control and reduce the stream when occasion demanded, and with the reduction of the stream there was a corresponding reduction of the reactive force, and consequently a heavy weight to be overcome by the governor. The use of the needle valve in the combination, therefore, created the problem which confronted the engineers and those skilled in the art, and which, for several years, they endeavored to solve. The problem was submitted to two engineers of the Risdon Iron & Locomotive Works, to George J. Henry, the engineer of the appellant, and to the engineer of the appellee. The result of their efforts was the construction of two or three devices. One was a straight nozzle inside of which was a flexible needle valve. Another was a nozzle with a stationary needle valve, relative to which the nozzle itself was made movable by means of a sliding tip. Mr. Henry in his testimony admitted that at that time the solution of the problem was not obvious. In the year 1902 Doble, the inventor of the Doble patent, constructed and installed for the Santa Ana Water Company two nozzles, pivoted in the plane of the nozzle's curvature. These were the first that were designed and used under his invention. Henry, the engineer of the appellant, saw this nozzle in use, and conceived the idea of an improvement upon it by adding a reactory support mounted upon its own pivot in the plane of the pivot of the nozzle itself. For this improvement he applied for a patent on June 3, 1903. Doble filed his application on October 17, 1903, and his patent was issued on February 9, 1904. A week later he filed an application for a reissue. On May 6, 1905, Henry, upon the suggestion of the Patent Office that he insert in his application claims sufficiently broad to cover the invention disclosed in his drawings, amended his claims so as to cover the Doble invention as his own. Interference was declared, and the result was that Doble was ad-

judged to be the original and first inventor of the nozzle covered by the patent here in suit. The cost of prosecuting Henry's application for a patent and the costs of the interference proceedings were paid by the appellant, pursuant to a general agreement which they had with Henry, their chief engineer.

While these facts are not sufficient to estop the appellant to deny that the appellee's combination involves invention, they may properly be considered as tending to show that at that time the appellee and its engineer deemed the improvement patentable. While it seems a very simple matter to overcome the reactive force of the jet with reference to the governor by changing the plane of the nozzle, the question of the invention involved in a combination of which that is an element should be regarded as it appeared to those who were skilled in the art who were called upon to deal with the problem, rather than in the light of its subsequent solution. All nozzles with needle valves theretofore used had been made in a curved form, and had been hinged at right angles to the curvature, with the needle valves so inserted as to be operated from a point outside the nozzle. The defects of that construction were well known. The problem of their correction was submitted, not to mere mechanics, but to the most skillful engineers in the art. After a period of some three years of experiment and investigation, Doble solved the problem, and his combination went into immediate and general use. In view of all these facts and the presumption arising from the issuance of the patent, we think the court below did not err in finding invention in the appellee's combination.

It is earnestly contended that there is to be found in the prior art a full and complete anticipation of each of the claims of the patent sued on. The nozzle principally relied upon as showing anticipation of the Doble nozzle is that which is designated in the record "Exhibit 11." It was installed by the appellant in 1896 at the Mill Creek plant No. 1 of the Redlands Electric Light & Power Company. It is a symmetrical nozzle, having two curved branches for the purpose of dividing the stream which issues from the supply pipe, and distributing it in the form of two jets upon the respective buckets of two wheels mounted upon a single shaft. The pivot of the nozzle is in the plane of the curves of the two branches thereof. To understand the value of this device as showing anticipation, it is important to consider its history and the circumstances under which it was installed. Prior to 1896 the head of water at the place where it was installed was 366 feet. There were in use two independent water wheels on a single shaft. Each wheel was driven by two jets issuing from a deflecting nozzle provided with two tips. Each nozzle was pivoted to the pipe line by a ball joint. In 1896 the head of the water was increased to 530 feet. Two jets were no longer required to operate each of the wheels, consequently the nozzles were changed for the purpose of adaptation to the increased head of water. The discharge pipe was placed midway between the wheels, and a single nozzle with branches curved laterally was pivoted thereon. There was no needle valve in either of the nozzles, as the head of water was uniform, and there was no occasion to exercise economy in the use of the water. As to the

reason why this particular form of nozzle was used, there is some conflict in the testimony. The witness Hagmaier, who was the engineer who installed the nozzle for the appellant, testified that the end in view in installing the nozzle was to overcome the reactive force of the jets issuing from the tips. This testimony is not in harmony with the proven facts, and we agree with the court below that it should not be credited. The evidence plainly indicates that the change in the nozzle was made for the reason above indicated, that, the pressure of water having been greatly increased, one jet was sufficient, and two jets were no longer needed to run each wheel. There was but one problem before the engineer, and that was the most practical method to distribute a stream issuing from a single pipe upon two water wheels mounted upon the same shaft. He adopted the simplest method of doing this. He used a nozzle with two branches. Necessarily the branches had to be curved and curved outwardly. Necessarily, also, the nozzle was pivoted in the plane of the curvature of its branches.

But it is said that by the use of that nozzle the reactive force of the water jets was counterbalanced. This is true. The reactive force in each jet counterbalanced the force in the other, so that no reactive force was perceptible. But it does not follow that Hagmaier was the inventor of an improvement which anticipates that element of the appellee's patent, or that he conceived the basic idea which was subsequently embodied therein. The question of counterbalancing a reactive force in a nozzle was not presented to him. It did not exist in the nozzles which were replaced by the installation of Exhibit 11, for the pressure had been constant, there had been no means of varying the volume of the jets, and the reactive force had been counterbalanced by fixed weights. The construction and use of Exhibit No. 11 would not in itself have the effect to suggest either the existence of reactive forces or their remedy. Such forces were not obvious, for they were in equilibrium. That nozzle never went into general use. None has been made in the last ten years, and only four were ever made.

Nor is the appellee's combination anticipated by the drawing shown in defendant's Exhibit No. 2, a drawing unaccompanied by text or description, and found in Bulletin No. 9, California State Mining Bureau. It shows a straight nozzle with a chamber for the mounting of the bearings of a needle valve stem. The nozzle is attached to a curved elbow whereby it is connected to the supply pipe which is curved upward so as to meet the elbow. The nature of the joint between the supply pipe and the elbow is not clearly indicated in the drawing. It appears to be a rotatable joint. If it is such a joint, it permits the lateral deflection of the nozzle from the water wheel, but it does not present a nozzle pivoted in the plane of its curvature. Nor is it pivoted in any other plane, unless it is said that it is pivoted in the plane in which it rotates, and in that case the plane is at right angles to the curvature of the nozzle. There is nothing in the drawing to suggest the solution of the problem of overcoming reactive force in the nozzle, and there is no proof in the evidence that any

nozzle was ever used or even constructed, or could have been made to operate in accordance with the drawing.

Several patents were exhibited for the purpose of showing the prior art, but they are so plainly variant from the appellee's combination as to require no discussion. The patent to S. Adams of February 7, 1871, shows a straight nozzle secured to a rubber hose which is connected to a curved pipe, which, in turn, is connected by a rotatable joint to the supply pipe. The patent to Hendy and Loveridge of November 27, 1888, shows a straight nozzle attached to an elbow, and the elbow attached to the pipe by rotatable joint. The Richardson patent of March 17, 1896, has a straight nozzle pivotally supported and connected with a supply pipe. The Bookwalter patent of December 17, 1895, shows a curved nozzle connected to the pipe by a rotatable joint. The friction at the point of juncture is regulated by a perpendicular bolt fastened through the nozzle and pipe and through a coiled spring above the pipe. There is no needle valve, and the plane of deflection of the pipe is at right angles to the curvature of the nozzle. The Crawford patent shows a straight nozzle connected to the pipe by a ball and socket joint, with no valve or other means of regulating the jet.

[2] It is contended that the claims of the Doble patent cover a mere aggregation of elements, and not a true combination. An aggregation is the mere assembling of separate elements without changing their respective separate functions or accomplishing any result other than the added results of those functions. In order to be patentable, a combination of elements must in their co-relation produce a different force, or effect, or result, from the sum of that which is produced by their separate parts. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719. It is not necessary that each element in performing its own function shall also modify the function performed by the others. Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241. It is generally sufficient if there be such coaction that a result is produced which is new, and the result is new if it is substantially a better result than that which has been accomplished by other combinations. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

[3] The fact that there is novelty in one of the elements, as in the present case in the change of the plane of the nozzle pivot, does not justify a claim to a combination of the elements, unless there is coaction between them to produce a new result, and a combination is not unpatentable merely because the result might have been accomplished by other combinations. The claims of the patent in suit cover a hydraulic apparatus consisting of an impact wheel with buckets, a nozzle pipe of double curved form for directing a stream of water upon the buckets, means for varying the amount of water discharged from the nozzle, and a supply pipe to which the nozzle is pivoted on an axis in the plane of its sinuosity, and substantially parallel to the axis of the wheel. We think there can be no question that the elements so described co-operate to produce a single result, which is the perfect regulation of the jet, together with the greatest practical economy of water. The means for varying the amount of water discharged

from the nozzle is the needle valve, and this not only controls the volume of the jet, but through the action of the governor it also controls the direction of the jet. The nozzle pivoted to the pipe line in a plane at right angles to the plane of its curvature renders the nozzle sensitive to the deflecting power of the governor. The result is a successfully working combination, one that marks a distinct improvement upon any prior combination. This result would not be produced by the elements in their separated state, or as assembled in a mere aggregation without co-operation and functional relations to each other. In the oral argument counsel for the appellant laid stress upon the fact that the needle valve does not act automatically, and contended that the necessity for manual operation thereof to increase or decrease the flow of water through the nozzle indicates lack of coaction of all the elements of the patented combination. It is the opinion of the court, however, that this is not a reliable test of a patentable combination applicable to this case, since the needle valve does by its action, in the combination, contribute to the production of the desired result.

We find no error in the decree of the court below. It is accordingly affirmed.

KRYPTOK CO. v. STEAD LENS CO.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1911.)

No. 3,584.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 954*)—REVIEW—PRELIMINARY INJUNCTION.

The granting of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not departed from them its injunctional orders may not be reversed without clear proof of an abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. § 954.*]

2. INJUNCTION (§ 26*)—ENFORCING LAWFUL RIGHTS—WHEN ENJOINED.

One may not be enjoined from protecting and enforcing his rights by lawful means, unless his acts to that effect are done or threatened unnecessarily, not really for the purpose of protecting his rights, but maliciously to vex, annoy, and injure another.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49; Dec. Dig. § 26.*]

3. INJUNCTION (§ 23*)—COMPARATIVE INJURY ON GRANT AND REFUSAL CONSIDERED.

It is a good defense to an application for an injunction that the wrong and injury likely to be inflicted upon the opponent of the application by its issue will probably be greater than that which the applicant is likely to suffer from its denial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 22; Dec. Dig. § 23.*

Consideration of comparative injuries to plaintiff and defendant in determining right to injunction, see note to McCarthy v. Bunker Hill & Sullivan M. & C. Co., 92 C. C. A. 276.]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PATENTS (§ 327*) — DECREE AGAINST MANUFACTURER NO BAR TO SUITS AGAINST RETAILERS PURCHASING FROM HIM.

The owner of a patent cannot recover in a suit against a manufacturer of an infringing article which the latter sells to retailers all the relief to which he is entitled in suits against the latter and a suit or a decree for an injunction, gains, profits and damages against the manufacturer is no bar to suits for infringement against those who purchase from him and use or sell the infringing article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. § 327.*]

5. INJUNCTION (§ 26*)—SUITS AGAINST RETAILERS NOT ENJOINED ON ACCOUNT OF SUIT AGAINST MANUFACTURER—FACTS—CONCLUSION.

The owner of patents sued a manufacturer for infringement on June 11, 1909, closed its evidence in chief on April 18, 1910, threatened to bring suits against four retailers who purchased the infringing article from the defendant in October, 1910, brought one such suit in November, 1910, notified the manufacturer's customers that the article they bought of it infringed, and threatened to sue them if they did not stop selling the article.

Held, these facts furnished no just ground to enjoin the owner of the patent from prosecuting the suit against the retailer he had already commenced or from commencing others of like character.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49; Dec. Dig. § 26.*]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Bill by the Kryptok Company against the Stead Lens Company for infringement of patent. From an order enjoining complainant from bringing other suits for infringement of patents, complainant appeals. Reversed.

John H. Atwood (Edward D. Ellison, on the brief), for appellant.

Wash Adams (Theoph L. Carns, on the brief), for appellee.

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

SANBORN, Circuit Judge. On June 11, 1909, Kryptok Company, a corporation, exhibited a bill in the court below at Kansas City, in the state of Missouri, against Stead Lens Company, another corporation, for infringement of letters patent Nos. 637,444 and 876,933, on improvements in bifocal lenses, and prayed for an injunction and an accounting of gains and profits and for damages. On September 9, 1909, the Stead Company answered, and denied the validity of the patents and its alleged infringement of them. On April 19, 1910, Kryptok Company closed its evidence in chief, and any delay thereafter in the proceedings in the case seems to have been attributable to the Stead Company. That company was a manufacturer of bifocal lenses alleged to infringe the patents, and Haussman & Co., a corporation of Pennsylvania, was one of their customers, that bought the lenses of the Stead Company at wholesale and sold them at retail. In November, 1910, about 17 months after it instituted its suit against the Stead Company, and about 7 months after it closed its evidence in chief in that suit, Kryptok Company brought a suit, in Philadelphia,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against Haussman & Co. for infringement of the patents. Thereupon the Stead Company filed a petition and affidavits in the suit in Kansas City, and prayed that the Kryptok Company be enjoined from prosecuting its suit against Haussman & Co., and from beginning any other suits against others who were purchasing bifocal lenses of the Stead Company; and upon this petition, these affidavits, and counteraffidavits presented by Kryptok Company, the court below entered an order whereby it enjoined Kryptok Company from proceeding farther with its suit against Haussman & Co. and from commencing any suits for infringement of its patents against any of the purchasers of bifocal lenses of Stead Company until the final decree should be rendered in the suit of the Kryptok Company against the Stead Company. From this order the Kryptok Company has appealed to this court.

[1] The grant of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not departed from them its injunctional orders may not be reversed without clear proof of an abuse of its discretion.

[2, 3] Established principles of equity jurisprudence are (1) that one may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person, unless his acts to that effect are clearly shown to be done unnecessarily, not for the purpose of preserving and enforcing his rights, but maliciously to vex, annoy, and injure another; and (2) that where the injury to the applicant if the preliminary injunction is refused will probably be greater than the injury to the opponent if it is granted it should be issued, while if the contrary is the probable result the application for it should be denied. Russell v. Farley, 105 U. S. 433, 438, 26 L. Ed. 1060; Shubert v. Woodward, 92 C. C. A. 509, 522, 167 Fed. 47, 60; Blount v. Société Anonyme Du Filtre, 53 Fed. 98, 101, 3 C. C. A. 455, 458.

[4] The Stead Company by its petition based its application for this injunction upon two grounds, upon the proposition of law that in this suit against it Kryptok Company could procure all the relief it was entitled to obtain for the infringement of its patents by the Stead Company and by Haussman & Co. and the other customers of Stead Company who bought the infringing article of it at wholesale and sold it at retail, and upon the averment of the fact that the Kryptok Company had brought the suit against Haussman & Co. and threatened to bring like suits against three other customers of the Stead Company, and had notified and were notifying its customers that they were infringing its patents, and had threatened and were threatening its customers with like suits for infringement, not for the purpose of protecting and enforcing its rights under its patents, but for the sole purpose of vexing and annoying the Stead Company, which was morally bound to defend the suits against its customers, and of maliciously injuring its business. The proposition of law which the Stead Company relied upon was an error of law. There was no denial that the patents were issued and from their issue the legal presumption arose that they were valid. While infringement was denied, the legal right

to sue and to prosecute suits for infringement to a hearing must be admitted in the consideration of this injunction, because thus only could that issue ever be tried or determined. Kryptok Company therefore had the legal right to sue Haussman & Co. and every other purchaser and retailer from Stead Company of the infringing lenses, and if it proved their infringement it had the right to an injunction forbidding each of them from selling or using any of the lenses, and to a recovery of the gains and profits each of them had made by purchasing and selling them, and to the damages it had sustained by their infringement. It is always difficult to prove the gains and profits an infringer obtains, and the damages suffered by the owner of a patent from the sales of the infringing article are equally difficult to prove, so that the most valuable relief to which he is entitled in equity is the injunction against further infringement. Such an injunction against the retailers Kryptok Company could not secure in its suit against Stead Company. It might in that suit recover the gains and profits Stead Company had acquired by its manufacture and sale to its customers of the infringing lenses and the damage Stead Company had inflicted thereby, but it could not in that suit recover the gains and profits the purchasers from Stead Company had made nor the damages their infringements had inflicted. The owner of a patent cannot recover, in a suit against a manufacturer of an infringing article which he sells to retailers, the full relief to which he is entitled in suits against the retailers, and a decree for an injunction and damages against a manufacturer is no bar to suits against those who purchase from the manufacturer and use or sell to others. Birdsell v. Shaliol, 112 U. S. 485, 488, 5 Sup. Ct. 244, 28 L. Ed. 768. The proposition of law, therefore, on which the petition for this injunction is based must fall.

The evidence fairly established these facts: Kryptok Company in October, 1910, more than 11 months after it sued Stead Company and more than 5 months after it closed its evidence in chief, notified Stead Company that it would sue four of the purchasers from it if it did not stop its alleged infringement, and in November, 1910, it sued one of them. But it had the legal right to sue them, and to endeavor by such suits to obtain an injunction to stop their alleged continuing trespass upon its rights. It notified many of the customers of the Stead Company that the lenses they were buying of that company were infringements of its patents, and that if they did not cease dealing in them it would sue them for infringement. But there was danger that if, knowing of their infringement, it failed to give these notices, it might thereby lose its right to recover the gains and profits they made anterior to the filing of its bills against them. Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 41, 104 C. C. A. 475, 481, 32 L. R. A. (N. S.) 274, and cases there cited.

The result is that all the acts of Kryptok Company were justified by the law, were well calculated to and tended to preserve and enforce its legal rights under its patents, and these acts fail to convince that they were not done for that purpose, or that they were done un-

necessarily and maliciously, for the sole purpose of annoying and vexing Stead Company and injuring their business.

Finally, it is a good defense to an application for a preliminary injunction that the wrong and injury likely to be inflicted upon the opponents of the application by its issue are greater than those which the applicant is likely to suffer from its denial. The only loss which Stead Company would probably have sustained by the prosecution of the suit against Haussman & Co. and the commencement of the threatened suits against three of its other customers, if the injunction had been denied, would have been the cost of defending those suits, which cost, it alleges, it was morally, but not legally, bound to pay. The loss which Kryptok Company will probably sustain from the issue and continuance of the injunction, if its bills are well founded, will be the postponement of its injunction against the infringement by these customers of its patents for several years, and the loss of those gains and profits made by those customers which it is unable eventually to prove. The evidence is not convincing that the probable loss of the Stead Company from the denial is greater than that of the Kryptok Company from the granting of the injunction.

No case has been cited that sustains an injunction of the character here in question under a similar state of facts. In Acetylene Co. v. Avery Portable Co. (C. C.) 152 Fed. 642, upon which counsel for the Stead Company seem to rely, the suit against the manufacturer was instituted on July 24, 1906, and within three months the complainant had brought ten suits against purchasers from the defendant and threatened more. Perhaps those facts indicated a purpose unnecessarily and maliciously to annoy the defendant and injure its business. But, even so, the court granted an injunction against the commencement of more such suits only, and refused to enjoin the prosecution of the ten that had already been commenced. There is a wide difference between a case in which 10 suits against customers of the defendant are brought within 3 months after the bill against a manufacturer is filed, and probably before the complainant has made his prima facie case, and one in which no such suit is instituted until 17 months after the bill is filed and more than 6 months after the complainant has closed its case in chief.

Because the proposition of law upon which Stead Company founded its petition for the injunction was an error, because the evidence in the petition and affidavits fail to show that Kryptok Company's notices to the customers of Stead Company of their infringement and of coming suits were given, that they commenced the suit against Haussman & Co., or that their threats to sue three other customers of Stead Company were made unnecessarily and maliciously, for the sole purpose of vexing and annoying Stead Company and injuring their business, and because it does not appear that the injury to Stead Company by refusing the injunction would probably be greater than to the Kryptok Company by granting it, the order below must be reversed.

And it is so ordered.

BYERLEY v. ELLIS CO.

(Circuit Court, D. Delaware. May 17, 1911.)

No. 306.

1. PATENTS (§ 297*)—SUITS FOR INFRINGEMENT—EFFECT GIVEN TO PRIOR ADJUDICATIONS.

Where, in an earlier adjudication of a patent, a rule determining infringement or noninfringement upon a given state of facts has been laid down or recognized by the appellate court, a lower court, in subsequently dealing with the patent on a similar or substantially similar state of facts, is as much bound to follow such rule of infringement as to recognize the validity of the patent theretofore upheld by the higher court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. § 297.*

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric & Mfg. Co. v. Stanley I. Co., 68 C. C. A. 541.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ASPHALTIC PETROLEUM PRODUCTS AND PROCESS OF MAKING SAME.

The Byerley patent, No. 524,130, for a process of making asphaltic products from the residuum of petroleum after distillation and for the product itself, *held* valid and infringed, on a motion for preliminary injunction, following prior adjudications.

In Equity. Suit by Francis A. Byerley, as executor, trustee, and individually, against the Ellis Company. On motion for preliminary injunction. Motion granted.

Fish, Richardson, Herrick & Neave, for complainant.

Marvel & Marvel and Robert P. Graham, for defendant.

BRADFORD, District Judge. This is an application for a preliminary injunction. The bill charges infringement by the Ellis Company of United States letters patent No. 524,130, dated August 7, 1894, and granted to Francis X. Byerley, now deceased, and prays an injunction and account. The patent in suit is for alleged improvements in the manufacture of asphalt and other products from petroleum, and relates more particularly to the manufacture of solid bodies from petroleum. The patent contains twelve claims of which claims Nos. 1, 2, 3, 6, 7, 8, 9 and 10 are in issue. [1] These claims were sustained by the Circuit Court for the Eastern District of Pennsylvania in Byerley v. Sun Co. (C. C.) 181 Fed. 138, and by the Circuit Court of Appeals in the same case, 184 Fed. 455. Their validity, therefore, is not open to question in this court unless under exceptional circumstances. Cohen v. Stephenson & Co., 142 Fed. 467, 73 C. C. A. 583. After examining the affidavits on both sides I have failed to find anything so conclusively pointing to the invalidity of the claims in suit, or any of them, as to prevent the application of the general rule. The question of infringement must be determined on the particular facts in any given case, regard being had to the scope of the claims as governed by their language and the liberality or strictness of construction properly applicable to them. But this is subject to the qualification that where in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

earlier adjudication of the patent a rule determining infringement or noninfringement upon a given state of facts has been laid down or recognized by the appellate court, the lower court in subsequently dealing with the same patent on a similar or substantially similar state of facts is as much bound to follow such rule of infringement as to recognize the validity of the patent theretofore upheld by the higher court. [2] On the whole I have, not without some hesitation, reached the conclusion that the several claims in issue have been infringed by the defendant and a case made for the awarding of a preliminary injunction on the giving by the complainant of a substantial injunction bond with surety. Let an interlocutory decree be prepared and submitted accordingly.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al.

(Circuit Court, N. D. New York. July 10, 1911.)

1. CORPORATIONS (§ 482*)—FORECLOSURE SUITS AGAINST ALLIED CORPORATIONS—CONSOLIDATION.

Eight corporations, engaged in the development and use of water power, the manufacture and sale of gas, and the generating, transmission, and sale of electricity by furnishing electric lights and power to various cities and towns throughout a considerable territory and to consumers therein, were managed and controlled and largely owned by the same persons, and for a number of years were practically operated as one; the earnings and the proceeds of mortgages made by the different companies being used largely as a common fund for the benefit of all. The business of the several companies was also to a large extent interdependent, some generating electricity only, which was transmitted by others and to some extent distributed and sold by still others. *Held*, that separate suits to foreclose mortgages given by the several companies would be consolidated with a view, if possible, of selling the properties together to be operated as a single system; it appearing that they were worth more and should realize a better price if so sold than if segregated.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.*]

2. CORPORATIONS (§ 482*)—FORECLOSURE SUITS AGAINST ALLIED CORPORATIONS—INSOLVENCY—PROOF OF CLAIMS.

Where all, or nearly all, of the companies defendant in such consolidated suit were insolvent, and there are general creditors of each whose claims have been proved, a sale of the property will not be delayed to await the adjustment of mutual claims between the several defendants which for the most part, so far as appears, cannot be paid for want of funds.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.*]

3. CORPORATIONS (§ 484*)—POWERS—GUARANTY.

A contract by a corporation written on bonds issued by another corporation which it controlled through stock ownership, providing that it "hereby indorses the within bond and guarantees to the holder * * * the payment in full of the principal and interest as provided thereby," to secure which it gave a collateral mortgage on its own property, *held* not a contract of indorsement, but one of guaranty, and within the powers of the corporation if authorized by the stockholders as required by Laws N. Y. 1892, c. 688, § 40.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CORPORATIONS (§ 484*)—POWERS—GUARANTY.

Under Laws N. Y. 1892, c. 688, § 40, which authorizes a corporation to guarantee the bonds of any other domestic corporation engaged in the same general line of business pursuant to a unanimous vote of its stockholders, where such a guaranty recites that the guarantor "has voted and agreed to indorse and guarantee the payment of the within bond and all other bonds of the same series," the presumption, in the absence of evidence to the contrary, is that the guaranty was authorized by vote of the stockholders in compliance with the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

5. CORPORATIONS (§ 484*)—GUARANTY—ESTOPPEL TO DENY POWER.

Where a guaranty of the bonds of one corporation by another was authorized by statute when made pursuant to the unanimous vote of the stockholders at a special meeting called for the purpose, the fact of irregularity in the exercise of the power so granted does not render the guaranty ultra vires and void as to bona fide purchasers of the bonds without notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

6. CORPORATIONS (§ 432*)—REPRESENTATION BY OFFICERS—PRESUMPTION OF AUTHORITY FROM USE OF SEAL.

The seal of a corporation affixed to a written instrument executed by its officers in the business of the corporation imports and raises a presumption that they were duly authorized to execute the instrument.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717–1730; Dec. Dig. § 432.*]

7. CORPORATIONS (§ 544*)—PREFERENCE—MORTGAGES—VALIDITY.

Laws N. Y. 1901, c. 354, § 48, which declares void any conveyance or transfer of property made by a corporation when insolvent or its insolvency is imminent with intent to prefer a creditor, does not render void a mortgage given by a corporation to secure its guaranty of the bonds of another corporation previously issued, where such mortgage was given pursuant to an antecedent agreement made in good faith and for a valuable consideration at the time of the guaranty and when the guarantor was not insolvent nor its insolvency imminent, although it was insolvent when the mortgage was executed and may have intended to give the mortgagee a preference over other creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162–2169; Dec. Dig. § 544.*]

8. CORPORATIONS (§ 473*)—BONDS—RIGHTS OF HOLDERS—INSOLVENCY—EQUITABLE LIEN.

Where a mortgage, executed by an electric company having transmission lines but no plant for generating electricity to secure bonds, provided that such bonds might be issued for the purpose of acquiring stock, bonds, rights, or franchises, or in improving property rights or franchises owned by the corporation or in which it had an interest, the use of proceeds of the bonds to aid in the completion of the works of a water power company in which it was interested, to develop power to be used in generating electricity, the advances being treated as a loan by the two companies, was not a diversion of which the mortgagee could complain or which gave it, on behalf of the bondholders, an equitable lien on the property of the power company as against its own bondholders.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 473.*]

9. CORPORATIONS (§ 566*)—INSOLVENCY—PRIORITY OF CLAIMS—EQUITABLE LIENS—MISAPPLICATION OF TRUST FUND.

That a creditor had an equitable lien on money which was disbursed by a corporation does not entitle such creditor to an equitable lien on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the property of the corporation as against its bondholders holding a prior mortgage thereon, where it is not shown that the money was used for any purpose which resulted in benefit to them; nor is the creditor entitled to a lien on the property of allied corporations as against their prior mortgage bondholders because the corporation having the money made advances therefrom, which were in effect loans, to the mortgagor companies to pay interest to such bondholders who had no knowledge or notice of such fact.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 566.*]

10. Deposits in Court (§ 9*)—Rights of Parties—Equitable Lien—Deposit Required by Court.

A judgment creditor of a corporation, whose judgment was afterward reversed, with others, filed a petition in involuntary bankruptcy against the corporation on which a receiver was appointed. The corporation denied the jurisdiction of the court over it and pending determination of the question obtained the discharge of the receiver and a restoration of its property on condition that it deposit with a trustee appointed by the court money and securities to cover the judgment creditor's claim. Subsequently by order of the court the fund so deposited was released and returned to the corporation without condition, and still later the proceedings were dismissed for want of jurisdiction. *Held*, that the creditor, who afterward obtained another judgment, had no lien on the money so deposited in compliance with the unauthorized order of the court, which followed it after its release and return to the corporation.

[Ed. Note.—For other cases, see Deposits in Court, Dec. Dig. § 9.*]

11. Mortgages (§ 163*)—Bona Fide Mortgagee—Record of Deed.

One of two associated corporations having the same office and practically the same officers executed three deeds conveying to the other separate pieces of real estate of which it was the record owner and in possession. Two of the deeds were never recorded, but were found in the safe used by the two companies in common, and the third was not recorded until a year after its execution. There was no evidence of a change of possession. Shortly after their execution the property conveyed was mortgaged by each corporation, the grantee by specific reference thereto or to the deeds, and the grantor by a general mortgage of all its property not excepted. The grantor's mortgage was recorded prior to the recording of the one deed which was recorded. *Held*, that the grantor's mortgage, accepted without knowledge or notice of the unrecorded deeds, must prevail over those given by the grantee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 368-379; Dec. Dig. § 163.*]

In Equity. Suits by Eben H. Gay and Joseph W. Jackson against Hudson River Electric Power Company, Hudson River Water Power Company, and others; by Trust Company of America, trustee, against Hudson River Water Power Company and others; by Morton Trust Company, now Guaranty Trust Company of New York, as trustee, etc., against Hudson River Electric Company and others; by Knickerbocker Trust Company, as trustee, etc., against Hudson River Electric Power Company and others; by Knickerbocker Trust Company, as trustee, etc., against Hudson River Power Transmission Company and others; by New York Trust Company, formerly New York Security & Trust Company, as trustee, etc., against Saratoga Gas, Electric Light & Power Company and others; by Trust Company of America, as trustee, etc., against Madison County Gas & Electric Company and others; and by National Contracting Company against Hudson River Water Power Company and others. Motion, first, for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the consolidation of the six pending foreclosure suits, all ancillary to the main equity suit, and, second, to postpone for the present the proof of the claims of the eight defendant companies as against each other; application by the receivers of said corporations for settlement of their accounts and motion for allowances to themselves and their solicitors, and finally hearing on exceptions to masters' reports in certain of the foreclosures and on allegations to obtain decree establishing certain alleged equitable liens; and finally application for a decree of sale, etc., in the consolidated foreclosure if the consolidation order is granted. Decree ordered.

See, also, 184 Fed. 631, 106 C. C. A. 643; 186 Fed. 410; 190 Fed. 812.

Abram J. Rose and Geo. B. Curtiss, for receivers.

W. D. Loucks, for Eben H. Gay and Joseph W. Jackson.

Charles E. Hotchkiss, for Knickerbocker Trust Co.

Franklin H. Mills, for Morton Trust Co., now Guaranty Trust Co.

John G. Boston, for Trust Co. of America.

Morgan M. Mann, for New York Trust Co.

Alfred A. Cook and Mr. Heermance, for certain bondholders of Hudson River Water Power Co.

Charles H. Tyler and R. A. Pritchard, for Boston Bondholders' Committee.

L. Laflin Kellogg, P. M. Brett, and Mr. Pette, for National Contracting Co.

Horace E. McKnight, for McKnight and Medbury, as trustees.

Edgar T. Brackett, for creditors of Saratoga Gas, Electric Light & Power Co.

F. D. Corey, for intervener Green.

RAY, District Judge. [1] The bill in the equity suit was presented about October 26, 1908, and, on notice to all concerned, George W. Dunn, Charles W. Andrews, and Milton Delano were appointed receivers of the eight defendant corporations, and, having qualified, took possession of their respective properties and have been running them and continuing their business since.

Not long after the organization of the said Hudson River Water Power Company and the ability of its plant to do business had accrued, and about or prior to January, 1904, by purchase of stock, etc., the control and management of all the companies came into the same hands, and thereafter they were in effect and in fact run and managed as one concern. In the meantime and during the construction, extension, and improvement of certain of the plants, the trust mortgages involved in these foreclosures, except one, were executed and bonds issued and sold to raise money with which to prosecute the work, purchase rights, construct dams, power plants, etc. These bonds to the amount of several millions of dollars, at least, were marketed, and most if not all of those so sold have passed to the hands of bona fide holders. The general scheme or plan of those who originally had control of the new plants being constructed, which are the main

ones, and who subsequently, in the manner referred to, obtained control of the others, was to construct and obtain control of water rights on the Hudson river and at other points, erect dams and plants for the generation of electricity and electrical power, obtain control of or construct steam plants for the same purpose and also of gas plants when necessary, extending over a large territory; extending into Vermont, south from Glens Falls to Albany, Troy and Schenectady, and other points in that vicinity, and up the Mohawk Valley as far as Utica and to Oneida further west. This scheme contemplated the erection of transmission lines, some of which were constructed, and the generation and distribution of electricity for furnishing light and power over this area of hundreds of square miles by water power in the main using the steam plants in case of low water only. This general plan and scheme was illustrated and shown by maps and printed statements, and on these representations, largely, the bonds of the companies were marketed.

As stated, for some years the plants were run as one concern under one management. The earnings of all the companies were massed and used for the benefit of all. Money borrowed and property and supplies purchased were used for the benefit of all. The proceeds of bonds sold went for the benefit of three or four of these corporations at least, and in some cases for the benefit of all. The same officers and the same employés in part did the work for all the companies. The Oneida plant was an exception in some respects. It is far from probable that it can ever be known what the equities are between these several corporations if torn apart, so to speak, and sold as separate concerns. Some, one at least, generate electricity and do nothing else. Some generate electricity and manufacture gas and do nothing else, while some transmit and others both generate and manufacture and transmit and sell. Connected and operated as one whole as a system, they are of great value. As single corporations some would be of little value. If these corporate properties are separated, go apart, and efforts are made by litigation, as would be inevitable, to settle their rights as between themselves and then establish business relations, the litigations would be ruinous and well-nigh endless. The claim of the National Contracting Company against the Hudson River Water Power Company has been in litigation for 10 years, and the end does not seem near. There are also reasons growing out of the making of the mortgages; one company guaranteeing those of another, etc., which make the consolidation advisable.

Having this situation in view, and having in mind the possible results of independent sales of these properties at different times by several masters, I am constrained to grant the motion for a consolidation. I am unable to see how harm can come to any interest by so doing, and in the judgment of the court good will come and much needless litigation and expense be avoided by the consolidation. The court will retain control so as to compel a separate and speedy sale in a given case should there be in evidence any disposition to unduly delay the sale of all or any one of these properties. Opposition to con-

solidation comes from the trustees of the Oneida plant and the Saratoga plant. I do not see any equity in the Oneida plant; but at the same time it will sell for more in my judgment if sold at the same time and place as the others. If the same party who purchases the others desires this as a future market, he or they will give more for it than its real present value as a single independent concern.

The Saratoga plant or corporation seems to be a solvent corporation. If there is any equity—and I think there is—after paying all debts, all creditors secured and unsecured, the surplus will go to the owners or owner of the stock or to creditors of one or more of the other corporations who are interested in various ways. I am not able to see that consolidation will seriously affect the rights of any one interested in the Saratoga Company.

Proof of Claims.

[2] All claims of general creditors against the various corporations involved have been proved before a special master, except the claims of the one company against another or others. I do not see that it is essential to determine these claims, their validity and amount, prior to a sale of the properties. If one party purchases all the properties, it may be unnecessary to litigate these claims. If the properties go to different purchasers, the amount of a debt, not a lien, owing by the one corporation to another corporation, is immaterial to the purchaser. It in no way affects his title or the value of the property. If the purchase price is sufficient to create a surplus after payment of mortgage bonds, other liens, costs, and expenses, it will go to the general creditors of that particular corporation. This surplus will be in the hands of the receivers of the corporation applicable to the payment of all its unsecured debts. If it then appears that such one of these corporations is indebted to another of these corporations, or that it asserts a claim, it will be competent for the court in the equity action to direct that proof of such claim and its amount be taken. Here only one or two of these corporate properties, if any, will bring more than the mortgage liens, and as now informed it appears that such possible surplus is subject to other claims or liens. If one corporation has a valid claim against another, or more than one, and such corporations have nothing for general creditors, why go to the expense of establishing such claim or claims? There may be some property not subject to the mortgage liens. If there is enough of this to interest the general creditors, these claims can be then established by litigation. In any event, it seems clear to me that the granting of a decree in foreclosure and a sale under it should not be delayed pending a settlement of these questions which can be settled after the existence of a surplus and in a contest over the distribution of the surplus quite as well as prior to the sale. In fact, the surplus and other property may be so small that a contest will seem inadvisable. In short, I am pointed to no valid objection to a postponement of the settlement of these controversies until after a sale. This motion, also, will be granted.

National Contracting Company Objects to Decree of Sale.

The Trust Company of America, by intervening cross-bill, the National Contracting Company answering, under which evidence has been taken and the report of the special master filed and excepted to, seeks a decree in foreclosure of a mortgage for $2,000,000, dated November 15, 1899, made by Hudson River Water Power Company to the Trust Company of America as trustee, to secure the payment of an issue of 2,000 bonds of the par value of $1,000 each. This mortgage was duly recorded and the bonds issued to the Water Power Company. The Hudson River Water Power Company was incorporated November 11, 1899, with an original stock issue of $2,000,000, increased December 23, 1902, to $5,000,000. It commenced the construction of a dam across the Hudson river at Spier Falls very soon thereafter, acquiring lands and water rights and purchasing materials, etc., and erecting a plant for the generation of electrical power, and such plant was put in operation. In its business it made a contract with the National Contracting Company for the construction of this dam, and the Contracting Company partially constructed same; but differences arose, and the work was abandoned, each party claiming that the other had violated and broken the contract. As that litigation now stands, it has been adjudicated that the Hudson River Water Power Company broke the contract; that a cause of action accrued to the National Contracting Company on the 23d day of November, 1900; and that it sustained damages in the sum of $323,387.55 for which sum judgment was entered December 23, 1909. Of this about $103,718.52 is for work, labor, and material put into the dam, and the balance for profits the plaintiff in that action would have derived had it been allowed to complete its contract. In short, the National Contracting Company is a judgment creditor to the amount of $323,387.55 and interest. To maintain foreclosure and become entitled to a decree of sale, it is necessary that complainant Trust Company of America shall have shown that Hudson River Water Power Company was in default under the terms of the mortgage to such an extent and in such a manner as to entitle it to foreclose, and in this case this involved a showing that payments had not been made as provided by the mortgage, that such default had not been cured, and that proper action had been taken to ripen the right to foreclose. It seemes to me that I am foreclosed on this subject by my action in making an order authorizing the foreclosure suit. All the objections in this regard now urged were then present, and, having arrived at the conclusion that default justifying foreclosure had occurred, the suit by cross-bill was authorized. This is the underlying mortgage, and a sale thereunder will give title, and equitable liens, if any exist, can attach to the proceeds of sale or otherwise be provided for. There is no good reason why a decree of sale should wait upon the final determination of those questions.

The Morton Trust Company, now Guaranty Trust Company, by intervening cross-bill, answer interposed, and report of special master filed, seeks a decree in foreclosure and sale under two mortgages,

viz., one of $3,000,000 to Morton Trust Company as trustee, dated December 18, 1901, and made by the Hudson River Electric Company to secure the payment of an issue of 3,000 bonds of the par value of $1,000 each, and the other for $3,000,000, dated July 19, 1902, made by the Hudson River Water Power Company to said Morton Trust Company as trustee to secure the guaranty of the Hudson River Water Power Company of the bonds ($3,000,000) issued under the said mortgage of said Hudson River Electric Company, dated December 18, 1901. The said bonds were issued and guaranteed by the Hudson River Water Power Company. The National Contracting Company not only attacks the validity of this collateral mortgage of the Hudson River Water Power Company, but claims that, if valid for any purpose, its claim, now reduced to judgment, is in equity a lien on the property of that company prior to that of the Morton Trust Company as trustee thereunder.

As I understand, the situation on the facts is substantially as follows:

Hudson River Power Transmission Company.

The Hudson River Power Transmission Company (the first of these Hudson River Companies) was incorporated July 16, 1897; capital stock $750,000. March 15, 1898, it executed a mortgage to the Mercantile Trust Company as trustee, to secure bonds to the amount of $500,000, and August 1, 1899, it issued debenture bonds to the amount of $150,000, and June 15, 1905, it executed a refunding mortgage to the Knickerbocker Trust Company as trustee to secure an issue of bonds to the amount of $1,250,000, of which $750,000, are outstanding.

Hudson River Water Power Company.

The Hudson River Water Power Company was incorporated November 11, 1899, with a capital stock of $2,000,000, increased December 23, 1902, to $5,000,000. Its first mortgage to the Trust Company of America for $2,000,000 has already been described; also, the second mortgage of $3,000,000, or the guarantee mortgage.

Hudson River Electric Company.

This, the third of these companies organized, was incorporated April 23, 1901, with an original stock issue of $1,000,000, increased July 17, 1902, to $3,000,000. December 18, 1901, it made the mortgage referred to to Morton Trust Company for $3,000,000 to secure bonds guaranteed as stated by the Hudson River Water Power Company and to secure which guaranty the mortgage of July 19, 1902, was executed.

Hudson River Electric Power Company.

This, the fourth of these corporations, was incorporated December 28, 1903, with a capital stock of $1,000,000, increased April 15, 1905, to $10,000,000. January 2, 1904, this company executed its mortgage to the Knickerbocker Trust Company as trustee to secure

a bond issue of $5,000,000 par value, and these bonds were guaranteed by the Hudson River Water Power Company. April 8, 1905, said Hudson River Water Power Company executed a collateral mortgage to said Knickerbocker Trust Company, as trustee, to secure such guaranty.

Control of Other Corporations.

The Hudson River Water Power Company acquired a controlling stock ownership of the Saratoga Gas, Electric Light & Power Company, a corporation having a capital stock of $100,000, and the property of which is subject to a mortgage of $200,000, held by the New York Trust Company, formerly New York Security & Trust Company, as trustee, and under which a decree of foreclosure and sale is also sought; a controlling stock ownership of the Ballston Spa Light & Power Company, a corporation having a capital stock of $35,000, and the property of which is subject to a mortgage of $35,000, no foreclosure pending; a controlling stock ownership of the Empire State Power Company, a corporation having a capital stock of $1,000,000, and the property of which is subject to a mortgage of $1,500,000, $210,000 of bonds issued under it outstanding, and which mortgage is in process of strict foreclosure by advertisement under the conditions of such mortgage, and therefore not subject to the control of this court; and also a controlling stock ownership of the Madison County Gas & Electric Company, a corporation having a capital stock of $300,000, and the property of which corporation is subject to the lien of a mortgage or mortgages for $500,000 and certain receivers' certificates.

Officers and Control.

In 1904 and 1905, Eugene L. Ashley was the president of said Transmission Company and said Hudson River Water Power Company. W. H. Trumbull was the vice president of said companies. Elmer J. West was secretary and treasurer of the Transmission Company and secretary of said Water Power Company; Eben H. Gay being its treasurer. Said Ashley, West, and Trumbull were three of the five directors of both the Transmission Company and the Water Power Company. Thomas Thompson and L. W. Guernsey were directors in said Transmission Company, and Eben H. Gay and Charles E. Parsons were directors in the Water Power Company. In 1904, C. H. Peddrick was president of the said Electric Company, said W. H. Trumbull its vice president, said Gay its treasurer, and said West its secretary. In 1905, Peddrick was its president, H. B. Austin its vice president, said Gay its treasurer, and said West its secretary. In 1904 and 1905, the officers of the Hudson River Electric Power Company were said West, president; said Guernsey, vice president; said Gay, treasurer; and C. M. Doolittle, secretary. Trumbull was a partner of Mr. Gay, and Peddrick was an employé of the Hudson River Water Power Company of which Mr. Ashley was president.

[3] Up to May 1, 1905, the Hudson River Water Power Company was the parent or controlling corporation, receiving all the earn-

ings and making all the disbursements; the funds being commingled as before stated. Subsequent to May 1, 1905, the Hudson River Electric Power Company was the parent and controlling corporation and continued as such doing the business in the same way up to the appointment and qualification of the receivers on October 31, 1908. In 1901 said Gay and Trumbull composed the firm of E. H. Gay & Co., and on the 18th day of December, 1901, the Hudson River Electric Company, the Hudson River Water Power Company, and E. H. Gay & Co. entered into a contract whereby the Electric Company was to issue the $3,000,000 of bonds (secured by the $3,000,000 mortgage to the Morton Trust Company of same date), as it should require funds for the purchase of property, rights, and franchises, and the improvement of same as then owned or thereafter acquired. The Hudson River Water Power Company was to guarantee the bonds as follows:

"Whereas, the Hudson River Water Power Company has voted and agreed to indorse and guarantee the payment of the within bond and of all other bonds of the same series:

"Now, therefore, for value received, and in consideration of the purchase of the within bond by the holder thereof, the Hudson River Water Power Company hereby indorses the within bond and guarantees to the holder, or, if registered, then to the registered owner thereof, the payment in full of the principal and interest as provided thereby, together with all costs, charges and expenses in connection with said bond or the mortgage whereby it is secured."

The National Contracting Company objects that the Water Power Company had no power to indorse the bonds; but I think the contract was one of guaranty and am of the opinion that it must be so construed. The "Water Power Company hereby indorses the within bond and guarantees to the holder * * * the payment in full," etc. I do not think this invalidates the contract of guaranty or the mortgage.

On the 19th day of December, 1901, an agreement was made between the Water Power Company and the Electric Company, whereby, in consideration of the sale to it of 995 shares of the stock of the Electric Company, the Water Power Company agreed to pay to the Electric Company $25,000 and to guarantee the payment of such bonds, principal and interest.

It is true that these agreements do not refer to or contain any provision for the giving of any security for such guaranty by mortgage or otherwise. However, the Morton Trust Company, now Guaranty Trust Company, cross-complainant, has shown an oral agreement as follows: Prior to the execution of the said agreement of December 18, 1901, and as part of the negotiations resulting in the agreement and that of December 19th, and what followed, Mr. Ashley, as president of the Hudson River Water Power Company, stated to Gay and the others interested that he was "prepared to supply any necessary legal protection that could be given to the Electric Company bonds." The case shows that the Hudson River Water Power Company was deeply interested financially in floating these bonds of the Electric Company. Its continuance of work on its dam seemed to de-

pend thereon, and I can see no reason to question the fact that the statement was made. Gay & Co. took a part only of these bonds in the first instance, but had an option for all, and I think it was understood that Gay & Co. could better dispose of these bonds than any other person. Mr. Gay in negotiating the bonds to large companies, and especially a large block to the Sun Life Insurance Company of Montreal, Canada, found some difficulty, and the proposed purchasers, not being content with the simple guaranty of the Hudson River Company, required security on its property. Mr. Gay says that "I made a demand upon president Ashley that the requirement of the Sun Life Insurance Company should be carried out through a conveyance in a supplemental mortgage of the additional security called for," and also that he informed Mr. Ashley that if Gay & Co. was to continue to purchase the bonds the mortgage security must be given. Thereupon the mortgage was given, and the sale of bonds to the Sun Life Insurance Company was consummated, and Gay & Co. continued to take the bonds under its option to purchase and dispose of them. I fail to see a want of consideration for this mortgage. It was given and recorded. The Hudson River Water Power Company had already guaranteed $905,000 of the bonds and continued so to do. It had the right to secure its guaranty. The bonds issued and guaranteed prior to this collateral mortgage, as well as the balance of the $3,000,000, were taken by E. H. Gay & Co. through E. H. Gay, who was treasurer of both companies. November 1, 1908, the Electric Company made default in payment of interest, and it was duly elected that the whole principal should become due, and thereafter by leave of this court these foreclosure proceedings were instituted.

The National Contracting Company, as judgment creditor of the Hudson River Water Power Company, claims:

(1) That there is no proof that the original guaranty of December 18, 1901, was made pursuant to the unanimous consent of the stockholders of such company as required by statute then in force, and that, as it is not shown that the bonds secured by such guaranty are in the hands of purchasers for value and without notice of such omission, the guaranty is invalid and void as to the Contracting Company at least. (2) It appears on the face of the guaranty contained in such collateral mortgage that the consent of the stockholders of the Water Power Company to such guaranty was not given at a meeting called in the manner required by statute. (3) The claim of the National Contracting Company having accrued prior to the giving of the guaranties, although reduced to judgment thereafter, such claim constitutes a lien in equity prior to that of such collateral mortgage, the Water Power Company having divested itself of means to pay its then outstanding debts without an equivalent in value having been received in return therefor, and therefore the claims of the bondholders are subordinated in equity to the rights of the Contracting Company. (4) That this is especially true as to the holders of $905,000 of the bonds sold prior to the execution of such collateral mortgage, as they did not and could not have relied upon such mortgage. (5) That, as to such bonds, $905,000, the collateral mortgage is without considera-

tion and void. (6) That the proceeds of the bonds of the Electric Company was not used for the purpose specified therein and in the proceedings, etc., authorizing them, but were diverted to other purposes, and that as to holders with notice the guaranty cannot be enforced. (7) Finally, the liability of the Water Power Company being conditioned and secondary, such mortgage can be enforced for any deficiency arising on a sale of the property of the Electric Company under the first mortgage only.

It is unquestionably true that the liability of the Hudson River Water Power Company on this collateral mortgage is secondary to the liability of the Electric Company, and that if the property of the Electric Company brings enough to pay costs and charges and liens, if any, prior to the first mortgage thereon, and the $3,000,000 of bonds and interest, the liability of the Water Power Company on such collateral mortgage will end. But I do not see that, under the conditions shown here, this fact bars a decree in foreclosure of such collateral mortgage until a sale has been had under the foreclosure of the principal mortgage and a deficiency determined. Whether or not the judgment of the National Contracting Company is prior in equity to that of the holders of these Electric bonds issued and guaranteed prior to the making of the collateral mortgage is immaterial on the question of a decree of foreclosure and sale, and the same is true as to the balance of such bonds. The evidence is that the entire $3,000,000 of the bonds of the Electric Company were sold to purchasers all over the country by Gay & Co. The judgment of the National Contracting Company is for about $330,000, including interest.

[4] By chapter 688, § 40, Laws of N. Y., approved May 18, 1892, "An act to amend the stock corporation law," it was provided:

> "Any stock corporation may, in pursuance of a unanimous vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation stating the time and place and object of the meeting, and served upon each stockholder appearing as such upon the books of the corporation, personally or by mail at his last-known post office address at least sixty days prior to such meeting, guarantee the bonds of any other domestic corporation engaged in the same general line of business."

It is presumed that the officers of a corporation do their duty, and I find no evidence and am not pointed to any showing that this statute was not complied with substantially. It is said that the cross-complainant did not prove affirmatively that the statute was in fact complied with. But there is no proof it was not complied with, and it was recited that the Hudson River Water Power Company "has voted and agreed to indorse and guarantee the payment of the within bond and all other bonds of the same series." I think we are to assume, in the absence of proof to the contrary, that the Water Power Company by its stockholders so voted at a meeting duly called for the purpose, and that the purchasers of these bonds had the right to assume that the guaranty was duly and legally authorized and executed.

[5] There is no proof except by inference that Gay or Gay & Co. knew or had reason to believe that the statute had not been complied with, if it be true that it was not, and it would be intolerable to hold that the ultimate or secondary purchaser of a negotiable bond offered on the market and guaranteed by another corporation is bound to go to the record of the corporation executing the guaranty and ascertain at his peril that the requisite authority had been given at a duly called meeting of its stockholders. Louisville, etc., v. Louisville Trust Company, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, expressly holds that, where a statute required the assent of the stockholders of the guaranteeing company, the bonds issued without such authority or assent were void as to purchasers with knowledge or notice of the want of such authority or assent, but valid as to purchasers in good faith and without such notice. I do not think there is any presumption of bad faith, or of notice of want of due authority conferred to make the guarantee. Conceding that without statutory authority the guaranty of the bonds of the Hudson River Electric Company by the Hudson River Water Power Company would have been beyond the scope of the powers of that company and strictly ultra vires, unlawful, and void (174 U. S. 567, 19 Sup. Ct. 817, 43 L. Ed. 1081, and cases there cited), still, as here there was statutory authority for doing the very act done, the mode of doing it and obtaining the authority of the stockholders being pointed out by the statute, the act of guaranteeing these bonds of the Electric Company was not ultra vires or void. Here the Power Company was not acting outside of or beyond the scope of its granted powers, but within them, although there may have been irregularities in the exercise of the granted power. Louisville, etc., v. Louisville Trust Co., 174 U. S. 552, 570, 19 Sup. Ct. 817, 824 (43 L. Ed. 1081), where it was held:

"The guaranty by the Louisville, New Albany & Chicago Railway Company of the bonds of the Beattyville Company was not ultra vires, in the sense of being outside the corporate powers of the former company; for the statute of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company. The statute, indeed, made it a prerequisite, to the action of the board of directors, that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

"The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

When the invalidity of such bonds is shown by the one contesting their validity, the burden of showing that he is a holder in good faith and for value is on the one seeking to enforce them. Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78. But here the National Contracting Company has not shown that these bonds are void, and their invalidity does not appear. Applying the same principle to this guaranty, there is an utter absence of proof that the guaranty was ultra vires and void. On the other hand, the guaranty, as stated, was within the granted powers of the Hudson River Water Power Company, although there may not have been a compliance with the terms of

the statute in exercising the power. When fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must show that he is a holder for value. So in the case of negotiable bonds, when it appears that such bonds were illegally or fraudulently issued, the burden of showing that they were purchased in good faith and for value is shifted to the one suing thereon. Stewart v. Lansing, 104 U. S. 505, 509, 26 L. Ed. 866.

I have yet to learn that the burden is on the holder of a negotiable promissory note or bond who purchased before maturity to show that there was no fraud or illegality in its inception. In Stewart v. Lansing, supra, cited and relied upon by the National Contracting Company, the court said, at page 510 of 104 U. S. (26 L. Ed. 866):

"Here the actual illegality of the paper was established. It was incumbent *therefore* on the plaintiff to show that he occupied the position of a bona fide holder before he could recover."

Hudson River Electric Power Company.

This company was incorporated, as stated, in 1903, with a capital stock of $1,000,000, increased to $10,000,000. January 2, 1904, this corporation made and delivered its mortgage to Knickerbocker Trust Company as trustee to secure the payment of an issue of 5,000 bonds of the par value of $1,000 each. On the 8th day of April, 1905, the said Hudson River Water Power Company made a collateral mortgage to said Knickerbocker Trust Company as trustee to secure its guaranty of the said bonds. This mortgage was acknowledged and delivered April 10, 1905. The said bonds were all certified and issued bearing the guaranty of said Hudson River Water Power Company. It is said that some of these bonds, about $150,000, are held as collateral; but of this fact, if it be a fact, I find no proof in the record. The written agreement to guarantee the bonds was made and executed January 2, 1904. The consideration for same was $1,000,000 of the bonds and $1,000,000 of the stock of said Hudson River Electric Power Company. This plant is situated at Utica, N. Y. It erected a new plant and transmission lines to Clarks Mills and either constructed or became the owner of certain transmission lines known as Amsterdam and Johnstown lines, Johnstown and Little Falls lines and Ballston and Amsterdam lines. While Utica is about 95 miles from Albany, this plant (steam) and these lines were to form part of the system before referred to. When this collateral mortgage was executed and delivered, only $1,350,000 of the said Electric Power Company's bonds had been issued; the others were issued thereafter.

The only evidence of an agreement to give this or a similar collateral mortgage to secure the guaranty of the bonds is found in the mortgage itself. That recitation or statement is as follows:

"Whereas, the Power Company, at the time of the issue and guaranty of the bonds of said Hudson River Electric Power Company, at present outstanding, agreed with the purchaser of said bonds, on behalf of said purchaser, and all succeeding holders of such bonds, that it would at any time execute and deliver all such further agreements or instruments as such purchaser might reasonably request in order to more fully secure the guaranty of such principal and interest on the part of the Power Company by lien on the properties, rights, privileges and franchises of the Power Company, or

otherwise, as such purchaser or any successor holder of such bonds might request; and

"Whereas, the purchaser of said bonds and the present holders thereof have requested the Power Company to make, execute and deliver this indenture, as further security for the faithful performance of its obligations under said guaranty:

"Now therefore, this indenture witnesseth: That said Power Company, in consideration of the premises and of one dollar to it in hand paid by the Trust Company, as trustee, the receipt whereof is hereby acknowledged, in order to secure the prompt payment and fulfillment of the guaranty by the Power Company of the principal and interest of the bonds of the Electric Company, issued or to be issued under said mortgage or deed of trust from the Electric Company to the Trust Company, its successor or successors and assigns in the trust, has granted, bargained, sold, conveyed, transferred, assigned and mortgaged, and by these presents does grant, bargain, sell, convey, transfer, assign and mortgage, unto the said Knickerbocker Trust Company, as trustee, its successor or successors and assigns in the trust, all those certain pieces or parcels and lots of land, water rights, easements and appurtenances, stocks, bonds and other securities more particularly described as follows."

Here, also, as in case of the guaranty of the Electric Company bonds, the cross-complainant did not prove the actual meeting of the stockholders, the call, or what occurred at such meeting if one was held to authorize the contract of guaranty. The record does show the meetings held authorizing the execution of the collateral mortgage. The same question is raised here as in the case of Morton Trust Company v. Hudson River Water Power Company on its guaranty of the Electric Company's bonds already discussed. Here, however, there is scant proof outside the recitation of the mortgage that the purchasers of the bonds or any of them actually requested the execution of this mortgage. These questions are important here, as the National Contracting Company, in addition to the defenses and objections before referred to, claims that this $5,000,000 collateral mortgage was executed and delivered by the Hudson River Water Power Company "at a time when the said Hudson River Water Power Company was insolvent and with intent to prefer the Knickerbocker Trust Company as trustee, and the holders of the bonds issued by said Hudson River Electric Power Company over the fair and just creditors of said Hudson River Power Company, and with intent to hinder, delay, and defraud the just and fair creditors of said company, including the National Contracting Company."

The special master, on the evidence, has so found; but he has not found that the Knickerbocker Trust Company or any of its officers had any such intent or purpose in receiving such collateral mortgage, or that it had any knowledge of such intent and purpose on the part of the Hudson River Water Power Company or participation therein. At that time the hereinbefore mentioned claim of the National Contracting Company was in suit, and on the 31st day of March, 1905, Judge Bookstaver, the referee before whom the action had been tried, had rendered a decision in favor of the National Contracting Company and against the defendant Hudson River Water Power Company for $547,896.40 damages, and judgment was about to be entered. The officers of the company had learned of this adverse decision—subsequently reversed—and it cannot be doubted, I think, that the prospect of this

judgment accelerated the action of the Water Power Company in complying with the agreement recited in the mortgage to execute further instruments and security for the guaranty. There is no evidence in the case that the Knickerbocker Trust Company at that time knew of this litigation or of this decision of Referee Bookstaver. It cannot be inferred that it had any intent to receive a preference or to participate in any hindrance or delay of the creditors of the Water Power Company in then executing the mortgage. It received what it was entitled to—what it had been agreed it should have. There is no evidence that the recital of the mortgage was untrue.

[6] It may be remarked here that, as in the case of the guaranty of the bonds of the Electric Company, the agreement for the guaranty, the respective guaranties on the several bonds and the mortgages themselves were executed under the seal of the corporation. There is a general rule not only that officers of corporations acting within the general scope of their powers do their duty, but that the seal of the corporation affixed to written instruments executed by them in the business of the corporation imports and raises the presumption that they were duly authorized to execute the instrument. This rule is stated in 10 Cyc. 1017, 1018, where many cases are cited as follows:

"In General. When the authenticity of the seal is established, either by proof or by presumptive evidence as already indicated, it carries with it presumptive or prima facie proof of everything else which is necessary to the validity of the instrument. Roundly stated, it carries with it prima facie evidence of the assent of the corporation to the deed. It carries with it the presumption that the seal was rightfully affixed to the deed or the other instrument on which it appears. In favor of innocent third parties without notice it cures any antecedent irregularities, such as the fact that the resolution of the directors authorizing the execution of the instrument was passed at a meeting at which less than a quorum was present.

"(11) Is Presumptive Evidence of Authority of Officers Who Signed, Sealed, and Acknowledged it. (A) In General. The seal, accompanied with the signature or signatures of the appropriate corporate officer or officers, becomes prima facie evidence that such officer or officers had due authority from the corporation to execute the instrument, such as casts the burden of proof upon any party challenging its validity."

See, also, Jourdan, as Receiver, v. Long Island R. Co., 115 N. Y. 380, 22 N. E. 153.

It is probable that the Hudson River Water Power Company was in fact insolvent at the time it executed this collateral mortgage. Its property, if then converted into money by the ordinary processes, would not have paid its debts. It had been paying its debts and interest in due course. Insolvency had not been contemplated, and it may be doubted that it was then insolvent in the sense of that word as used in section 48 of the stock corporation law of the state of New York. But, however that may be, the Hudson River Water Power Company was not insolvent, nor was its insolvency imminent, when the written agreement to guarantee the bonds of the Electric Power Company was executed and the agreement made to execute and deliver security for such guaranty within the true intent and meaning of the statute referred to. There is no proof of any such condition or impending condition. It may be that there was no market value for such property and rights as the company, then, January 2, 1904,

possessed. Its dam and plant were incomplete, and in November, 1908, were still incomplete; but it was "a going" corporation, doing business, improving its plant, and paying its bills and interest. Its future was promising and seemed assured.

[7] Section 48 of the stock corporation law (chapter 354, § 48, Laws of 1901) reads as follows:

"No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. * * * Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. * * * No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice."

If that statute is to be applied strictly, and is strictly and literally applicable to such a case as this, it may be that this collateral mortgage is void as to the creditors of the Hudson River Water Power Company. But I do not think it is so applicable or to be applied literally and strictly here or in such a case as this. The statute quoted is drastic in its terms; but it is to be read and construed in the "light of reason," an old doctrine, but one sometimes ignored or forgotten. Here the agreement to guarantee the bonds had been made, executed, and delivered in good faith and for an adequate consideration long before; the agreement had been made, as I must find, to give the collateral security, not this particular security, but security, a "lien" which embraced or included it in good faith and for a valuable consideration at the same time; bonds had been issued and certified and put on the market; the Knickerbocker Trust Company as trustee expected the security and had the undoubted right to it at any time even if intermediate the making the agreement to give the security or lien and its actual execution and delivery the Water Power Company became insolvent. The statute was not intended to invalidate or render ineffective or worthless prior contracts made in good faith and for a valuable consideration. This is not a case under the bankruptcy act making all preferences given within four months of filing the petition voidable by the trustee.

In Paulding v. Chrome Steel Co., 94 N. Y. 334, in face of the Revised Statutes, quite similar to the present statute, the validity of a chattel mortgage as security for a debt was upheld, although executed on the very eve of insolvency, for the reason it was simply the carrying out or execution of a prior agreement previously made in good faith to give such security. The corporation had borrowed money on an agreement that its payment should be secured by a chattel mortgage, and one was given in 1874, which for reason was either void or supposed to be void. In 1878, the debt remaining unpaid, a new mortgage was given. The corporation was then insolvent. The mortgage was held good, and at page 340 of 94 N. Y. the court said:

"It is difficult to see how, under these circumstances, it could properly be held that the mortgage was given in contravention of the statute, or how in any way the insolvency of the company induced its execution. In the case cited (Dutcher v. Importers' & Traders' Bank, supra [59 N. Y. 5]) it is in substance held that a company, although insolvent, may deal with its creditors by making payment, or in the ordinary course of business transfer or sell its property. It follows then that some other fact must be proved before it can be held that a transfer thus made is fraudulent; and in considering that question the date of the agreement pursuant to which any transfer is made, and not the day when the conveyance is in fact executed, is to be regarded. As between the parties, at any rate, the fulfillment of the agreement relates back to the time when the obligation was incurred. Ex parte Kevan, L. R., 9 Ch. App. Cas. 752; Castle v. Lewis, 78 N. Y. 131."

In Black, as Receiver, v. Ellis, 197 N. Y. 402, 412, 90 N. E. 958, a new chattel mortgage was given to secure the payment of an old debt, which was by agreement to be secured by a chattel mortgage, and which had been at a prior time so secured. It was claimed that the giving of this new chattel mortgage, not a renewal of the old one, was in violation of section 48 of the stock corporation law before quoted. The Court of Appeals, no dissent, held that this contention could not be sustained, since the renewal of the old mortgage by the giving of the new mortgage "must be construed as relating back to and simply effectuating the contractual obligation originally assumed." The Court of Appeals (page 412 of 197 N. Y., page 961 of 90 N. E.) quoted and approved the language of Judge McCall at Special Term where the learned judge said:

"This mortgage, executed on March 20, 1907, when it may be conceded the corporation was insolvent, was but the observance of contractual obligations entered into and assumed in July, 1904, at which time no question exists as to its absolute soundness. * * * That which transpired on March 20, 1907, does not fall within the prohibition of the statute, but must be construed as relating back to May, 1904, and simply effectuating the contractual obligation at that time assumed."

Again as was said in Black v. Ellis, supra, as a principle applicable in that case:

"Courts of equity regard the substance and not the form of a transaction, and one of the favorite maxims is to regard that as done which has been agreed to be done and ought to have been done."

I can discover no distinction between that case and the one now under discussion in principle. The facts differ in that there a prior mortgage had been given, but that was not the point of the case. The pivot was that there was a prior agreement to give a mortgage as security, and that the giving of a mortgage at a subsequent date when the corporation had become insolvent related back to the date of the agreement to give it and must be treated, so far as the provisions of section 48 of the stock corporation law was concerned, as having been executed and delivered at the date of the agreement to give it.

The case of Foster et al. v. McAlester et al. (Eighth Circuit) 114 Fed. 145, 153, 154, 52 C. C. A. 107, 115, 116, is quite in point here. There the court held:

"An agreement between a wholesale mercantile firm and a customer that the latter will give a mortgage on his stock, when demanded, to secure his indebtedness to the firm, is entirely legal; and, unless fraudulent in fact,

such an agreement cannot be held to constitute a fraud in law, or a badge of fraud, to affect the validity of a mortgage subsequently requested, and voluntarily given by the debtor. * * *

"A chattel mortgage, valid on its face, taken by a bona fide creditor for the purpose of securing his debt, and not for the purpose or with the intent of shielding his debtor and assisting him to hinder and delay his other creditors, is valid, and impervious to attack from any quarter, in the absence of a bankruptcy law which renders it invalid as a preference."

In Huiskamp v. Wagon Co., 121 U. S. 310, 319, 7 Sup. Ct. 899, 902, 30 L. Ed. 971, the Supreme Court said:

"In order to invalidate the mortgage of Rummel to Huiskamp Bros., it must have been made with the intent on the part of Rummel to hinder and delay his other creditors, and Huiskamp Bros. must have accepted it with the intent of assisting Rummel to hinder and delay his other creditors. A debtor being in failing circumstances and having the right to prefer a creditor, if the preferred creditor has a bona fide debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent, and that the debtor's intention is to hinder and delay other creditors."

I conclude from the authorities that: (1) The agreement to give the lien having been sufficiently proved in the manner stated and not disproved, and having been made in good faith and for a valuable consideration at a time when insolvency was not contemplated or imminent, same was valid. (2) This having been followed by a request for the security, and the security having been executed and delivered pursuant to the said agreement, its execution and delivery relates back to the date of the agreement and speaks as of that date so far as the statute quoted is concerned. (3) That, as the Knickerbocker Trust Company received it pursuant to a valid agreement and for a valid consideration and in good faith, it is immaterial whether or not the Hudson River Water Power Company was solvent or insolvent at the time of the actual execution and delivery of the instrument and what the real object and purpose of the Water Power Company in giving it at that time was, so long as the Trust Company did not share or participate in any fraudulent intent or purpose.

Morton Trust Company Equitable Lien.

This claim of an equitable lien raises an issue between the Morton Trust Company as trustee and Trust Company of America as trustee, growing out of the following facts: The Hudson River Water Power Company was incorporated prior to the incorporation of the Hudson River Electric Company as before stated. It is quite apparent from the record that the Water Power Company was short of funds for prosecuting its work, the construction of the Spier Falls dam and plant. The Electric Company was thereupon incorporated and had or constructed transmission lines only, or in the main. It had some stock of the Hudson River Power Transmission Company. Its president, Peddrick, was an employé of the Water Power Company, and the stockholders and directors were, in the main, the same as those of the Water Power Company. The Hudson River Power Transmission Company was in existence with a steam and water power plant at

Mechanicville lower down the river; but it had transmission lines sufficient for its power. The completion of the dam and plant of the Water Power Company was essential to the existence of the Electric Company. It was power generated by it, in the main at least, that the Electric Company was to transmit or purchase and transmit. The offices of the two corporations were in the same building at Glens Falls, N. Y., and the bookkeeping there was all done by the same persons, and the deeds and papers of both corporations were in the same safe. Gay, of Gay & Co., was treasurer of both, and Gay & Co. had the sale of most of the bonds of both. The Electric Company was almost immediately mortgaged for $3,000,000, and, as we have seen, the Water Power Company guaranteed its bonds. Later it executed the collateral mortgage to secure such guaranty showing clearly the interest and anxiety of the Water Power Company to convert the Electric bonds into cash. Receivers' Exhibit R–1, an extract from the books of the Hudson River Water Power Company, "Account of Hudson River Electric Company," May 1, 1901, to May 1, 1905, shows that between October, 1901, and March, 1904, the Water Power Company received of the proceeds of the Electric Company bonds $2,269,981.28, in cash. Of this about $1,391,500 was turned over by the Electric Company between October, 1901, and December 31, 1902, and $800,500 between January, 1903, and August 31, 1903. It also credited the Electric Company with 29,000 shares of the capital stock of the Electric Company. It also credited that company with earnings, accounts due it, etc., in all, prior to May 1, 1905, $4,116,701.42; but this includes an alleged purchase of the balance of the stock of Electric Company, except 5 shares, $25,000, and of its pole lines of $313,200, etc.

[8] In the mortgage of December 18, 1901, executed by the Electric Company, the bonds issued under which were guaranteed by the Hudson River Water Power Company, it was provided the remaining bonds numbered from 501 to 3,000 ($2,500,000 par value), both inclusive, shall be issued by the Electric Company only for the purpose of acquiring stock, bonds, notes, evidences of debt, other property, rights, or franchises, or making improvements upon or extensions or additions to property rights or franchises which the Electric Company shall at the time of such issue own, or in which said Electric Company shall then be interested. The Electric Company was taking power from the said Transmission Company and was in a way and to an extent interested in it, as until the Hudson River Water Power Company's dam and plant were completed or on a working basis it had no other source of supply and hence no business. In 1902 it had a large majority of the stock of the Transmission Company. However, it was interested in the Hudson River Water Power Company, as its organization, officers, stockholders, business, management, and disposition of its stock and of the proceed of its bonds show. There can be no question that here was an express consent in the mortgage executed by the officers of the Electric Company that the proceeds of these bonds should be used, if desired, in the construction and maintenance and extension and improvement of the dam and plant of the

Hudson River Water Power Company. This is further evidenced by the tripartite agreement of December 18, 1901, between Gay & Co., the Electric Company, and the Hudson River Water Power Company for the guarantee and dispositon of the bonds of the Electric Company. I fail, under the facts appearing in the record, and in view of this provision of the mortgage, to discover any diversion or misappropriation of the proceeds of these bonds. I think the money was used where the stockholders, directors, and officers of both companies intended and expected it would be used. The special master does not find any misappropriation or diversion or state of facts justifying such inference. The Morton Trust Company, now Guaranty Trust Company of New York, clearly had knowledge of this provision of the mortgage and was at least put on inquiry, and there is no evidence that it was misinformed as to the facts. It cannot complain, in view of all the facts and recitals.

It is true that the mortgage stated that the bonds were to be secured by a first mortgage on the property, rights, and franchises of the Electric Company, whether then acquired or thereafter acquired; but it also explicitly stated at least twice that the proceeds of bonds of the face value of $2,500,000 might and could be used for making improvements upon or extensions or additions to property, rights, or franchises in which the Electric Company was, at the time of the issue of the bonds, interested. I think it unreasonable, in the light of the existing facts and circumstances and of what was actually done, to limit these words to a company in which the Electric Company had a stock ownership, or an actual property ownership of some kind. We can hardly charge the officers and managers of these two corporations with a willful misappropriation or diversion of these funds. When two purposes are consistent with the proven facts, one honest and lawful and the other dishonest and unlawful, we are to impute to the actors the lawful and honest purpose consistent with a faithful discharge of duty. The bonds of each company were sold without notice to the secondary purchasers of the actual facts, except that the Electric Company's mortgage gave notice of the use to which its bonds might be put. Both sets of bondholders are on an equality, unless it be that the holders of the bonds of the Electric Company are inferior in equity growing out of the fact the mortgage itself gave notice that the proceeds of the bonds might be used as mentioned for the benefit of any company in which the Electric Company was interested. Clearly the purchasers on the market of the bonds of the Hudson Water Power Company had no notice of any claim for an equitable lien of this or any character. I am therefore of the opinion, and hold, that no equitable lien has been established in favor of the Morton Trust Company as trustee, for the benefit of its bondholders. To establish or declare one on these facts and under all the circumstances would do a wrong to the holders of the bonds of the Hudson River Water Power Company which has guaranteed the bonds of the Electric Company.

It is true that, during the years 1902 and 1903, Mr. West was secretary and Mr. Gay treasurer of both these corporations, and it is

not unreasonable to suppose that both had knowledge of the terms of the mortgage of the Electric Company and of the use being made of the proceeds of the Electric Company's bonds, as indeed Mr. Ashley, the president of the Water Power Company, and Mr. Peddrick, an employé of that company and president of the Electric Company, must have known. That this was done by the common understanding cannot be doubted, and in view of the terms of the mortgage and the practical construction both companies gave to its terms, and in the absence of any protest against such action, I am constrained to the opinion that this was regarded as a mere loan of the one company to the other.

It also fully appears that, so soon as the Hudson River Water Power Company was in operation, it commenced selling and delivering its power to the Electric Company, and there is a large indebtedness of the Electric Company to the Hudson River Water Power Company which has not been proved, although a claim has been presented. It is evident to my mind that it was the mutual expectation and understanding that the Water Power Company would deliver power and pay all its indebtedness to the Electric Company, and that the whole transaction was treated as one of mutual indebtedness and account to be adjusted finally in the usual manner where such relations exist. The mode and manner of keeping the books and accounts show this. This is not the case of a vendor's lien for purchase money or of a purchase-money mortgage on after-acquired property, where as a matter of common justice the lien of the first mortgage, first in point of time and covering after-acquired property, is always understood to cover it subject to the equities of the vendor's lien or of the purchase-money mortgage. Here the lien of the first mortgage attached to the property of the Water Power Company, that which it then owned and that which it afterwards acquired; but can we say that every person who sold that company property which went into the construction of that dam and plant thereafter had and has a vendors' lien or any equitable lien therefor? If such were the law, there would be no necessity for our statutory lien laws to protect labor and materialmen.

It is, of course, true that where the mortgagor acquires property after the giving of a mortgage which by its terms is to come under the lien thereof and does so come, it comes in the precise situation and condition it is when purchased by the mortgagor, and, if it be then subject to a lien of any character held by a third party, such lien of such third party is in no way affected, and the mortgagee under the first mortgage mentioned takes his lien on such after-acquired property subject to the lien thereon existing when his mortgagor took his title. But here no lien existed on any of the property or material put into this dam or plant of the Water Power Company after the giving of the first mortgage. True the Water Power Company borrowed, so far as appears, the money of the Electric Company, and with it paid for labor and material which went into the construction of its dam and plant; but there was no agreement for a lien or security of any kind and no diversion or misappropriation or conversion of such money. The title of the Water Power Company to this dam and plant as improved and

added to by the expenditure of the money obtained rightfully from the Electric Company was not obtained under circumstances which gave the Electric Company any lien or equitable claim whatever, nor did the lien of the first mortgage thereon held by the Trust Company of America ripen or attach under circumstances which gave the Electric Company any such equitable lien or claim. As the dam and plant grew, the lien of the first mortgage attached; that is, the security grew more perfect and valuable. But the Trust Company of America had no knowledge or information that the accretions came from borrowed money even, much less trust funds or misappropriated or diverted funds belonging to another. If it looked into the matter at all and ascertained the facts, it learned that the Water Power Company was obtaining money from the Electric Company which it had borrowed on a mortgage through the medium of bonds secured thereby with the consent expressed in such mortgage that the money derived from a sale of the bonds might be used for the improvement, etc., of the property belonging to any company or corporation in which the mortgagor was interested, and that the Water Power Company was such company. The fault of the contention of the Morton Trust Company is that it assumes this money went into the hands of the Water Power Company impressed with a trust under the terms of which the money should have been used for the improvement, etc., of the property of the Electric Company and the consequent benefit of the holders of its bonds. This ignores the relations of the two companies and the very terms of the mortgage through which the money was obtained. Harris v. Youngstown Bridge Company, 90 Fed. 322, 33 C. C. A. 69, Irrigation Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327, and Botsford v. R. Co., 41 Conn. 454, hold nothing inconsistent with these views; indeed, they support all that has been said in so far as the facts are similar or at all in point.

National Contracting Company Lien.

[9] The National Contracting Company with its lien and judgment against the Hudson River Water Power Company, the nature and character of which claim has been sufficiently described, with date when such claim accrued, now claims specific equitable liens against the property of six of these corporations, viz.:

Hudson River Water Power Company, prior to all mortgage liens, the sum of	$ 64,495 87
Hudson River Power Transmission Company ahead of the $500,000 mortgage to the Mercantile Trust Company as trustee and refunding mortgage held by Knickerbocker Trust Company as trustee for $750,000, the sum of	12,500 00
Hudson River Power Transmission Company ahead of said refunding mortgage, the sum of	13,300 00
Hudson River Electric Company ahead of the $3,000,000 mortgage, the sum of	4,500 00
Hudson River Electric Power Company, prior to the $5,000,000 original mortgage, the sum of	123,355 69
Saratoga Gas, Electric Light & Power Company, prior to the $200,000 mortgage, the sum of	6,175 00
Madison County Gas & Electric Company, prior to second mortgage thereon of $50,000 bonds actually issued, the sum of	1,250 00

This contention arises from the following facts, over which there is little dispute except as to the construction, meaning, and legal effect of a certain agreement or stipulation made July 19, 1905, under the circumstances hereafter described: For the purposes of this discussion, it will be taken as true that the Hudson River Water Power Company was in fact insolvent within the meaning of the bankruptcy act at the time of the pendency of the bankruptcy proceedings hereafter described, and that the actual enforcement and collection of the judgment in favor of the National Contracting Company against that corporation, which then was upon the record, would have resulted in bankruptcy and an administration of its property in the bankruptcy court had the bankruptcy court had jurisdiction. March 31, 1905, Ex-Judge Bookstaver as referee made his decision, filed April 5, 1905, on the claim of the National Contracting Company in favor of that company for $547,696.40 damages, part for work and material put into the Spier Falls dam pursuant to the contract, and part for prospective profits. Judgment was about to be entered and was entered on the 12th day of April, 1905, for $554,680.43, including interest on the report and costs. Execution was issued on such judgment, which had been docketed in the proper counties, and returned wholly unsatisfied. In the meantime and between the making of such decision and the actual entry of judgment thereon, the collateral mortgage of $5,000,000, heretofore described to the Knickerbocker Trust Company as trustee, was executed and delivered, and the Hudson River Water Power Company made other dispositions of certain of its property not necessary here to describe. On the 11th day of May, 1905, a petition in bankruptcy was filed by the National Contracting Company and other creditors, in which other creditors subsequently joined by intervention, against said Hudson River Water Power Company in the District Court, in bankruptcy, in and for the Northern District of New York, the proper district. Thereupon that court appointed Charles W. Andrews, of Syracuse, N. Y., receiver in bankruptcy of all the property of said corporation, and he qualified and took actual possession of substantially all its property, books, and papers and by authority of the court continued its business. Certain investigations followed with certain motions, etc., unnecessary to describe, except that the court had refused to dismiss the proceedings for want of a showing of acts of bankruptcy and necessary petitioners. The corporation, alleged bankrupt, at that time, interposed an answer denying, amongst other things, the jurisdiction of the court and that it was subject to the bankruptcy law. This answer was never actually withdrawn, although long subsequently the board of directors passed a resolution acknowledging its inability to pay its debts and declaring its willingness to be adjudged a bankrupt. Of this mention will be made subsequently. That action was subsequent to and had nothing to do with the making of the agreement and stipulation mentioned and about to be described.

On the 19th day of July, 1905, it was stipulated in open court in said court of bankruptcy and then reduced to writing (reciting that it was made in the bankruptcy proceedings) and signed by Hudson River Water Power Company, by Eugene L. Ashley, president, and E. H. Gay

as treasurer, by Eugene L. Ashley and Eben H. Gay personally, and by Taylor L. Arms and Geo. B. Curtiss, of counsel, for said corporation, said Ashley and Gay, and filed with the court, as follows:

"In order to relieve the property of the Hudson River Water Power Company from the custody and control of the receiver heretofore appointed and to have such receiver discharged, the above-named parties hereby stipulate that on Wednesday, the 19th of July, 1905, there will be deposited with a trustee to be appointed by this court the sum of $250,000 cash; there will be delivered to said trustee the agreement of Hudson River Water Power Company to pay to the trustee the sum of $15,000 on the 20th of each month, beginning the 20th of August, 1905, and the letter or agreement of the General Electric Company that when it sends the amount of its monthly check for payment of energy supplied to it that it will notify Kellogg & Rose that if the amount of the monthly check is less than $15,000 that the Hudson River Water Power Company will turn over the check received from the General Electric Company together with other checks or money sufficient to make $15,000 on or before the 20th of August and the 20th of each month thereafter until such time as is hereinafter stated.

"That a bond will be given and delivered to the said trustee by the Hudson River Water Power Company with Eugene L. Ashley and Eben H. Gay as sureties, conditioned to pay the claim of the National Contracting Company; at the same time there will be delivered to the trustee and deposited with him as collateral to the above bond the bonds of the Hudson River Electric Power Company to the amount of the difference between the amount of the judgment of the National Contracting Company against the Hudson River Water Power Company with eighteen months' interest added less $250,000; the amount of these bonds to be calculated at 85.

"There will also be delivered to the trustee an agreement of E. H. Gay & Co. to take up said bonds at 90 and to substitute in their place cash, so that the trustee will have at the time hereinafter mentioned when such substitution is made in his hands, including the $250,000 cash and the amount received for the monthly payments of $15,000 herein specified, the full amount of the judgment of the National Contracting Company against the Hudson River Water Power Company with interest for eighteen months.

"The taking up of said bonds and the substitution of cash in their place is to be within thirty days after the decision of the Appellate Division of the Supreme Court of the State of New York First Department on the appeal now pending in said court from said judgment; and at any date on or before the first of January, 1906. This substitution and exchange of cash for bonds is to be made whether said judgment is affirmed, modified or reversed and without regard to the validity of said bonds. All of the moneys, bonds, securities or agreements hereinbefore mentioned to be held by the said trustee as security for the payment of the judgment or claim of the National Contracting Company against the Hudson River Water Power Company, and when said judgment is finally established or the claim is finally determined or settled said money or so much thereof as may be necessary is to be applied to the payment of such claim. In addition to this, the trustee's fees are to be fixed by the court and paid out of the fund or by the Hudson River Water Power Company. * * *

"It is further stipulated that the receiver is at once to render an account of his proceedings as such, and that if the same is found correct the account is to be passed, settled and allowed, and on the payment of the fund in his hands and turning over of the property received by him to the Hudson River Water Power Company, as shown by said account, he is to be relieved and discharged as receiver and the bond given by him is to be canceled.

"All letters, papers or exhibits in the hands of the receiver or master which came from the Hudson River Water Power Company are to be returned to the custody of the Hudson River Water Power Company and kept subject to the order of this court. * * *

"It is stipulated that in case of failure to make the monthly payments above mentioned of $15,000, or to take up the bonds and substitute cash therefor, as above stipulated, this court may upon five days' notice to George

B. Curtiss, and Taylor L. Arms or either of them appoint a receiver in bankruptcy of the Hudson River Water Power Company.

"It is further stipulated that if any judgment is obtained against the Hudson River Water Power Company and the same is not secured or paid within thirty days after the right to issue an execution accrues, then on like notice a receiver may be appointed by this court.

"It is further stipulated that when at any time the full amount of the judgment with eighteen months' interest is deposited in cash in the hands of the trustee under this stipulation and the claims of the petitioning creditors, other than the National Contracting Company, and of the intervening creditor who has come in in this proceeding, are paid in full, that the Hudson River Water Power Company may apply to this court to dismiss the bankruptcy proceeding, such dismissal to be without cost or liability against the National Contracting Company.

"It is further stipulated that the entering of this stipulation and the order thereon and the execution and carrying into effect of this stipulation shall in no wise affect the bankruptcy proceeding, except as herein provided: but that in case this stipulation is not fully carried into effect the rights and remedies of the petitioning creditors and of the bankrupt shall be and remain and be held and considered as of the date of the filing of the petition for adjudication in bankruptcy, namely, the 11th day of May, 1905, and not in any way affected by this stipulation or the proceedings under it."

There were provisions for paying the receiver and his counsel and the special master, and for modifying the injunction so as to permit the turning back of the property and business to the corporation and its officers. On the filing of such stipulation the court was asked to make an order in accordance therewith, which was done the same day. A motion to dismiss the proceedings and discharge the receiver on giving security had been made and was then pending, and this motion was by the order of July 19th denied; but the court did order, as follows:

"And in order to relieve the property and assets of said Hudson River Water Power Company from the claims of said receiver and to have the receivership terminated and the receiver discharged, the said Hudson River Water Power Company in open court by its president and treasurer and by its attorneys, stipulated as herein set out, and such stipulation being reduced to writing and signed is hereto annexed, and it appearing therefrom" —then follows the substance of the stipulation. "And it appearing to the court that the proposition so offered is for the interests of all parties, it is on motion of Kellogg & Rose, attorneys for the petitioning creditors, ordered that for the purpose of carrying out said proposed arrangement"—then followed a provision appointing said Charles W. Andrews a "special trustee" to take and receive the bonds, cash, etc., to be paid and held as security as provided for in the agreement.

With some changes in detail of deposit the stipulation was complied with by the deposit of bonds and cash with said "special trustee" and the execution and delivery of the personal bond of Ashley and Gay, and the property of the corporation was turned back to it, and it proceeded with its business as theretofore. The judgment referred to was appealed from and reversed. A new trial was had, and a judgment rendered in favor of the defendant on its counterclaim on the theory that the National Contracting Company violated the contract, and that the Water Power Company was entitled to judgment for the damages it had sustained by reason thereof. That judgment was appealed from, and the Court of Appeals reversed the judgment and a new trial was had before Chas. E. Rushmore as referee and resulted in the present judgment before mentioned. While this litigation was

going on and with the property returned to the Water Power Company, except such deposit, and it in full control of its affairs but with the bankruptcy proceedings still pending, motions were made in the bankruptcy court for an order releasing such deposit of bonds and cash and directing their return. These motions were opposed by the National Contracting Company, but finally granted, and an order of that court was made releasing the bonds, and another order was made later releasing the cash. The bond of Ashley and Gay was not released by any order of the court. Mr. Andrews, the special trustee, complied with the orders directing him to return the deposits, and he was discharged as such special trustee by order of the bankruptcy court. These orders were not appealed from. Later, the National Contracting Company made a motion or motions in said bankruptcy court for an order directing the return or restoration of such deposits. These motions were not granted. All these proceedings were had with the bankruptcy proceeding against the Water Power Company pending. On or about the 26th day of October, 1908, the equity suit referred to was instituted by Gay and Jackson, and said George W. Dunn, Charles W. Andrews, and Milton Delano were therein appointed receivers. At the same time they were appointed receivers of the property of the Water Power Company by the bankruptcy court in the bankruptcy proceeding pending against it, and they duly qualified as such, but took no other action whatever in the bankruptcy proceedings.

Shortly after the commencement of such equity suit, the directors of several of these corporations passed resolutions declaring their inability to pay their debts and their willingness to be adjudged bankrupts, and petitions in involuntary bankruptcy proceedings were thereupon filed against them. They made no defense; but the Circuit Court directed the receivers in the equity suit to contest the adjudications in bankruptcy proceedings, open them, and defend. This did not apply to the Water Power Company at that time. This was done and trial had, and the District Court held that the action of the directors in passing the resolutions before mentioned were in violation of the injunction granted against them in the Circuit Court in the equity suit, and that, being public utility corporations, they were not amenable to the bankruptcy law, and the court had no jurisdiction, and such bankruptcy proceedings were dismissed. Later the said receivers of said Water Power Company in the equity suit, in behalf of the corporation, raised the same question in the District Court by direction of the Circuit Court, and on a hearing and trial it was adjudicated by the bankruptcy court that, being a public service or public utility corporation, the Hudson River Water Power Company was not subject to the bankruptcy law, and that the District Court in bankruptcy had no jurisdiction or power, and that court thereupon, March 25, 1911, dismissed the bankruptcy proceedings and discharged the receivers. It was after the commencement of the equity suit and the granting of an injunction against its officers therein that the directors of the Hudson River Water Power Company held its meeting and adopted a resolution declaring its inability to pay its debts and its willingness to be adjudged a bankrupt and also directing the withdrawal of its answer in the then pending

bankruptcy proceedings. When the motions were made in the District Court for a release of such deposits of bonds and money with special trustee, Andrews, the true financial condition of the Water Power Company was concealed from the court; but the money and bonds were ordered returned without condition. No application was ever made to the bankruptcy court to vacate its orders releasing the said deposits on the ground of fraud or misrepresentation or concealment of facts. The bankruptcy court of course expected that the money would be used by that company as it saw fit in the conduct of its business.

The special master has found that the National Contracting Company still holds the personal bond of Ashley and Gay given in pursuance of such stipulation, and that there is no proof of the insolvency of Ashley. Gay has been adjudicated a bankrupt and discharged from all his debts.

The special master finds, and the evidence shows, that pursuant to the order of December 28, 1906, and January 3, 1907, said special trustee, Andrews, paid over and delivered to said Water Power Company $420,000, face value, of bonds, and $97,037.12 in cash; and that, pursuant to the subsequent order of July 29, 1907, the balance of cash with said special trustee (deposited with the Standard Trust Company) was paid over to said Water Power Company July 30, 1907, viz., $385,023.62. The special master also finds that the return of these bonds and of this cash greatly benefited the Water Power Company and its said allied corporations. Out of the $97,037.12 returned January 3, 1907, the Water Power Company paid $1,063.64 to certain creditors in the special master's report named. Out of the said $385,023.62 so returned July 30, 1907, the Water Power Company paid out as follows:

July 31, to Hand, Bonney & Jones for legal services	$ 9,245 87
Aug. 1, to R. L. Hand for legal services	20,000 00
Aug. 2, to E. T. Brackett for legal services	5,000 00
Oct. 30, interest on its bonds, issued under first mortgage, due November 1, 1907	13,000 00
July 30, 1907, to Standard Trust Company a note of $125,000 for money loaned, dated April 29, 1907, and made by Hudson River Electric Power Company and indorsed by said Gay and said Ashley individually	125,000 00

The money obtained on this note at the time it was discounted was used as follows: $48,450 paid to Trust Company of America for interest due May 1, 1907, on first-mortgage bonds of Water Power Company; $75,000 paid to Morton Trust Company for interest due May 1, 1907, on first-mortgage bonds of Hudson River Electric Company; $100 to Standard Trust Company for legal services connected with the loan; and $1,450 to E. H. Gay & Co. on account.

It will be noted that the note was made by the Electric Power Company, and that the proceeds were used in part to pay debts (coupons for interest) owing by Hudson River Water Power Company and by Hudson River Electric Company. When that note was given, so far as appears, it became the debt and obligation of the Hudson River Electric Power Company, then the controlling and managing corporation, secured by the personal indorsements of Ashley and Gay. The

debt was not secured by any lien on anything, except in the sense that the debt of a corporation is a lien or charge on its assets in a general way. The proceeds used for the benefit of the Water Power Company, $48,450, and of the Electric Company, $75,000, was treated as a loan to them on account and was charged to them in the accounts as any loan would have been or as a payment on account if anything was due and owing. There was no security or agreement for security. The Water Power Company and the Electric Company owed the Electric Power Company for these sums advanced, if it owed any one. They did not owe the Standard Trust Company. It is true, however, that the sums named were used for the benefit of such companies respectively. There may have been and probably was an obligation to repay to the Electric Power Company when it should pay the note; but these were debts pure and simple. The note and the indebtedness of the Electric Power Company created thereby, and the loans to the other corporations and the debts created thereby, if any, had no connection with or reference to the money then on deposit with the special trustee. When the $385,023.62 was returned to the Water Power Company, it did not put it into any specific property or receptacle, but used it to pay the debt of another corporation represented by a note upon which it was not liable either as indorser or surety. The money did not release any lien on the property of the Water Power Company or of the Electric Company, but passed the same day, July 30, 1907, to the Standard Trust Company, and, if it augmented or increased the funds or property of any one, it increased that of the Standard Trust Company, who got the money.

If the Water Power Company owed the Electric Power Company the $48,450 and it took this way to discharge the debt, and if it so appears the Water Power Company paid its own debt in this way, but it did not use any of this money to pay a bondholder, either principal or interest, or to reduce its bonded indebtedness and thereby release or reduce the lien of the mortgage, nor did the Water Power Company add anything to its assets. There is no pretense that the money or any part of it was used to pay current operating expenses of the Hudson River Water Power Company or of any company in this combination. Conceding, for argument's sake and for the present, that the National Contracting Company had a lien on this money released and turned over to the Water Power Company, how does that fact make this $48,450 a lien on the real estate and other personal property of the said corporation ahead of the first mortgage, when it appears that no part of it went to pay off or reduce bonds, interest, or other liens on the property, or to purchase property which went under the lien of the mortgage, or into the pockets or for the benefit of the bondholders under such first mortgage? There is no evidence that the Trust Company of America, trustee, or the bondholders, had any notice or knowledge of facts imparting notice, that the money used to pay the note held by the Standard Trust Company was subject to any lien in favor of the National Contracting Company, or that either the Water Power Company or the Electric Company obtained the money with which they paid the interest referred to from the Hudson River Electric Power

Company, or that there was any indebtedness of either company to the Standard Trust Company.

Out of the $385,023.62 paid over as aforesaid by the special trustee July 29, 1907, there was paid September 28, 1907, to Knickerbocker Trust Company to pay interest due October 1, 1907, on refunding bonds secured by so-called refunding mortgage made by Hudson River Power Transmission Company $13,300, and the money was so applied, and the same day $12,500 of said money was paid the Mercantile Trust Company as trustee, to pay interest due on first-mortgage bonds due October 1, 1907, under a first mortgage made by said Transmission Company to the Mercantile Trust Company. These payments were made direct to said trust companies by the checks of E. H. Gay as treasurer of the Hudson River Water Power Company drawn on the account to the credit of said Gay as such treasurer with said Standard Trust Company. While the National Contracting Company claims that both these payments are liens prior to the lien of the refunding mortgage, I do not see how under the prayer of the cross-bill it claims or can claim that the $12,500 paid as interest due October 1st on the first mortgage is a lien on the property of the said Transmission Company. The first mortgage is not in process of foreclosure. These direct payments of interest are within the same principles of law as the payment of $13,000, made October 30th, on the interest then due on first mortgage of $2,000,000 on the property of the Water Power Company, except that the latter sum was paid by the Water Power Company in satisfaction of interest on a mortgage by it on its own property, while, as to the payments of $13,300 and $12,500, the payments were made by the Water Power Company in reduction of interest due on mortgages on the property of the Transmission Company.

Out of the $97,037.12 returned to the Water Power Company January 3, 1907, said Gay as treasurer of that company paid January 29, 1907, to the Knickerbocker Trust Company as trustee the sum of $33,025.98 on account of interest due February 1, 1907, on the $5,000,000 executed by the Hudson River Electric Power Company.

On the 30th day of July, 1907, and again February 17, 1908, said Hudson River Water Power Company, by Gay, its treasurer, paid the interest on the mortgage of $200,000 ($123,500 of bonds actually issued), $3,087.50 on each date, in all $6,175.

On the 1st day of February, 1908, the said Water Power Company by check of said Gay as treasurer paid the interest that day due on the $50,000 first consolidated mortgage bonds of the Madison County Gas & Electric Company, out of said $385,023.62.

The National Contracting Company claims that as it had a lien on the money so returned, and it was actually used to pay interest on the bonded indebtedness of said corporations and reduced the bonded indebtedness of the said corporations by that much, and so benefited their bondholders at its expense, when the money should have been used (if used at all) for the sole benefit of the Hudson River Water Power Company against which the claim of the Contracting Company existed, that its lien follows the fund and attaches to the property of those corporations respectively prior to the lien of the respective

mortgages mentioned, to the amounts stated. There is no evidence in the case that the several trust companies, trustees, or bondholders had express or implied knowledge of the existence of any such claim as is now put forward by the National Contracting Company. The National Contracting Company knew the facts in relation to the creation, deposit, and release and return of this fund by order of the bankruptcy court. It did not appeal from such orders, and it must have known the Water Power Company would use the fund, probably for the common benefit of these companies, for it knew they were all under one control and management and were all being run as one company or concern, and also had knowledge of the manner in which the funds were collected, commingled, and disbursed. It was also informed of the mortgages and generally of the amount of the outstanding bonds. All this and more had been developed in the bankruptcy proceeding. There was no suggestion made at any time that there would be any change in the management of the corporations or the conduct of their financial affairs.

Assuming that the National Contracting Company had an equitable lien on the fund while with the special trustee, was it one created by the act of the court under the stipulation, or was it one created and existing independent of the court exercising its powers in the then pending proceeding in bankruptcy? And, whether the one or the other, in view of the want of knowledge thereof by the trust companies, trustees, or notice to them or to the bondholders, can it be held that the equitable lien followed the fund, as divided up, to the respective corporations, and attached itself to the respective properties as a lien prior to that of the mortgages mentioned? While I am of the opinion that no equitable lien existed in favor of the National Contracting Company on this fund or any part of it after its release by the court which created and directed and controlled it, acting without jurisdiction over the Hudson River Water Power Company and its property in point of fact, as to which more hereafter, I am also of the opinion that as to the payment of $125,000, made from this money to take up and pay the note of the Standard Trust Company given by the Hudson River Electric Power Company and indorsed by Ashley and Gay, no equitable lien followed and attached to the property of the Standard Trust Company which received it, and that clearly no equitable lien attached to the property of the Water Power Company or that of the Hudson River Electric Company in favor of the Contracting Company, as they did not receive it to pay interest on the bonds or to purchase property which went under the trust mortgages; but the Hudson River Water Power Company received it for its purposes generally with knowledge of the Contracting Company, and the Electric Company and its bondholders never had any of it directly or indirectly, and the Trust Company of America and the bondholders under that mortgage never had any part of it. Neither the Trust Company of America nor the Morton Trust Company nor the bondholders under the trust mortgages held by them received any part of that $125,000, and I know of no principle on which their security can be impaired for the reason that at a prior time their bondholders had

been paid $123,450 interest with borrowed money, money borrowed by the Electric Power Company, and which debt was subsequently paid with some of the alleged trust money. See Denton v. Davis, 18 Vesey, 499, a case in point. There was no prior arrangement or understanding that this was to be done. In Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865, and the authorities there referred to, and in Holly v. Missionary Society, 180 U. S. 284, 293, 294, 21 Sup. Ct. 395, 45 L. Ed. 531, and the cases there cited, and Ketchum v. St. Louis, 101 U. S. 306, 316, 25 L. Ed. 999, Pinch v. Anthony, 8 Allen (Mass.) 536, and in many other cases and in the text-books, the rule is stated in various forms, but always to the same effect, that parties by written or even oral agreement may set apart a specific fund or property for a specific purpose or for the payment of a specified debt or claim, not yet liquidated, and thereby impress that fund or property with a trust for the agreed purpose; that this trust follows the fund and property into which it has been changed or converted in the hands of the parties themselves for the benefit of the one and as against the other so long as it can be identified, and follows such fund or property into the hands of volunteers and also of third persons, strangers to the original transaction, who received same, or incumbrances thereon, with notice of the trust or of facts which should have put them on inquiry so that they may be said to have had notice. I fail to find any evidence that these trust companies, trustees, or the bondholders who received the interest had notice, express or implied, of this trust relation or agreement or of the source from which the money was derived.

Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511, is an illuminative case, and is cited and approved in Holly v. Missionary Society, supra. If the Water Power Company had paid a prior lien on its property mortgaged to the Trust Company with this fund, or a part of it, thus advancing the security of the bondholders, or with it had purchased specific property which passed under the lien of the trust mortgage, or had purchased property which did not pass under the trust mortgage, or had kept the money in bank, or had invested it in securities of any kind, assuming that the money was impressed with a trust, quite likely an equitable lien would attach to such property prior to the lien of the trust mortgages. But this did not happen. Having received the money from the special trustee pursuant to the order of the court, the Water Power Company proceeded to disburse it in the usual course of business as pursued by these companies, that is, using the funds of each and all the corporations for their common benefit, and the trust companies received it without notice of any trust in the usual course of business and proceeded to disburse it to the bondholders in payment of interest, who received it in the usual course of business without notice of any trust or alleged equitable lien. Neither the trust companies nor the bondholders were volunteers. Large sums of this money were disbursed by Gay as treasurer of the Water Power Company to Mr. Hand and Mr. Brackett in payment for legal services. Can the National Contracting Company recover it of them? Other general creditors were paid from this

fund. Can the Contracting Company recover from them? All these persons received the money in the usual course of business, and so far as appears in good faith. Suppose either of the individuals referred to had deposited the money in bank or kept it in a safe in their own homes, could the Contracting Company have recovered it of them? I think not. Stephens v. Board of Education, supra, 79 N. Y. 187, 188, 35 Am. Rep. 511. If the money itself cannot be followed into the hands of the bondholders, and recovered if found in their possession, how can this court, in effect, take it from them by making it a prior lien on the property mortgaged to secure the payment of their bonds?

[10] But did any lien or equitable charge, such as the law recognizes and will enforce, attach to this money and follow it into the hands of the Hudson River Water Power Company? The National Contracting Company with a judgment on its claim, subsequently reversed, instituted the bankruptcy proceedings. In fact, the bankruptcy court was without jurisdiction, as the Water Power Company was not subject to be adjudicated; the law having no application to it. Of course it was proper for the court to entertain the petition and ascertain the facts and then dismiss for want of jurisdiction to make an adjudication.

Prior to a determination of that question, the bankruptcy court took possession of the property (nearly all of it) of the alleged bankrupt, and the corporation, denying jurisdiction, asked the court to release and turn back its property to it. One of the petitioning creditors, the National Contracting Company, insisted on conditions, and the court imposed conditions, viz., that security for the claim of that creditor should be given, and it was given in the way described. The court in fact had no jurisdiction to impose such a condition. The Water Power Company, so far as the District Court in bankruptcy was concerned, had a perfect right to the full possession and control of its property without any condition whatever. By legal compulsion, wrongfully exercised, the Water Power Company, as a condition of obtaining its own from an officer of the court, was compelled to make the deposit and did make it. If, when the proceeding was dismissed for want of jurisdiction over the Hudson River Water Power Company and its property, the money and the bonds had been in the hands of Mr. Andrews as special trustee, constituted such by the order of the court, it would have been its duty to direct its release and return to the Hudson River Water Power Company, and it would have been the duty of such special trustee to obey the order and restore the property. The court, so far as it was concerned, was bound to order restoration and place the parties in the same condition as when the bankruptcy proceedings were instituted, except as to certain matters of payment, etc., not necessary to detail. The court could not dismiss the bankruptcy proceedings for want of jurisdiction in the first instance and retain any control over the property of the alleged bankrupt.

But it is said that this stipulation or agreement was a contract and agreement between the Hudson River Water Power Company and

the National Contracting Company, voluntarily made, one independent of the court or its action or compulsion, by which the corporation pledged this money and these bonds to the payment of the claim of the Contracting Company in any event, when and if established, and whether the court had jurisdiction or not, whether the proceedings were retained or dismissed. If this is so, the District Court had no power to direct the release and return of this money by the special trustee, and he was a wrongdoer in obeying the order. This was not the construction put on that stipulation by the court or by the parties. The order of the court was sought and obtained and the stipulation was attached and made a part of it. The court later exercised jurisdiction over the deposit and the trustee as its officer, not recognizing him as a mere agent of the National Contracting Company and the Water Power Company, no claim being made that such was the relation, and directed the restoration of the money, and it was restored pursuant to the order of the court notwithstanding the opposition of the National Contracting Company. The orders were not appealed from and no motion made to vacate as having been made without jurisdiction. In fact, the Contracting Company recognized this deposit as a proceeding in court by authority of the court and one over which the court had full control. It acquiesced in the construction put on the transaction and cannot say that Mr. Andrews violated a duty to the National Contracting Company to hold this money as agent or depositary for the satisfaction of the claim of that company when finally adjudicated. It was a part of the deposit agreement that the fund was to be placed by the special trustee with the Standard Trust Company, and this was done, and it had full knowledge of the stipulation and order, a copy of which was placed with it. When the orders of the court were made releasing the fund, it paid same over to the Water Power Company and disbursed it on the checks of its treasurer relying on the order of the court and without protest from the National Contracting Company or notice that it had or claimed any equitable lien thereon. Again, the stipulation was signed by the Hudson River Water Power Company and Ashley and Gay only. The Contracting Company signed nothing, gave up nothing to which it had any right, and forebore no right.

But it is said that the release of the money by the bankruptcy court was procured by concealment and fraud practiced upon it. The special master in effect so finds. If that court had been fully advised of the facts, the true condition of the Water Power Company, and especially of all the allied companies, quite likely it would not have made the orders at that time; but they were made and no motion has been made in the bankruptcy court to vacate or set them aside for fraud. But again, of what moment was that fraud, except in point of time, as the bankruptcy proceedings were subsequently dismissed for want of jurisdiction of the Water Power Company and its property, and that dismissal ended all power of the court in the premises over the deposit except to release it had it then remained with the specal trustee. Suppose it had been with the said trustee March 28, 1911, when the proceedings were finally dismissed, could

Mr. Andrews have retained it for the benefit of the National Contracting Company on the theory he was a mere depositary agreed upon by the Water Power Company and the National Contracting Company and that the action of the bankruptcy court was immaterial and did not affect or terminate his powers and duties? I think not. I am of opinion that the stipulation, order, and deposit were based on and wholly supported by the proposition or supposition that the bankruptcy proceedings were valid and would be sustained although they might not be carried to a final termination in due course, and that when the proceeding fell the stipulation fell with it, and that the deposit reverted to the Water Power Company in the same condition as if the proceeding had not been instituted or the deposit made. I think it uncertain that the deposit made ever actually belonged to the Hudson River Water Power Company alone; but this will not be discussed. Clearly there is no proof that there was any diversion or misapplication of current earnings or of any lien growing out of the nonpayment of current operating expenses from current earnings. The claim of the National Contracting Company is not for an operating expense in any sense in whole or in part, and the money borrowed on notes, or a note to obtain money to pay interest, is not a claim for an operating expense. I have examined all the cases on this subject to which my attention has been called and fail to find anything which sustains the position of the National Contracting Company. It is of course true that creditors with unpaid claims incurred for operating expenses and who have the right to rely on the application of current earnings to their payment may have a lien on the property of the corporation ahead of the lien of a prior trust mortgage to secure the payment of bonds, if such current earnings applicable (so-called six months rule) have been diverted to pay the interest on such bonds.

In Ill. Trust & Savings Bank v. Doud, 105 Fed. 123, 148, 44 C. C. A. 389, 414, 52 L. R. A. 481, after a comprehensive and careful review of the cases, the Circuit Court of Appeals, Eighth Circuit, said:

"The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The broad language of the dicta in Fosdick v. Schall, that 'necessary operating and managing expenses, proper equipment, and useful improvements' are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited, by the later decisions of the Supreme Court" (citing cases) "to claims incurred for the current expenses of the operation of the mortgaged property in the ordinary course of business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred."

The foregoing, I think, applies to and covers every disposition of this fund paid over to the Water Power Company by Mr. Andrews as special trustee. There is evidence of the payment of other notes, one or two, given at prior dates, for money borrowed and which was used to pay interest; but I do not regard it essential to detail the circumstances, as I have already covered the subject. This is true as to other payments made from this fund. My conclusion is that the National Contracting Company has failed to establish an equitable lien on the property of either of these corporations superior to the lien of the trust mortgages and the rights of the bondholders thereunder. The trust companies, as trustees, and their bondholders, respectively, were innocent parties in the receipt of these moneys. If the National Contracting Company had a lien in the first instance, while the deposit remained, it allowed it to lapse and may be said to have abandoned it, as it gave no notice to the special trustee, to the Trust Company with which it was then deposited, or to the trust companies holding the trust mortgages, and made no such claim even to the Water Power Company. If the Contracting Company was induced to this course by the fraud, concealment, or wrong of the Water Power Company or its officers, the mortgage bondholders, innocent of any wrong, cannot be made to suffer. This would be visiting the consequences of that wrong on innocent parties, who were not in a position to protect themselves, for the sake of protecting the National Contracting Company, which, if its theory is correct, had power to protect itself. I think the case is covered by what was said in Holly v. Missionary Society, 180 U. S. 284, 294, 21 Sup. Ct. 395, 398 (45 L. Ed. 531), viz.:

"Let it be conceded that he was not, in the circumstances, estopped from following his money into the hands of the Missionary Society, by having entered an attachment against Thompson for a fraudulent conversion of his money. Let it also be conceded that, by trusting his money with Thompson, who had theretofore been his attorney, and whose standing in the community was good, he was not guilty of conduct so reckless and negligent as to, of itself, deprive him of a remedy. Yet his case fails in the essential particular that he has not shown that the Missionary Society, in receiving from Thompson, executor, the money due from the estate of Rev. Dr. Saul, and in applying it in accordance with the appointments in the will, acted with any notice or knowledge, actual or imputable, that Thompson was misapplying funds intrusted to him by a third person with whom the society had no relations whatever. As against the Missionary Society, Holly, in the circumstances disclosed, has no equities; and, even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent."

Also by State Bank v. United States, 114 U. S. 401, 5 Sup. Ct. 888, 29 L. Ed. 149.

Aside from the particular form of the decree and allowances and their amount, on which last question the parties in interest have agreed, there is but one other question, or rather three questions requiring consideration.

Title to Certain Lands.

[11] This controversy is wholly between the Hudson River Water Power Company and the Hudson River Electric Company, and con-

sequently between their respective trustees, Trust Company of America and Morton Trust Company, as trustees.

As already stated, the offices of these two corporations were in the same rooms in the same building in the city of Glens Falls, N. Y. The officers, practically, were the same. They used a safe in common to which both had free access.

After the granting of the orders herein permitting foreclosure and the filing of the cross-bills, the attorney for the Morton Trust Company, in examining papers in the said safe used in common, found therein a duly executed deed or conveyance from the Hudson River Electric Company to the Hudson River Water Power Company, dated October 8, 1901, and acknowledged October 9, 1901, never recorded, and which conveys certain rights of way, pole lines, and equipment thereon so far as then constructed. Consideration expressed, $150,000, and Mr. Seay, comptroller of the companies, testifies that the Water Power Company gave credit to the Electric Company for that sum, and that it is included in Receivers' Exhibit R-1. The next day, or October 9, 1901, the Hudson River Water Power Company by reference to this deed as a description, viz., dated October 8, 1901, and recorded October ———, 1901, Liber ———, page ———, mortgaged this property, by a supplemental mortgage, to the Trust Company of America, and that mortgage was duly recorded in Saratoga County, N. Y., October 14, 1901. The $3,000,000 mortgage of the Hudson River Electric Company to the Morton Trust Company as trustee was dated December 18, 1901, and acknowledged December 24 and 26, 1901, and recorded December 27, 1901. There is no proof of the actual manual delivery of this deed. Delivery, if proved, is to be inferred from the making of the deed, the credit given by the Water Power Company to the Electric Company, and the mortgaging of the said property by reference to the deed from the Electric Company to the Water Power Company. There is no evidence as to actual change of possession, or that the Morton Trust Company when it took its mortgage knew of the deed to the Water Power Company. The mortgage to said Morton Trust Company did not specifically describe this property, but in general terms covered all the property, real and personal, of the said Hudson River Electric Company. During all this time the Hudson River Electric Company had the record title. The Morton Trust Company in examining title had no occasion to examine the mortgage from the Water Power Company to the Trust Company of America, as there was nothing to inform or suggest to it that the property had been deeded to the Water Power Company. The deed from the Electric Company to the Water Power Company was executed by Peddrick, president, and attested by E. J. West, secretary. The said mortgage by the said Electric Company to the Morton Trust Company was executed and attested by the same persons. So far as appears, they gave no notice or information as to the deed of the Morton Trust Company. The general description contained in the mortgage by the Electric Company to the Morton Trust Company was all-sufficient, as it had the record and the legal title and was in possession. Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301. Under Page v. Waring, 76 N. Y.

463, as the parties in controversy claim from a common source, and the mortgage to the Morton Trust Company was actually recorded in December, 1901, and the deed to the Water Power Company was never recorded, and the Trust Company had no notice or knowledge of the unrecorded deed, and there was no change of possession, the mortgage of the Morton Trust Company must prevail over that of the Trust Company of America, which, although prior in date of record, was from the Water Power Company, and not from the Hudson River Electric Company, the one in possession and owner of the record title.

Second Deed.

November 5, 1901, the Hudson River Electric Company, the record owner in possession, by deed dated that day, conveyed certain rights of way and pole lines, etc., thereon to the Hudson River Water Power Company. This deed was not recorded until October 24, 1902. November 5, 1901, the Water Power Company mortgaged such property by a supplemental mortgage to the Trust Company of America pursuant to a prior agreement to execute supplemental mortgages whenever it acquired additional lands, etc. This supplemental mortgage was recorded November 7, 1901.

December 18, 1901, and nearly a year before the deed to the Water Power Company was recorded, the Electric Company executed its $3,000,000 mortgage to the Morton Trust Company, as heretofore stated, to secure the payment of $3,000,000 of bonds. This mortgage was duly recorded December 27 and December 28, 1901, about 10 months before the deed to the Hudson River Water Power Company was recorded. There is no evidence of a change of possession prior to the time the Morton Trust Company as trustee took and recorded its mortgage or of notice to it of the said deed. In short, the Morton Trust Company took and recorded its mortgage months prior to the record of the deed to the Water Power Company without notice of such deed express or implied. It had no occasion to examine mortgages given by the Hudson River Water Power Company to any one, as there was no deed of record to the said company from the Electric Company.

Under the recording acts and the decisions referred to, it seems clear that the lien of the Morton Trust Company is superior to that of the Trust Company of America.

Third Deed.

The $3,000,000 mortgage of the Electric Company to the Morton Trust Company, dated December 18, 1901, was recorded December 27 and 28, 1901, and covered all its property not excepted therefrom.

There was found in the safe used in common by the Electric Company and the Water Power Company an executed deed dated September 23, 1902, from the Hudson River Electric Company to the Hudson River Water Power Company. This deed has never been recorded, and there is no evidence that it was ever actually delivered. This deed covers certain pole lines or rights and pole lines thereon. A portion of the property described in this deed—the pole line and rights from Ballston Spa to Schenectady—was expressly excepted from the said mortgage of the Electric Company to the Morton Trust

Company. This portion of the pole lines and rights cannot be claimed by the Morton Trust Company; but it is clear that under the recording acts and the decisions the balance of such property is covered by the lien of the mortgage to said Morton Trust Company. The same day that this unrecorded deed was dated, the Hudson River Water Power Company mortgaged same to the Trust Company of America as trustee, by a supplemental mortgage. This mortgage was amongst the papers of the said Trust Company, but unrecorded, and the acceptance of the trust thereby declared was not signed by said Trust Company.

This tends to show an incomplete transaction, and in view of the facts that the deed was not recorded, that delivery is not proved, and that the Trust Company of America did not acknowledge its acceptance of the trust or record the mortgage, I am of the opinion the proof fails to show title to the pole line and rights from Ballston Spa to Schenectady in the Hudson River Water Power Company.

Allowances.

As agreed by the parties and all interested in open court, the allowances to the receivers are fixed at $16,000 per annum each in addition to expenses as presented and filed, with $19,000 per annum to Abram J. Rose, and $16,000 per annum to Geo. B. Curtiss, their attorneys, in addition to their expenses as shown by accounts filed, all of which, in view of the value of the properties, their condition when received by the court and now, the reduction of expenses in managing them, the increase in business and net receipts, and the intricate and important questions settled and disposed of with great labor and intelligence, the court regards as reasonable and proper; such compensation to commence October 31, 1908, and terminate with the delivery of the deeds on a sale of such properties.

The Decree.

The consolidated decree should provide for a sale of the Madison county property and any other property at the place prescribed by statute, as well as at the place of sale of the main properties the sale of the first-mentioned property to follow that of the others, and also an express provision reserving the right in the court to order a sale of the Madison county property and the Saratoga Gas, Electric Light & Power Company property separately and at such time as it shall fix in case of unreasonable or undue delay in executing the consolidated decree. The court has no reason to anticipate any such delay; but, as this is the ground urged against consolidation, I think the provision should go in the decree, which as I consider will be but declaratory of the power residing in the court whether expressly reserved or not.

There will be orders and decrees accordingly.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al.

(Circuit Court, N. D. New York. September 16, 1911.)

1. JUDGES (§ 30*)—FEDERAL DISTRICT JUDGE—POWERS UNDER ASSIGNMENT TO HOLD COURT IN ANOTHER DISTRICT.

A federal district judge, assigned by order of a circuit judge to hold Circuit and District Courts in a district other than his own, because of the contemplated absence of the district judge of the district to which such assignment is made, is not thereby empowered to make and sign orders in a case pending in such other district when absent therefrom and in his own district, and especially when the resident judge of such other district, who presided at the hearing of the cause, is within his district.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 30.*]

2. APPEAL AND ERROR (§ 470*)—SUPERSEDEAS—AUTHORITY TO APPROVE BOND.

Under the provisions of Rev. St. § 1000 (U. S. Comp. St. 1901, p. 712), that "every judge signing a citation * * * shall take good and sufficient security * * * where the writ is a supersedeas," etc., where the presiding judge of a Circuit Court of Appeals allowed an appeal from a Circuit Court, signed the citation, and fixed the amount of the security to be given to operate as a supersedeas, the bond to be approved by "this court," in order to become effective as a supersedeas the bond must be approved by such judge, and neither the judge nor clerk of the court from which the appeal was taken has power to give such approval.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 470.*]

In Equity. Suit by Eben H. Gay and Joseph W. Jackson against the Hudson River Electric Power Company, the Hudson River Water Power Company, and others. On application for order confirming sale. Order granted.

See, also, 190 Fed. 773.

Application on order to show cause for an order confirming the sale of the properties of six of the defendant corporations made pursuant to a consolidated decree of foreclosure directed by this court in foreclosures allowed by this court.

Davies, Stone & Auerbach (Charles E. Hotchkiss, of counsel), for Knickerbocker Trust Company, and Winthrop & Stimson (Franklin H. Mills, of counsel), for Guaranty Trust Company of New York, and John G. Boston, for Trust Company of America, for the motion.

L. Laflin Kellogg (Alfred C. Pette, of counsel), for National Contracting Company, opposed.

RAY, District Judge. On or about November 1, 1908, this court in the above-entitled action appointed George W. Dunn, Milton De Lano, and Charles W. Andrews, receivers of the properties of the eight defendant corporations, same being then under one management and control, with directions to keep the properties, accounts, etc., of such corporations separate so far as possible. The said receivers qualified and have been in the possession, control, and management of such corporate properties since. On application to the court, permission was granted to foreclose certain mortgages on such properties; it appearing that such a course was absolutely necessary to protect and pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

serve the rights of the parties. It has always been evident that to keep the properties together and sell them at one time would realize more money and be more beneficial to the bondholders and general creditors, as well as the general public interested in having the business of these corporations kept alive and continued. For good and sufficient reasons, no foreclosure as to the defendant Ballston Spa Light & Power Company was permitted, and under a decision of the Circuit Court of Appeals the trustee for the bondholders of the Empire State Power Company was permitted to foreclose by advertisement—strict foreclosure—under a clause in the trust mortgage. The sale of that property has not been had. All are what are known as public service, or utilities, corporations.

The properties referred to, aside from those of the Empire State Power Company and the Ballston Spa Light & Power Company, were sold August 29 and August 31, 1911, on four weeks legal notice and other notice directed by the decree deemed proper for the purpose of giving wide notice. They brought about $7,500,000, and, subject to certain prior liens, the purchase price was equivalent to a sale for about $8,500,000. No question is raised as to the adequacy of the price paid or as to the sale having been fairly conducted. The contention is that the court, by its special master appointed for the purpose of executing the consolidated decree of sale, was without power to make the sale on the days named, the sale having been in legal effect stayed by an appeal from the consolidated decree taken by the National Contracting Company, defendant, duly allowed, and on the taking of which appeal it is claimed a supersedeas was duly granted, not only by order, but by the fixing by order of the amount of the bond to be given to operate under the statute as a supersedeas on the appeal, and which orders, it is claimed, were fully executed and complied with by the said appellant before any modification or vacation thereof, and that therefore the appeal was perfected, the supersedeas operative, the cause and jurisdiction over it transferred to the Circuit Court of Appeals, and that no circuit judge could thereafter in any way limit, modify, or vacate the order of supersedeas above referred to or the order fixing the bond to be given and operate as a supersedeas. It is also insisted that the right to a supersedeas is statutory, and that all the court or judge allowing the appeal has to do is to fix the amount of the supersedeas bond by order, and that when such bond is given pursuant thereto the supersedeas is operative and cannot be limited or vacated by the Circuit Court or a judge thereof, as supersedeas on giving the bond, once fixed, is a matter of statutory right.

The National Contracting Company, one of the defendants, is a judgment creditor to the amount of $326,387.55 by virtue of a judgment obtained and duly entered against the Hudson River Water Power Company on or about December 23, 1909. The National Contracting Company defended against the validity of two of the mortgages foreclosed given by the Hudson River Water Power Company aggregating some $8,000,000, but did not attach the first mortgage of some $2,000,000. If its appeal shall be sustained and the said mortgages, too, held invalid, there can be no question that its judgment is good

in part, at least, and to a large amount. The questions involved are substantial, and the defense presents questions of law on which judges may well differ.

The National Contracting Company also claims an equitable lien on the properties so sold for the satisfaction of its judgment based on grounds and facts not necessary to recite. Nothing should be done by this court or a judge thereof which will operate to place the property of the Hudson River Water Power Company (or of any of the other companies) or its proceeds beyond the reach of the National Contracting Company to the extent of its priority, if its appeal is sustained.

The facts upon which the National Contracting Company bases its opposition to the confirmation of the said sale are as follows: The Honorable E. Henry Lacombe is the senior circuit judge of the Second circuit and the presiding judge of the Circuit Court of Appeals, Second Circuit. The decree of sale in the consolidated foreclosure was granted by Judge Ray, district judge of the Northern district of New York, and acting circuit judge in said district, on the 13th day of July, 1911, and same was entered July 14, 1911. August 19, 1911, the National Contracting Company, ex parte, presented to Judge Lacombe at chambers in the Southern district a petition praying that it alone be allowed to appeal from the decree and that its appeal be allowed, also assignments of errors, and asked that the judge direct the appeal to stand as a supersedeas on giving the required bond to be fixed by the judge, and that the judge fix a supersedeas bond accordingly. The petition set forth that the other parties defendant had been requested to join in the appeal but had failed and refused so to do, and also that the properties directed to be sold were in the hands of receivers duly appointed by the court and being operated by them for the benefit of the mortgagees or mortgage bondholders. Judge Lacombe allowed the appeal and signed the citation returnable September 16, 1911, and made and signed an order fixing the bond to be given at the sum of $5,000, conditioned to pay all damages and costs if the said appellant should fail to make its appeal good, etc., and ordered that on giving such bond to be approved by "this court" the decree stand superseded pending the appeal.

No bond in accordance with the order and direction of the judge was presented to or approved by Judge Lacombe, nor has it been. The petition, assignment of errors, and allowance of the appeal and said order were duly filed in the office of the clerk of the Circuit Court of the Northern District of New York. The citation was duly served. On the 22d day of August, 1911, the said appellant, National Contracting Company, presented to the clerk of the said Circuit Court of the Northern District of New York a bond executed pursuant to said order of Judge Lacombe in the sum of $5,000, executed by said National Contracting Company as principal and by the United States Fidelity & Guaranty Company as surety, conditioned to pay "all damages and costs," etc., if the National Contracting Company should fail to make its appeal good. This bond was duly approved by the clerk of the court and filed. The next day, August 23, 1911, the question of the

power of the clerk to approve the bond having been raised, the clerk (deputy in the absence of the clerk himself) of the Circuit Court, Northern District of New York, presented the said bond to Judge Ray, district judge of the Northern district of New York and acting circuit judge in said Northern district, for approval. Judge Ray declined to approve said bond on the ground that, Judge Lacombe having allowed the appeal, granted the supersedeas, fixed the amount of the supersedeas bond, and signed the citation, the bond should, under the statute and decision, be approved by him (Judge Lacombe). In June, 1906, Judge Ray and Judge Geo. C. Holt, one of the district judges of the Southern district of New York, exchanged, and Judge Holt was to hold the June term in the Northern district, and Judge Ray was to hold the June term in the Southern district, and Judge William J. Wallace, then presiding judge of the Circuit Court of Appeals, Second Circuit, and the then senior circuit judge of the Second circuit, made an order duly entered and filed as follows:

"I, William J. Wallace, Circuit Judge of the United States Circuit Court for the Second Circuit, hereby certify that it having been certified to me by the clerk of the United States Circuit and District Courts for the Northern District of New York, under the seals of the said courts, that from the accumulation of judicial business in the said courts and the contemplated absence from the district, of the district judge for that district, the public interest requires the services of a judge from another district to hold the said courts:

"Now, in pursuance of the authority conferred upon me by law, I hereby designate and appoint the Honorable George C. Holt, District Judge of the United States for the Southern District of New York, to hold the said Circuit and District Courts for the Northern District of New York, in the place of the district judge of the said Northern District of New York; and to have and exercise all the powers conferred upon him by virtue of this appointment from this date until this order is revoked.

"In witness whereof, I have hereunto subscribed this certificate this 8th day of June, A. D., 1906. Wm. J. Wallace, Circuit Judge."

This order has never been revoked. On the 24th day of August, 1911, the said bond of $5,000 was presented to Judge Holt in the Southern district of New York for approval, and he approved same. Judge Ray was then in the Northern district and acting as district judge and as circuit judge in said district, and Judge Holt was not in the Northern district or holding court therein. His only power to act was conferred by said order, and the question is raised that as Judge Holt was not within the Northern district of New York on the 24th day of August, or holding court therein, but in the Southern district, and Judge Ray was present in the Northern district, Judge Holt had no power or authority to act as circuit judge in said Northern district at the time, and that the statute, in any event, requires the bond to be approved by the judge who allows the appeal and who signs the citation, and that therefore Judge Holt had no power or authority to approve said bond, and that the approval by him was and is a nullity. The appellant contends that, even if this is true, the bond may be approved within 60 days from the entry of the decree, and that it is the duty of Judge Ray, even now, to approve such bond. August 23d, the solicitors for the trust companies, trustees, holding the mortgages foreclosed, went before Judge Lacombe and applied ex parte for a vaca-

tion, or in the alternative a modification of the order fixing the bond and granting supersedeas, and that judge fixed August 25, 1911, at his chambers in New York City as a time and place for hearing all the parties. On the 25th day of August the parties went before Judge Lacombe at his chambers in New York City and were fully heard, and thereupon Judge Lacombe made and August 28, 1911, signed an order which was duly entered striking from his first order the provision as to a supersedeas bond and amending such order and inserting the following:

"Ordered, that upon the appellant filing the usual bond upon appeal, as security for costs, in the sum of $1,000, duly approved as to form and sufficiency, within ten days from the date thereof, the appeal of the National Contracting Company from the final decree of this court made and entered on or about July 13, 1911, be and it hereby is, allowed. Further ordered, that the appellant may apply in the Northern district to the judge holding circuit therein for an amendment of the decree directing that from the proceeds of the sale a sum sufficient to meet the appellant's claim be reserved until its appeal is heard and decided. And it is further ordered, that the bond on appeal herein, dated August 21, 1911, and filed in the office of the clerk of the United States Circuit Court, for the Northern District of New York, on August 22, 1911, be, and the same hereby is, stricken from the files of said court, and the said clerk is hereby directed to deliver said bond to said appellant, National Contracting Company, or its attorneys."

The National Contracting Company appeared at the sale and presented and read a written protest against the sale, alleging substantially all the facts and grounds stated, and asserting that the sale was in fact stayed by the taking of the appeal, the allowance thereof, the presentation of the assignment of errors, the fixing and execution and filing of the bond, and the approval thereof as stated, etc., and that the special master had no power or right to proceed. The special master overruled the protest and objections and proceeded with such sale. He has made and filed his report, and the National Contracting Company has filed exceptions thereto which were presented to and before the court on the hearing of the order to show cause why such sale should not be confirmed. The National Contracting Company is the only party in interest objecting to such confirmation.

Judge Lacombe is a circuit judge of great learning and ability and long experience, of undoubted integrity, and for many years has been a member of the Circuit Court of Appeals and for some years its presiding judge. He is famed for his careful and painstaking examination of all questions presented to him, his clear conception of the law, and fearlessness in the performance of his duties. It would be unseemly and impertinent for a district judge acting as circuit judge to disregard and in effect overrule the order of Judge Lacombe vacating the supersedeas and striking the bond from the files and hold it null and void, unless so clearly and unquestionably wrong because made without power, or in violation of some express statute or clear decision of the Supreme Court of the United States, as to show that Judge Lacombe called upon to decide hastily in the matter acted inadvertently, or overlooked such statute or decision, in which case he would, of course, expect the judge before whom the motion to confirm the sale came to disregard the void and ineffectual order granted

by him. In view of the interests involved, I have given the matter close attention and careful examination, and if satisfied that the order of Judge Lacombe vacating the supersedeas and striking the bond from the files of the court was void, or ineffectual, one he had no power to make, and that an appeal and a supersedeas under the statute had been perfected by a proper and legal approval of the bond before such action, and that the cause had been actually transferred to the Circuit Court of Appeals before Judge Lacombe amended his order as stated, I should unhesitatingly refuse to confirm the sale. However, I am not so satisfied. I think the order of Judge Lacombe, first granted, and fixing the amount of the bond and directing that it be approved by "this court," meant that it was to be approved by him. If Judge Lacombe, who signed the citation, had approved the bond, and all the papers had been filed before he made his last order, it may be that the cause would thereupon have been in the Circuit Court of Appeals, and that a circuit judge, even Judge Lacombe, acting alone would have been without power to make any such order in the cause.

[1] I have never understood that a district judge of one district, duly assigned and empowered by order of a circuit judge to hold district and circuit courts in another district of the circuit because of and in contemplation of the absence of the district judge residing and holding such courts in such other district, may act as such circuit judge of and in such other district when not in the district to which so assigned and in which empowered to act by such order, but when in his own district, that of his residence and for which appointed, especially when the resident judge of such other district is therein and acting, and especially in a cause with which such district judge has had nothing to do. The fact that Judge Holt was sitting as a circuit judge in the Southern district of New York, his own district, gave him no power to act as circuit judge in and for the Northern district.

[2] But, even if this is wrong, I am of the opinion that the supersedeas bond, to be effectual and operate as such, must be approved by the judge who allows the appeal and signs the citation—in this case Judge Lacombe. The statute so reads, and the Supreme Court has so held. If not approved by him or a defective bond is filed, a judge of the appellate court probably may approve or take such action as will cure the defect.

Section 1000 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 712) reads as follows:

"Every justice or judge signing a citation or any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Section 1007 (U. S. Comp. St. 1901, p. 714) reads as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment

complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days."

Section 1012 (U. S. Comp. St. 1901, p. 716) reads as follows:

"Appeals from the Circuit Courts and District Courts acting as Circuit Courts, and from District Courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

In Haskins v. St. Louis & S. E. R. Co. et al., 109 U. S. 106, 107, 3 Sup. Ct. 72 (27 L. Ed. 873), the court said:

"Section 1000 of the Revised Statutes requires the justice or judge signing the citation to take the security. This power cannot be delegated to the clerk or to a commissioner. O'Reilley v. Edrington, 96 U. S. 724, 726 [24 L. Ed. 659]."

See, also, opinion in the case cited.

In Kitchen v. Randolph, 93 U. S. 86, at page 89 (23 L. Ed. 810), the court goes into the question of supersedeas, and says:

"It is not said when the writ of error shall be served. Its execution must of course precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think," etc.

Also:

"The execution, approval, and filing of the bond are substantial."

This is the law on the subject as stated by Bates in 2 Bates on Federal Equity Procedure, § 824, p. 855. He says:

"The law requires the justice or judge signing the citation to take the security. This power cannot be delegated to the clerk or a commissioner of the court. The judge must approve the bond."

He also asserts that this is the rule on appeals to the Circuit Court of Appeals. Section 824, p. 855; section 821, p. 851. Foster's Federal Practice asserts the same. 3 Foster, Federal Practice (4th Ed.) § 510, p. 2085. He says:

"A supersedeas is a stay of proceedings upon a judgment or decree to which a writ of error is issued or from which an appeal is taken. To secure a supersedeas in a civil case, the writ of error or appeal, and the security required to be given upon the issue of a citation, must be lodged in the clerk's office for the use of the defendant in error or appellee within 60 days, Sundays exclusive, after the rendering of the judgment. Security must also be given that the plaintiff in error, if he fail to make his plea good, will answer all damages and costs. The latter security, if filed concurrently with the issue of the citation and the lodging of the writ of error in the clerk's office or at any time within the said sixty days, Sundays exclusive, may be approved by the judge or justice who signs the citation, and operates as a stay as a matter of right. Otherwise it can only operate as a stay by the permission of a judge or justice of the appellate court, and then only if the writ of error was sued out and served within the 60 days."

If the power of approval is in the judge who signs the citation and it cannot be delegated by him to the clerk of his court, it cannot be delegated to another judge or assumed by another judge.

If this be the law, there was no effective supersedeas bond and no stay and no bond which perfected an appeal. True, within the authorities cited by Foster and Bates the appellate court, Circuit Court of Appeals, or a judge thereof, may permit the filing of a bond to operate as a supersedeas after the case is in that court; but this has not been done. In view of the action taken and order granted by Judge Lacombe, it is evident that he would not have approved any supersedeas bond after the solicitors and counsel for the trust companies appeared before him. I think I am bound to assume that August 26, 1911, the date of Judge Lacombe's memorandum vacating the supersedeas, and August 28th, the date of his order whereby the prior order that the giving of the bond should operate as a supersedeas was so far vacated, and it was also provided and ordered that the bond of $5,000 approved by the clerk and by Judge Holt should be stricken from the files of the court and the bond delivered up, Judge Lacombe decided and held that the bond had not been properly approved and was ineffectual, and that the Circuit Court had not lost jurisdiction of the cause—that it had not been transferred to the Circuit Court of Appeals—and that therefore he had full jurisdiction and power in the premises over his own prior order and power to vacate or amend according to the justice of the case. In any event, the appeal taken, if effectual as an appeal, did not operate as a supersedeas, and, as I view the law, a supersedeas bond, if not both fixed and approved by Judge Lacombe who signed the citation, could only be fixed and allowed pursuant to an order of the Circuit Court of Appeals which was not done and has not been done. Undoubtedly, after a cause is in the Circuit Court of Appeals by a regular appeal and that court is applied to to grant a supersedeas or to correct an error in the appeal or bond, that court may direct who shall approve, if a supersedeas is then granted or a defective bond is to be corrected. In such case the citation having been signed by a judge of the lower court and the case transferred, and the appellate court having exercised its power to grant a supersedeas or correct a defect, the rule that the judge signing the citation must approve the bond has no application, and the approval by him is not required by statute in such case. The appeal was not perfected until a bond for costs, duly approved, was filed. If the bond filed was defective, the appellate court may give a remedy or the appellant may now perfect the appeal in that regard.

There can be no question that a supersedeas is a matter of right under the statute so far as the interest of the appellant is involved. But it is not for the appellant to determine the amount or penalty of the supersedeas bond—the amount and sufficiency of the security. The other necessary papers must be presented to the judge, the appeal allowed, the citation signed, and the amount of the supersedeas bond fixed by the judge who signs the citation and allows the appeal, and approved by him. He is to determine the sufficiency of the security. The provision of the statute is substantial, says the Supreme Court, not merely directory. If the judge who allows the appeal and signs the citation should arbitrarily refuse to fix a supersedeas bond,

or to approve a sufficient one duly offered, in a proper case, some other judge would probably grant a stay of the execution of the decree until suitable action could be taken. And it may be that the tender of a sufficient bond duly executed to the judge allowing the appeal and signing the citation would be sufficient to operate as a supersedeas. But in this case no bond has been presented to Judge Lacombe, and no such question arises here. There is nothing in rule 13 (150 Fed. xxviii, 79 C. C. A. xxviii) of the Circuit Court of Appeals as to "supersedeas and cost bonds" which in any way provides, even by implication, that a supersedeas bond in a civil case, not allowed by the appellate court, may be taken or approved by a judge other than the one who allows the appeal and signs the citation. And any such rule or practice, if adopted, would be in the face of the statute and the decisions of the Supreme Court, and would also lead to confusion and conflict between the judges. I find nothing in Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237, or in Draper v. Davis, 102 U. S. 370, 26 L. Ed. 121, or McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56, or Goddard v. Ordway, 101 U. S. 745, 25 L. Ed. 1040, to the effect that one judge may allow the appeal, fix the bond, and sign the citation, and another judge take and approve the bond and its sufficiency, prior to the actual transfer of the case to the appellate court.

In Draper v. Davis, 102 U. S. 370, 371, 26 L. Ed. 121, the judge who signed the citation took and approved the security; the appeal having been allowed by the court sitting in term at a prior date but no security offered or given and no citation signed at that time. This of course complied fully with the statute and rules of the Supreme Court and Circuit Court of Appeals. Here the appeal was not allowed by the court in term, but by a circuit judge at chambers, who not only fixed the security to be given, but signed the citation. There was no delegation of authority to any other judge to approve the security or attempt to do so.

In Goddard v. Ordway, 101 U. S. 745, 752, 25 L. Ed. 1040, the order allowing the appeal and the order of revocation were both made by the court in the same term and during the sitting of the court.

In Goddard v. Ordway, 94 U. S. 672, 673 (24 L. Ed. 237), it was held:

"A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf."

"A compliance by the appellant with the provisions of the act of Congress in that behalf" requires: (1) The presentation to the judge of the petition of appeal and assignments of error; (2) the allowance of the appeal; (3) the fixing of security by the judge to operate as a supersedeas; (4) the execution of the bond and its approval by the judge who signs the citation, and also the signing of a citation; and, finally, the due filing of all the papers. I am of the opinion that, if one judge allows the appeal and fixes the security to be given to operate as a supersedeas, but does not sign the citation, another circuit judge or a district judge acting as circuit judge in the district may approve the security or bond later, provided he also signs the citation, although

this may be questioned. But the statute and rule are imperative that the judge who signs the citation shall approve the bond.

Jerome v. McCarter, 21 Wall. 17, 28, 30, 22 L. Ed. 515, is a plain holding that the judge who signs the citation is to approve the bond, and, I think, this should be done by the judge who fixes the security which is to operate as a supersedeas. In that case the court said:

"The twenty-second section of the judiciary act of 1789 provides that every justice or judge signing a citation or any writ of error shall take good and sufficient security. * * * Under the act of 1789, the amount of the security to be taken is left to the discretion of the justice or judge accepting it. The statute is satisfied if in his opinion the security is good and sufficient."

In short, the judge signing a citation is to determine not only the amount, but the sufficiency of the security offered. Again, the court said:

"This is a suit on a mortgage and, therefore, under this rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure," etc.

As Judge Lacombe signed the citation, he only could approve the bond, and, as it never was presented to or approved by him, there was no effectual stay or supersedeas entirely irrespective of his power to make the order of August 28th, vacating the supersedeas, or so modifying his prior order that no supersedeas was granted, and striking from the files of this court the bond actually filed. That bond was wholly ineffectual to operate as a supersedeas because not approved by Judge Lacombe, and it was immaterial whether it was or is on or off the files of this court.

I have not overlooked the case of Brown v. Northwestern Mut. Life Ins. Co. (Eighth Circuit) 119 Fed. 148, 55 C. C. A. 654, holding that a supersedeas bond is not to be held void in an action against the surety thereon as to such surety because not approved by the judge who signed the citation. In that case the court, Caldwell, C. J., Sanborn, C. J., and Adams, D. J., did hold, referring to section 1000, R. S., hereinbefore quoted:

"It ought to have, and has constantly, received a broader and more liberal construction—the construction that the bond may be approved by any judge or justice who was vested with the power to sign the citation and to allow the writ of error or appeal in the first instance."

The learned court cites as authority Catlett v. Brodie, 9 Wheat. 553, 555, 6 L. Ed. 158; O'Reilley v. Edrington, 96 U. S. 724, 24 L. Ed. 659; and Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424. The court also said:

"The judge who finally approved the bond had authority to do so, although he did not sign the citation, and the bond constituted a valid obligation of the sureties."

The result declared that the bond was a valid obligation of the sureties was of course correct. The bond had been acted on by the parties and respected as valid. It was duly executed by the sureties. Its validity as to the sureties did not depend on the approval by the judge signing the citation. Its effectiveness as a supersedeas did. The ques-

tion of the sufficiency of the bond to operate as a supersedeas had not been, and was not, raised. It had been respected as sufficient, and the appellant had had all the benefits, and it did not lie with the sureties at that late day to raise that question and thereby avoid liability. But I am compelled with all respect to dissent from the holding that the bond was properly approved so as to become effectual as a supersedeas bond, and the cases cited by that learned court in no way sustain the holding that it was, or that it could be, approved so as to operate as a supersedeas by any judge other than the one who signed the citation except pursuant to the direction of the Circuit Court of Appeals to remedy an omission or defect, or in case a supersedeas was granted by that court.

In Catlett v. Brodie, 9 Wheat. 553, 6 L. Ed. 158, the appeal had been taken to the Supreme Court of the United States and a supersedeas bond duly given, but not for the whole judgment. A motion to dismiss was made in the Supreme Court unless adequate security should be given. The case was then in that court and subject to its orders and decrees. The citation had been signed and the appeal perfected. The Supreme Court held that a bond should be given for the whole judgment and ordered a dismissal unless such a bond should be given and directed, as it had the inherent power to do, that the bond be approved by any judge or justice authorized to allow a writ of error and citation on the judgment. This is not a holding that the supersedeas bond given in the first instance, to be effective as such, need not be approved by the judge who signs the citation as the Supreme Court has held in the cases already cited that it must be.

In O'Reilley v. Edrington, 96 U. S. 724, 24 L. Ed. 659, the Supreme Court expressly said:

"The security required upon writs of error and appeal must be taken by *the* judge or justice"—not *a* judge or justice.

The court then said:

"*The* judge has never acted; but, as the omission was undoubtedly caused by the order of the court permitting the clerk to take the bond, the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals and writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings."

The court then, in the exercise of its own inherent power to stay the execution of the judgment, imposed its own terms and directed how the bond should be approved. When the court said, in the O'Reilley Case, "the security required upon writs of error and appeal must be taken by *the* judge or justice," and, later, "*the* judge has never acted," it plainly referred to *the* judge who signed the citation.

The cases later than Wheaton construing section 1000, R. S., have been cited. Haskins v. St. L. & S. E. R. Co., 109 U. S. 106, 107, 3 Sup. Ct. 72, 27 L. Ed. 873; Kitchen v. Randolph, 93 U. S. 86, 89, 23 L. Ed. 810; Jerome v. McCarter, 21 Wall. 17, 28, 30, 22 L. Ed. 515.

Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424, the last case cited by said Circuit Court of Appeals, in no way involved the question here presented. In that case, as authorized by section 5

of chapter 517, Act of March 3, 1891, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), establishing the Circuit Court of Appeals, a writ of error to the District Court, Western District of Arkansas, was allowed in the case of an infamous crime, assault with intent to kill, taking the case direct to the Supreme Court of the United States. Mr. Justice Brewer of the Supreme Court assigned to the Eighth circuit was absent from that circuit and from the city of Washington, and the petition for a writ of error supersedeas and bail pending appeal was presented to Mr. Justice White of the Supreme Court. Mr. Justice White indorsed on the petition the following order:

"Writ of error to operate as supersedeas allowed, returnable according to law, the defendant to furnish bond in the sum of $5,000 conditioned according to law subject to the approval of the district judge.

"[Signed] E. D. White, Justice Supreme Court of the United States.

"Dated Aug. 14, 1894."

After the writ of error was issued and the citation served, a sufficient bond in the sum of $5,000 was presented to the district judge of said district in open court, who refused to approve it because, as claimed by him, the order of Justice White was made without authority of law and invalid. The prisoner remained in jail. Application was made for a mandamus to compel the approval of such bond and the admission of the defendant to bail. The return of the district judge to the application for mandamus (156 U. S. 279, 15 Sup. Ct. 450, 39 L. Ed. 424) shows that the district judge had granted a writ of error and signed a citation August 15, served August 21, 1894, and also alleged a subsequent conviction of defendant on another charge. The return also alleged: (1) That the bond, if approved, would be void for the reason the defendant could only be admitted to bail after citation served; (2) that Mr. Justice White was not the justice assigned to the Eighth circuit and not a circuit or district judge and was without power to make the order; (3) that rule 36 (11 Sup. Ct. iv) of the Supreme Court was void for want of authority to order or take bail after conviction. There was no suggestion that bail could be approved by Justice White only, and it does not appear that he signed the citation. The Supreme Court there held that, as decided in Claasen's Case, 140 U S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409, a writ of error from the Supreme Court in case of a crime, infamous but not capital (the case before the court), was a matter of right without any security. 156 U. S. 283, 15 Sup. Ct. 450, 39 L. Ed. 424. At 156 U. S. 282, 15 Sup. Ct. 450, 39 L. Ed. 424, that under section 917, R. S., it had power to make rules, and that its rule regulating appeals was valid. And also held at 156 U. S. 283, 15 Sup. Ct. 452, 39 L. Ed. 424, that in such a criminal case "the citation might be signed by a justice of this court (Supreme Court) under R. S. § 999; that a supersedeas might be granted not only by this (the Supreme) court, under section 716, but by a justice thereof, under section 1000; and that, if the justice signing the citation directed that it should operate as a supersedeas, the supersedeas might be obtained by merely serving the writ within the time prescribed in section 1007." These holdings disposed of the whole question of the supersedeas in such a criminal case, as no security is required. The or-

der of Mr. Justice White as to a bond was treated as one requiring the district judge to admit the defendant to bail in the sum of $5,000, and the court said (156 U. S. 284, 15 Sup. Ct. 453 [39 L. Ed. 424]):

"The next question is of the validity of his order so far as regards admitting the prisoner to bail pending the writ of error. * * * In Claasen's Case it was held that, in the case of an infamous crime, the writ of error was a matter of right, and that no security, such as is necessary in a civil case, was required. The only 'proper security' then in a criminal case is security for the appearance of a prisoner admitted to bail. Within the very terms of the rule, therefore, any justice of this court, although not assigned to the particular circuit, would seem to have power to permit bail to be taken."

The court then shows that bail for appearance, "shall be taken" and was matter of right, and that any justice of the Supreme Court has power to "order the plaintiff in error" (defendant) "to be admitted to bail, independently of any rule on the subject." The court then said (156 U. S. 287, 15 Sup. Ct. 454, 39 L. Ed. 424):

"Having the authority to order bail to be taken, the same justice might either himself approve the bail bond; or he might order that such a bond should be taken in an amount fixed by him, the form of the bond and the sufficiency of the sureties to be passed upon by the court whose judgment was to be reviewed, or by a judge of that court; or he might leave the whole matter of bail to be dealt with by such court or judge.

"Upon a writ of error in a civil case, the requisite security is ordinarily taken by the justice or judge who allows the writ and signs the citation. Jerome v. McCarter, 21 Wall. 17 [22 L. Ed. 515]. But, where the bond taken is insufficient in law, this court, in the exercise of its inherent jurisdiction as a court of error, may direct that the writ be dismissed, unless the plaintiff in error gives security sufficient in this respect, to be taken and approved by any justice or judge who is authorized to allow the writ of error and citation. Catlett v. Brodie, 9 Wheat. 553, 555 [6 Sup. Ct. 158]; O'Reilley v. Edrington, 96 U. S. 724 [24 L. Ed. 659].

"This court, in the lawful exercise of its power to prescribe the forms of process and to regulate the practice upon writs of error, has said, in paragraph 2 of rule 36 [11 Sup. Ct. iv], that, in the case of a conviction of an infamous crime, 'the Circuit Court, or District Court, or any judge or justice thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.'"

There is not a suggestion in the whole case that in a civil or a criminal case a judge or justice, other than the one signing the citation, may take or approve a bond which is to operate as a supersedeas unless directed to do so by the appellate court when the one first taken is defective or omitted. No supersedeas bond was necessary in that case (Hudson v. Parker), and the order of Justice White was an order to the district judge to admit the defendant to bail in the sum of $5,000. This was not the supersedeas which became effectual by the order; that is, the execution of the sentence was stayed. But that did not entitle the prisoner to go at large, and the justice fixed the bond which he must give in order to be enlarged on bail pending the decision of the writ of error and directed in effect that the district judge take such bail and enlarge the defendant. In the Claasen Case, 140 U. S. 208, 11 Sup. Ct. 735, 35 L. Ed. 409, the Supreme Court held that in a criminal case there are no costs and no damages to be paid, and there-

fore no bond or security whatever is required or to be taken or approved.

I hold that, as the statute says "every judge signing a citation * * * shall take good and sufficient security * * * where the writ is a supersedeas," etc., it means what it plainly says, and that taking security necessarily includes the approval of the bond. The statute is not satisfied by his fixing the amount of the security and leaving it with some other judge to "take" the security. I hold, also, that there was no supersedeas in the case.

I am of the opinion that the rights of the National Contracting Company can be fully protected. If its appeal is successful and the two mortgages held invalid, or if it is finally determined that it has a priority by equitable lien, the proceeds of sale will be in court and subject to the order of the court so far as necessary for the purpose and adequate provision must be made in this regard. The Circuit Court of Appeals would undoubtedly stay any distribution or disposition of the proceeds of the sale which will place them beyond the reach of that company in case this court should refuse to make ample provision for its protection. The parties may submit their proposition in this regard on the settlement of the order confirming the sale which is fixed for September 21, 1911, at 11 a. m. at my chambers in Norwich, unless the parties agree upon some other day.

UNITED STATES v. DENVER & R. G. R. CO. et al.

(Circuit Court, D. Colorado. August 29, 1911.)

No. 4,377.

1. PUBLIC LANDS (§ 93*)—INJUNCTION (§ 197*)—JURISDICTION—SUIT TO RESTRAIN WASTE.

A bill by the United States against a railroad company and others, alleging that such company, claiming the right under an act of Congress, has, through its codefendants as its agents, unlawfully cut and removed timber from the public lands, that it and its codefendants are wantonly abusing the license given by such act, and committing waste in taking such timber for private and unauthorized purposes, states a cause of action cognizable in equity for relief by injunction, and the court having assumed jurisdiction may decree full and final relief, including damages.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 93;* Injunction, Cent. Dig. § 417; Dec. Dig. § 197.*]

2. PUBLIC LANDS (§ 88*)—GRANT OF RIGHTS TO RAILROAD COMPANY—CONSTRUCTION OF ACT.

By Act June 8, 1872, c. 354, 17 Stat. 339, as amended by Act March 3, 1877, c. 126, 19 Stat. 405, the Denver & Rio Grande Railway Company was granted right of way over the public lands and the right to take timber and other material for its construction and repair from the public lands adjacent thereto, "provided that said company shall complete its railway as far south as Santa Fé within ten years of the passage of this act and shall complete 50 miles additional south of said point in each year thereafter; and in default thereof the right and privileges herein granted shall be rendered null and void so far as respects

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the unfinished portion of said road." The southern terminus of the company's line as fixed by its articles of incorporation was El Paso, in Mexico, which was intended to be reached by following the valley of the Rio Grande through Santa Fé. The company subsequently entered into a contract with other companies by which it preluded itself from building its line to Santa Fé or down the Rio Grande Valley, but which left it free to build as far south to the westward. *Held*, that such contract was not an abandonment of its line, and did not affect its rights under the grant.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 88.*]

3. PUBLIC LANDS (§ 85*)—GRANT OF RIGHTS TO RAILROAD COMPANY—LOCATION OF LINE.

The line of railroad constructed by the Denver & Rio Grande Railway Company from Antonito, on its main line westward across the divide separating the waters of the Great Colorado from the Rio Grande and extending to Durango, *held* to be the "San Juan Railway" authorized by its articles of incorporation, and entitled to the grant of right of way and timber rights conferred on the company by Act June 8, 1872, c. 354, 17 Stat. 339, as amended by Act March 3, 1877, c. 126, 19 Stat. 405.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 259; Dec. Dig. § 85.*]

4. PUBLIC LANDS (§ 93*)—GRANTS TO RAILROADS—RIGHT OF WAY THROUGH INDIAN RESERVATION—"PUBLIC LANDS" DEFINED.

By Act June 8, 1872, c. 354, 17 Stat. 339, as amended by Act March 3, 1877, c. 126, 19 Stat. 405, defendant the Denver & Rio Grande Railway Company was granted right of way over the public lands, and the right to take timber, stone, etc., from such lands adjacent to its several projected lines one of which extended through the then existing Ute Indian reservation, which covered a tract 125 by 200 miles in extent in southwest Colorado, and had been set apart by treaty for the exclusive use of the Indians, but with a reservation of the right by proclamation of the President to appropriate right of way for the construction through the reservation of any railroad authorized by law. Such a proclamation was issued on behalf of the defendant in 1880, and it thereafter constructed its line through the reservation. Prior to such construction Congress had also ratified an agreement with the Indians by which their rights in the reservation were extinguished, except as to allotments in severalty. *Held*, that the words "public lands," as used in the grant, must be construed as including lands within the reservation, and that the act gave defendant the right to take the timber and other materials from such lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 283; Dec. Dig. § 93.*

For other definitions, see Words and Phrases, vol. 6, pp. 5793–5795; vol. 8, p. 7772.]

5. PUBLIC LANDS (§ 93*)—RECOVERY OF DAMAGES FOR CUTTING OF TIMBER—ESTOPPEL.

The United States is not estopped to recover damages from a railroad company for timber cut and removed from public lands under a claim of right given by a congressional grant, which was a mere license to the company to use timber from lands adjacent to its line for construction purposes, by the acquiescence of government agents in such taking, if it was, in fact, unauthorized and unlawful.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 93.*]

6. JUDGMENT (§ 707*)—CONCLUSIVENESS OF ADJUDICATION—NATURE OF ACTION.

A plea of res judicata as estoppel inter omnes must be based on a judgment in a proceeding purely in rem.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. PUBLIC LANDS (§ 93*)—GRANT OF TIMBER RIGHTS TO RAILROAD COMPANY—"ADJACENT LANDS."

Under a grant to a railroad company of the right to cut timber for construction purposes from the public lands "adjacent" to its line, lands more than three miles from the line of the right of way, measured at right angles thereto, are not adjacent, while those within that limit are adjacent.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 93.*

For other definitions, see Words and Phrases, vol. 1, pp. 184–187; vol. 8, pp. 7565, 7566.]

8. PUBLIC LANDS (§ 93*)—GRANT OF TIMBER RIGHTS TO RAILROAD COMPANY—"REPAIR."

Under a grant to a railroad company of the right to cut timber from adjacent public lands "for the construction and repair" of its road, where neither the grant nor the company's articles of incorporation specified the kind of road to be built, it was optional with the company to build either a broad or narrow gauge, and, having constructed a narrow-gauge road, it had no authority to take timber to make the same over into a broad gauge, which was reconstruction, and not repair, but it did have the right to take such timber to keep the road in repair after such change had been made.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 283; Dec. Dig. § 93.*

For other definitions, see Words and Phrases, vol. 7, pp. 6096–6102; vol. 8, p. 7785.]

9. PUBLIC LANDS (§ 93*)—GRANT OF TIMBER RIGHTS TO RAILROAD COMPANY—CONSTRUCTION.

Under an act granting to a railroad company generally the right to take timber from adjacent public lands "for the construction and repair of its railway and telegraph lines," where the articles of incorporation of the company authorized it to construct a number of connecting lines, it had the right to take timber from lands adjacent to one line for use in the construction or repair of another.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 283; Dec. Dig. § 93.*]

10. PUBLIC LANDS (§ 93*)—GRANT OF TIMBER RIGHTS TO RAILROAD COMPANY—CONSTRUCTION.

Under a grant to a railroad company of the right to take timber from public lands adjacent "required for the construction and repair of its railway and telegraph line," any part of the timber cut which was not suitable for such use, and all waste or side cuts incident to the sawing of the logs used into the dimensions required, remains the property of the United States, and the company has no right therein, and, if used by it for other purposes or by its agents for their own benefit with its consent or to its profit, the company and such agents are jointly liable therefor.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 283; Dec. Dig. § 93.*]

11. PUBLIC LANDS (§ 93*)—GRANT OF TIMBER RIGHTS TO RAILROAD COMPANY—WASTE.

Evidence considered, and *held* insufficient to show that a railroad company in exercising the right granted by Congress to take timber from public lands required for the construction and repair of its road abused the privilege by causing the timber cut to be so manufactured as to leave an undue percentage of merchantable lumber not used for the purposes specified which was sold for the benefit of itself or its agents.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 93.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the United States against the Denver & Rio Grande Railroad Company and others. Hearing on the merits. Order of reference.

See, also, 124 Fed. 156, 59 C. C. A. 579.

Jno. H. Knaebel, M. C. Burch, and W. A. Norton, for complainants.

J. F. Vaile and E. N. Clark, for Denver & R. G. R. Co. and Greenlaw.

Horace N. Hawkins, for Rio Grande, P. & N. R. Co., Pagosa Lumber Co., and Sullenberger.

C. C. Dawson, for Rio Grande & P. S. R. Co., New Mexico Lumber Co., and Biggs.

B. W. Ritter, for T. C. Graden and Graden Mercantile Co.

Richard McCloud, for Savage.

LEWIS, District Judge. In 1870 the Denver and Rio Grande Railway Company was organized under the laws of the Territory of Colorado. Its purpose, as shown by its articles of incorporation, was to locate, construct and operate railways and telegraph lines along the routes described in a general way in its articles of association; said lines being eight in number and designated as, 1, The Denver and Rio Grande Railway, 2, The Denver and Southern Railway, 3, The South Park Railway, 4, The Western Colorado Railway, 5, The Merino Valley Railway, 6, The San Juan Railway, 7, The Gallisteo Railway and 8, The Santa Rita Railway.

By act approved June 8, 1872, the congress granted to said company a right of way two hundred feet wide over the public domain, "together with such public lands adjacent thereto as may be needed for depot, shops and other buildings for railroad purposes, and for yard room and sidetracks, not exceeding twenty acres at any one station, * * * and the right to take from the public lands adjacent thereto stone, timber, earth, water and other material required for the construction and repair of its railway and telegraph lines * * * Provided, that said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years after the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road." (17 Stat. 339.)

By act of March 3, 1877 (19 Stat. 405), the time limit in the above act was extended to ten years; and the ten years expired June 8, 1882.

The railway company had constructed and was operating many miles of its system prior to June 8th, 1882, and thereafter greatly extended some of its lines. It claimed the benefit of the congressional grant on all mileage completed on said date.

The Railway Company was succeeded by The Denver and Rio Grande Railroad Company shortly after the organization of the latter company in July, 1886, and it immediately acquired all of the property, rights and franchises of the Railway Company and has

claimed, and been adjudicated to be entitled to, the benefits of said congressional grant as the successor of said Railway Company.

On December 1st, 1902, the complainants exhibited their bill against defendant, the railroad company and its co-defendants, wherein it is charged that the defendants were then taking, and for several years theretofore had been taking, from public lands in southwestern Colorado large amounts of standing trees which were sawed up into great quantities of merchantable lumber of all kinds by some of the defendants at their mills, and being so manufactured into lumber were used in part by the defendant railroad company for repair purposes on its lines of railway, and in part for construction purposes on lines extended after June 8th, 1882, and that other parts of lumber so manufactured from said trees was converted by the other defendants to their individual use and profit with the knowledge, consent and acquiescence of the railroad company. The bill further alleges that the defendant's San Juan Railway was the nearest of its lines mentioned in the articles of incorporation of the original railway company to the locality from which said trees belonging to complainants were taken. It further charged that said timber was devoted to repair purposes on defendant's lines, other than the San Juan Railway, far remote from the section of country from which it had been originally taken; that its lines of railway were originally constructed as narrow gauge roads and that a large part of the timber had been taken for use in converting its line from narrow to broad gauge. That the other defendants went upon the public lands and took said timber and trees at the direction of, and as the agents and representatives of, the railroad company, under the claim made by it that it had the right to do so under the congressional grant. It charged that the congressional grant, according to its true intent and meaning, did not give the railroad company the right to take timber from adjacent public lands for construction purposes on any of that part of its lines built or extended after June 8th, 1882, nor for the purpose of converting a narrow gauge to a broad gauge road, nor for repairs of its lines at remote points, nor for repairs on any of its lines except the one to which the lands from which the timber was taken were adjacent. It charged that none of the timber was taken from lands adjacent to any of the defendant's lines, but from lands lying far remote therefrom. It further charged that the Rio Grande, Pagosa and Northern Railroad Company and the Rio Grande and Pagosa Springs Railroad Company were built and operated, under the direction and control of their managers, the defendants Sullenberger and Biggs respectively, for the purpose of reaching sawmills, which said two individuals respectively controlled and operated as managers, with the intent of transporting from said mills to the Rio Grande Railroad lumber made from trees taken from public lands far remote from the line of the Rio Grande road, and that such lumber was so transported. The bill charges in great detail an abuse of the rights and license claimed by the railroad company under the act of June 8th, 1872, and a wanton and reckless commission of waste in taking timber from complainants'

lands, and that it threatens to continue therein, and thereby a great destruction of the value of complainants' estate in said lands will result.

The separate answer of the Denver and Rio Grande Railroad Company admitted that it had taken timber from public lands in the territory described in the complaint, that it had appointed its co-defendants, except the two railroad companies, its agents for the purpose of cutting timber from public lands, that it had authorized its said agents to cut timber on public lands and to prepare the same at their mills under orders given for that purpose, and to manufacture for it, out of said timber, ties, telegraph poles and other timber of such dimensions as was needed by it in the repair of its lines of railroad, that it had used the same on its lines of railroad constructed prior to June 8th, 1882, at various points, some of them remote from the place of taking, for repair purposes. It alleged that all of such timber so taken by its agents was taken from public lands of complainants lying adjacent to the line of its San Juan Railway, and it justified all of its acts in that regard as having been done under said congressional grant. It alleges that it changed extensive portions of its railway system from narrow to broad gauge many years prior to 1900, and that for many years such parts have been used as standard guage railway lines, that the ties first used in construction of, and afterwards for repair of, its narrow gauge road were not adequately adapted to support a standard gauge track, that it first began standard gauge construction in 1881 and that it now has more than three hundred miles of standard gauge railway track, a part thereof being on lines constructed before June 8th, 1882, and a part thereof since that date. It denies that the two railroads of its two co-defendant railroad companies were constructed principally for the purpose of hauling out or carrying timber taken from the public domain and alleges such to be a small part of the business done by said roads, that they transport much lumber taken from private lands and also carry on a general transportation business and that they are common carriers for hire. It admits that it receives over said two roads from mills situated on or near them some timber manufactured from trees taken from public lands for repair purposes on its lines of road.

The answer denies all charges made in the bill against the defendants of acts of waste of timber taken from public lands and charges that it, through its agents, felled and took from public lands only such logs as were suitable for the immediate needs of the defendant, and that it and its agents at all times exercised the right and license granted it under the congressional grant in a fair and impartial manner, economically and prudently and without waste, it admits that it was its duty economically and without waste to select and take only such timber as was reasonably adapted to its use and within the limitations as to use fixed by said statute and for its own purposes only, and alleges that upon the reasonable exercise of such right the timber so taken from the public lands from time to time upon the taking thereof ceased to be the property of complainants. It alleges that it and its agents acting for it at all times acted in good faith in exercising the

right given by the act of congress, and at no time took any timber from the public lands which it did not believe to be adjacent to its lines of railway as authorized under said act. It makes reference to suits brought against it in the territorial court of New Mexico and in the federal court for the District of Colorado in which the construction of the act of June 8, 1872, was involved, and particularly the question as to the meaning of "adjacent" as used in that act, and alleges that it has attempted to conform to the construction of said act as given by the courts; it alleges that it, through co-defendants' officers and agents, has kept full and accurate records of the timber felled on the public lands from time to time and has given full information thereof, on request, to the proper officers of the complainants, although it alleges that it was not required to keep such record nor was the keeping of such record ever demanded or required of it. That through its officers and agents it has kept records and accounts of the manufactured products ordered by this defendant to be obtained from timber taken from the public lands and that it has at all times given to the accredited officers of the United States full information, upon request, of such records and accounts; that it has never at any time refused to give such information; but it alleges that such records were kept by it voluntarily and for its own purposes. It alleges that it had the right to give orders and directions to its co-defendants, who acted as its agents, to cut timber from public lands and to manufacture at divers mills railroad ties, bridge timbers and other railroad timbers and lumber of kinds, qualities, quantities, forms and dimensions needed by it and specified by it in its written directions to its agents, and alleges that it has at all times rigidly and carefully insisted that its agents should take only such timber from the public lands as was necessary for its purposes and as shown in its specific orders, and that they should not commit any waste or cut or destroy or take away any timber not required for such purposes; and that said its agents have at all times agreed that they would not commit any waste on the public lands nor cut or carry away any timber therefrom except for the sole purpose of supplying the railroad company with timber required by it for construction and repair of its railway lines. It alleges that some trees, after being taken by its agents to the mill, were found to be defective so that they were not suitable for railroad purposes and that its agents have from time to time converted such material into laths or other merchantable material and have disposed of the same upon the public market, but that such acts have not invaded or disregarded any rights of the complainants; that certain valuable surplus of slabs and boards, in the trimming of the timbers at the mills for the use of the railroad company, necessarily results; that such side cuts, slabs and surplus material is not the property of the complainants; that its agents have converted a part of such side cuts or surplus into merchantable material and disposed of the same for their use, but that such practice has at all times been well known to the complainants' agents who have from time to time examined the operation of said mills and have never complained against such methods.

It alleges that all of the timber taken by it from public lands were from lands within a reasonable wagon hauling distance of its railway line, and that none of the timber was obtained at a greater distance than fifteen miles from its line. That it has at all times signified its willingness to comply with any reasonable regulations of the Department of the Interior with reference to the taking of timber from public lands not inconsistent with the grant made by the act of June 8, 1872; that from time to time controversies have arisen between the complainants and the defendant in regard to its right to take such timber, but no definite rules and regulations have ever been made covering the subject matter by complainants' officers. Defendant further alleges that all of the timber mentioned in the bill of complaint, and for which an accounting is asked against it, was taken within the distance from the line of its San Juan Railway held by the adjudicated cases above referred to, as being within the meaning of the term "adjacent" in said congressional grant. It admits that it took some timber from complainants' public lands for construction purposes under the act of March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), but alleges that it has a right so to do, and that it at all times complied with the regulations of the Department of the Interior or of the Commissioner of the General Land Office with reference to such taking. It asserts its willingness to make full showing of all its transactions in connection with the taking of timber from public lands, asserts that all its acts in that regard were done openly and in the utmost good faith and under the belief that it had a right to take the timber mentioned in the bill under said grant.

The Rio Grande, Pagosa and Northern Railroad Company, The Pagosa Lumber Company and Alexander T. Sullenberger answered jointly. This answer admits that said railroad company is a corporation and has existed as such since the latter part of the year 1900, and is operating a railroad between Pagosa Junction, which is the point of connection with the Rio Grande Railroad, and Pagosa Springs, but denies that its principal business has been or is the carrying of logs cut from public lands or the lumber made therefrom, but asserts that this is but a small part of its business. It admits that the defendant Sullenberger is president and general manager of said railroad company and that he is also the president and general manager of the Pagosa Lumber Company, a corporation, and that both of said companies are immediately under his general control and management. It admits that said lumber company operates two sawmills, but denies that all or any considerable part of the lumber manufactured by said mills is derived from the public lands of the United States, but avers that the principal produce of said mills is derived from timber cut from private lands. It admits that the lumber company has taken some timber from public lands as agent of the Denver and Rio Grande Railroad Company and claims that such taking for the Rio Grande Company was under the authority of congressional acts. That the lumber company in that respect acted by virtue of an appointment in writing made by the Denver and Rio Grande Railroad Company, whereby said lum-

ber company was constituted the agent of said railroad company to take such timber and that in such taking it at all times acted within both the letter and spirit of the congressional grant. That it carefully and economically cut from the public domain only such timber as was suitable and proper for the purposes for which it was ordered by the railroad company, that in reducing said timber to the sizes called for by the orders given by the railroad company there has always been a certain amount of inevitable waste, that it has caused such waste to be reduced to the least possible amount and that it used and disposed of such waste to its own benefit. Admits that in the slabbing and sawing of the logs derived from the public lands in filling the orders of the Denver and Rio Grande Railroad Company, in the course of shaping said logs into the forms and dimensions specified in the directions of the Rio Grande Company, there resulted in every case a considerable surplus or waste that could be and was adapted by the Pagosa Lumber Company, by trimming and sawing, into divers forms of lumber which was disposed of by the lumber company lucratively for the use and benefit of said lumber company, and that if such waste had not been so utilized and disposed of it would have been lost and destroyed and have been of no use or benefit to any person whomsoever. Admits that in the course of the felling of trees and the manufacture therefrom of standard gauge ties, bridge timbers, and other lumber for the Rio Grande Company there has resulted a considerable surplus of lumber which can be made into commercial lumber and which cannot be used in filling the orders of the Denver and Rio Grande Railroad Company, and the three said defendants admit that they have used such excess of lumber for their own private purposes, and that such excess has been intermingled with the private stocks of lumber of the said Pagosa Lumber Company as collected from time to time at its mills, and that the same has been used for commercial and lucrative purposes by the said Pagosa Lumber Company; but it avers that said excess lumber would have been wholly wasted had it not been so used. Avers that in all respects the taking of such timber from public lands has been in strict accord with the authority conferred by the Denver and Rio Grande Railroad Company under the acts of congress; that they have strictly and carefully followed the directions in that regard of the Denver and Rio Grande Railroad Company, and have delivered the manufactured product from the timber so taken to the Denver and Rio Grande Railroad Company, except said surplus or inevitable waste.

The answer denies that the complainants are interested in or concerned in the said excess or waste, denies that the Pagosa Lumber Company in converting the same to its own use and benefit worked any wrong or injury to the complainants, and denies that any of said timber was taken from public lands which were not adjacent to the line of the Denver and Rio Grande Railroad Company.

The answer alleges that the Rio Grande, Pagosa and Northern Railroad Company in due time pursued and complied with the matters and things provided for by the act of congress of March 3, 1875 (18 Stat. 482), and that it took timber from public lands of the United States

lying adjacent to its line of railroad for the construction of said road, that, with the exception of such timber as has been used by it in the construction of its said railroad, neither it nor Sullenberger nor the Pagosa Lumber Company has taken, or caused to be cut or taken, from the public domain of the United States any timber of any kind or character for any purpose or purposes whatsoever, save and except such timber as has been cut by these defendants under the power and authority conferred upon them by the Denver and Rio Grande Railroad Company acting by, through and under the authority conferred upon it by the acts of congress in the bill of complaint set forth.

The Rio Grande and Pagosa Springs Railroad Company, The New Mexico Lumber Company and E. M. Biggs filed joint answer. It admits that the Rio Grande and Pagosa Springs Railroad Company is a corporation organized and existing under the laws of the State of Colorado, and has been, and is, operating a railroad as averred in the bill, but it denies that its principal business consists, or has consisted, in carrying logs cut on or from the public domain to the sawmill of the New Mexico Lumber Company, or in carrying and delivering to the Denver and Rio Grande Railroad Company telegraph poles cut on the public domain, or large quantities of lumber manufactured at said mill from logs cut on the public domain. It avers that but a small part of its business consists in hauling logs and lumber products of timber cut from the public domain; admits that it does handle some logs and some lumber cut and manufactured from such timber. Admits that the New Mexico Lumber Company is a corporation organized under the laws of Colorado, and that the defendant Biggs is president and general manager of both said railroad company and lumber company and that both of said companies are under his immediate control and management; but denies that any considerable part of the lumber manufactured at said mills is derived from timber taken from the public lands of the United States, but avers that the principal product of said mills is derived from timber cut from private lands.

Said answer then contains substantially the same allegations as found in the answer of Sullenberger and others above noted in reference to the written authorization given to the lumber company by the Denver and Rio Grande Railroad Company for cutting and taking timber from public lands for the use and benefit of said last named company, the manufacture of the same at the mills of the New Mexico Lumber Company for said railroad company and the use by it of the excess waste or surplus resulting in such manufacture. It also alleges that the Rio Grande and Pagosa Springs Railroad Company took timber from lands adjacent to its line for construction purposes under the act of congress of March 3, 1875, and that it took no other timber from public lands except as the agent of the Denver and Rio Grande Railroad Company under the grant and license to said latter company given by congressional acts.

The Graden Mercantile Company and Thomas C. Graden filed a joint answer. It admits that the Graden Mercantile Company is a corporation under the laws of the State of Colorado, admits that Thomas C. Braden, is, and has been, the president of said Graden

Mercantile Company and that he has had direct management and control of said company, that in the year 1900 and since that time the Graden Mercantile Company has been engaged in the lumber business and has two mills of the daily capacity respectively of twenty thousand feet and twenty-five thousand feet board measure, that one of said mills is situate about twelve miles easterly from Durango and within four miles of the San Juan Railway and the other about twenty-three miles easterly from Durango and within ten miles of the San Juan Railway, but that said mills have not been constantly operated. Admits that the Graden Mercantile Company, acting for and on behalf of the Denver and Rio Grande Railroad Company, and as its agent, and not otherwise, cut and removed timber from certain of the public domain of the complainants, to wit, parts of sections 3 and 4, Township 34, North, Range 6 West, and parts of sections 33, 34, 35, Township 35, North, Range 6 West, to the aggregate amount of 528,960 feet and no more, and manufactured the same at one of its mills, that said timber was taken from lands not further distant from the line of the San Juan Railway than twelve miles, that said lands from which said timber was taken were adjacent to the line of said San Juan Railway within the meaning of the act of congress, and was within reasonable and easy hauling distance of said line of railway. That the other mill of said Graden Mercantile Company has been chiefly engaged in manufacturing lumber from timber cut from private lands and not belonging to complainants; but that, acting as the agent of the Denver and Rio Grande Railroad Company, and in its behalf, it has felled, cut, manufactured and delivered to said railroad company trees, logs and timber from certain of the public domain of the complainants, to wit, parts of sections 25, 26, 27, 28, 33, 34 and 35, in Township 35, North, Range 8 West, to the aggregate amount of 1,868,339 feet and no more, and that no other logs or timber taken from public lands were manufactured at said mill; that said trees and logs taken from public lands and manufactured at said mill as aforesaid were taken from lands not further distant from the line of said San Juan Railway than five miles, and were within reasonable and easy hauling distance from such line of railway and adjacent thereto, within the meaning of the acts of congress. That in the taking of said timber from the public lands the Graden Mercantile Company acted under and by virtue of a written appointment and authority from the Denver and Rio Grande Railroad Company, and that all of the timber so manufactured at its mills was delivered to the Denver and Rio Grande Railroad Company for its use in the construction and repair of its said railroad line; and for use in the construction and repair of those portions of its said line which had been completed prior to June 8th, 1882, and that said timber was taken, as it verily believed, for the purposes and as authorized by the congressional acts of 1872 and 1875. That the Mercantile Company at all times acted in the utmost good faith and with the greatest possible care and precaution to prevent any unnecessary or unavoidable waste or loss of any timber, trees or lumber; that it took no such trees or timber for its own use or benefit, nor for any purpose except to pro-

vide the defendant railroad company with the lumber so by it directed to be procured for the purposes and under the authority aforesaid; that the total amount of timber so taken by it was 2,397,299 feet and no more; and that the Graden Mercantile Company manufactured lumber from logs and timber bought by it from private persons not taken or procured from lands belonging to complainants or from any portion of the public domain of the United States. That such care and prudence was exercised by the Graden Company that very little of such timber was lost or wasted by reason of any defect or decay therein, or otherwise, and a very small proportion was lost or wasted in the preparation and manufacture of any such lumber, that all and every such loss or waste or shrinkage in such timber, whether by reason of defects in the timber itself or by reason of the portions necessarily cut therefrom in the manufacture thereof, was made good by the Graden Company by supplying to the Denver and Rio Grande Railroad Company other lumber manufactured from timber belonging to the Graden Company and not taken from lands belonging to complainants. That the Graden Company in felling and taking timber from the public lands for the Denver and Rio Grande Railroad Company took the same only from lands adjacent to its line of railway and adjacent to a line constructed prior to June 8th, 1882, that it at all times acted in the utmost good faith and within the limitations expressed and implied in the acts of congress. That the timber so cut and taken by these defendants did not, and does not, exceed in any case, in value one dollar and fifty cents ($1.50) per thousand. This answer also refers to the adjudications construing the acts of 1872 and 1875 and alleges that all the timber taken by these defendants was within the terms of said act and the construction put upon the same by the courts. Admits that in manufacturing such timber there necessarily occurs some surplus of slabs or pieces of some value which are not fitted for railway repair or construction, but that on account of the care and caution exercised by the Graden Company such surplus was very small and that none thereof was converted by the defendant to its own use or confused or intermingled with its own lumber where such side cut was of such dimensions and quality as was suited to such railway uses and purposes.

The defendant E. F. Greenlaw filed a separate answer. He admits that he was maintaining and operating a sawmill at the time the bill was filed, located within ten miles of Ignacio, a station on the San Juan Railway, and that he manufactured lumber from logs cut on complainants' public lands, and that said lumber was delivered to the Denver and Rio Grande Railroad Company; that he bought the mill from other parties and sawed up some logs then at the mill at the time of his purchase which he believes came from section 28, Township 35, Range 6 West; that thereafter he was duly appointed in writing by the Denver and Rio Grande Railroad Company as its agent to enter upon public lands of the United States adjacent to its railway lines for the purpose of obtaining therefrom timber for the use of said railroad company; that he received orders from said company to manufacture lumber for it to the amount of 55,000 feet, and that

for that purpose he cut logs reasonably sufficient to fill said order on section 27, in Township 35, Range 6 West, in the County of La Plata, and that he proceeded to execute said order to the extent of about 20,000 feet and was then ordered by a special agent of the Land Office not to saw any more lumber for the railroad company under the terms of his agency appointment, and he thereupon ceased to do so. That the greater part of the logs sawed at his mill came from lands owned by private persons, less than two per cent thereof coming from public lands of the United States. That he has taken no timber from lands of the United States other than from the two sections mentioned, and acted then only as the agent of the railroad company and in good faith, believing said railroad company had a right to take said timber; that as the agent of the railroad company he kept exact memoranda and data by which he is able to know and to show the quantity of timber so cut by him and the localities from which the same were derived; that he exercised such care in sawing the logs that very little waste resulted, which small amount of waste and surplus he devoted to private uses or sale, and that the timber taken by him from said two sections was on lands adjacent to said line of railway and within reasonable wagon hauling distance thereof, to wit, the San Juan Railway.

The defendant J. W. Savage filed a separate answer. He admits that he was operating a sawmill for the manufacture of lumber, and alleges that the same was situate within six miles of that part of the Denver and Rio Grande Railroad line constructed prior to June 8th, 1882. He denies that he has cut or taken any logs or timber upon the public lands of the complainants, but, on the contrary, alleges that all of the timber so cut or taken by him was taken from private lands in which the complainants have no interest whatever.

The defendant Denver and Rio Grande Railroad Company filed an amendment to its answer. In this amendment it denies that any standard gauge railroad ties, or bridge timbers, or other timber or lumber adapted to use on standard gauge railway, were used by the defendant for the purpose of remodeling or reconstructing its narrow gauge railroads into standard gauge railroads, or to converting into standard gauge railroads its narrow gauge railroads which had been constructed or completed before the 8th day of June, 1882, or other narrow gauge railroad constructed after that date; but alleges that as to the portion of its line constructed prior to June 8th, 1882, it has since the original construction thereof taken timber from public lands and used the same only for the purpose of repair of said railway line. That for the purposes of necessary repair it has caused certain of said timber to be manufactured into sizes and lengths adapted to standard gauge railway and asserts the right to do this under the acts of congress. That as to the portion of its lines constructed subsequent to June 8th, 1882, it alleges that it has used timber from public lands only for purposes of original new construction, which it asserts it had the right to do under the act of March 3, 1875, and any timber taken for that purpose has been in accordance with the provisions of said act, and that as to lines constructed since June 8th, 1882, it did not take

or use timber from public lands for any purposes of repair or remodeling or reconstruction whatever.

On January 8th, 1904, the complainants filed their petition asking leave to amend the bill of complaint, with the proposed amendments attached thereto. This petition was not presented to the Court for action thereon until more than two years after the same had been filed and after a great deal of testimony had been taken in the case. The right to amend was opposed by the defendants. Arguments were heard upon the petition and briefs filed, but no action was then taken by the Court on said petition, the Court announcing that leave to amend the bill would not be passed on by the Court unless it appeared on final hearing that each party had had ample opportunity to adduce proof on the new matter to be brought into the bill by the proposed amendment. It now appears that such proof has been introduced by all the parties and the new issues raised by the proposed amendments have been elaborately argued by respective counsel in their final briefs. It will therefore be ordered that complainants may amend their bill as prayed in their petition. Said amendments will be taken as denied in the several answers, unless the defendants ask leave to plead thereto otherwise. The proposed amendment introduces into the suit two alleged vital elements, viz.:

1. That the line of the San Juan Railway as constructed, which was alleged in the bill to be the line contemplated in the original articles of incorporation of the Denver and Rio Grande Railway Company, is not, under the facts adduced in evidence, the true line of the San Juan Railway. That the true line was a line that the defendant partly constructed, but never completed, beginning at Chamita, in New Mexico, and extending northerly up the valley of the Big Chama River, whereas the line of the San Juan Railway as completed begins at Antonito, in the State of Colorado, at a point far north of Chamita and runs from Antonito in a general westerly direction; and

2. That a written contract entered into between the Denver and Rio Grande Railway Company, The Union Pacific Railway Company, The Atchison, Topeka and Santa Fé Railroad Company, The New Mexico and Southern Pacific Railroad Company and The Pueblo and Arkansas Valley Railroad Company, in which it was agreed that the Denver and Rio Grande Company would not further extend its lines into certain sections of the Territory of New Mexico as contemplated by its articles of incorporation, operated as a repudiation by the Rio Grande Company, and thereby a loss, of all of its rights from that date granted by the act of June 8, 1872. These matters will be considered later.

The bill prayed for an injunction against the further taking of complainants' timber and for an accounting for that which had been taken and judgment for the value thereof. The temporary writ issued, and among its other prohibitions restrained the defendants from taking any timber from beyond three miles of its right of way on either side of the road. From this order an appeal was taken. The court of appeals lifted some of the restrictions in the temporary order and

modified others. 124 Fed. 156, 59 C. C. A. 579. With these changes the temporary writ has since stood.

Proofs have been taken, consisting of about four thousand typewritten pages, and a large number of exhibits comprising many hundred pages more. Oral arguments have been had, written briefs filed and the issues submitted for final determination.

It was suggested at the oral argument, and again in the briefs, that the record was so extensive and the testimony of witnesses so contradictory as to the physical facts disclosed upon the ground which had to do with the measurement of stumpage for the purpose of ascertaining the amount of timber that had been taken from concededly public lands; that there was such positive and direct contradiction between witnesses as to whether some of the public lands from which complainants claim timber was taken, ever at any time had any timber growing on it; that there was such a wide difference between witnesses for complainants on the one hand and for defendants upon the other as to the amount of timber which has been taken from complainants' lands as ascertained from the stumpage; and that so much clerical and accounting work would have to be done by way of deducting from the gross measurements reported by complainants' witnesses stumpage unquestionably included therein but found afterward to be on many tracts of privately owned land, that the Court would need the services of an accountant to examine the record and make report in condensed form, (1) of the amount of timber actually taken which belonged to complainants, (2) the sub-divisions from which such timber was taken and the distance thereof from a line of the defendant's railroad, (3) the amount thereof taken from lands adjacent to such line within the meaning of the act of June 8, 1872, and used by the defendant Denver and Rio Grande Railroad Company and for what purposes used, (4) the amount thereof, if any, converted to the private use and benefit of the other defendants with the permission or acquiescence of the railroad company, (5) the amount, if any, taken from lands not adjacent to a railroad line and by which of the defendants, and (6) the amount, if any, taken by others than any of these defendants or by other agents of the railroad company other than the defendants here sued. The arguments on the hearing, the briefs and such examination of the record as time will permit, convinces that this ought to be done.

It is earnestly insisted by the defendants that the government's cruising party, said to be composed of twenty or thirty men who were sent into the field to measure the stumpage and spent about two summers in that work, measured up stumpage indiscriminately throughout that entire section of country, including that found on both public and private lands, and that the stumpage so measured on lands privately owned enters into and is a part of the ninety-six million feet which was claimed by complainants, but which their counsel now say should be reduced by some fifteen or twenty million feet. It is evident that this insistence is not lightly made, and a careful examination of the record must be made for the purpose of ascertaining the true facts in that particular.

The defendants also sent a cruising party into the field and made

measurements of stumpage and they insist that their measurements do not disclose more than one-third as much timber taken from public lands over the territory in question as that claimed by the complainants, and that complainants' cruisers greatly swelled their estimates of the true amount of timber that had been taken from particular sections of public lands by measuring the stumpage on a small part of any one section which they believed to be a fair stumpage for the entire tract and on such measurement making their estimate for the entire tract; that this was found to be wholly misleading because in measuring the different sections the only manner in which the true stumpage could be arrived at was to take the smallest subdivision of each tract and make measurements and estimates only thereon, as they claim their cruisers did. It is also claimed by the defendants that complainants' cruisers measured and carried into their estimates stumpage on either side of the line of the San Juan Railway and within its two hundred foot right of way, and they insist that any timber standing on said right of way became, by ownership of the right of way, the property of the railroad company in which the complainants had no interest and for which they can in no event recover the value thereof.

The results of these measurements, by each side, were put down in small blank books carried at the time. There are a great number of them and they have been filed as a part of the evidence in the case and must be examined. It will also be necessary to eliminate the measurements ascertained from stumpage of timber taken, if any, by the Rio Grande, Pagosa and Northern Railroad Company and the Rio Grande and Pagosa Springs Railroad Company, each of which availed itself of the right to take timber for construction purposes under the act of March 3, 1875. I shall hereinafter state the other matters which will need to be examined into and reported by the special master, if appointed.

It is important to first ascertain and determine the rights of the parties. In order to do so the following questions must be considered and answered, and their true answers on being applied to the facts will determine, as I conceive, the whole controversy. The questions are these, viz:

1. Is the case as made by the bill and answers one of equitable cognizance?

2. Did the contract entered into by the Denver and Rio Grande Railway Company with the Santa Fé Railroad Company and the three other railroad companies on March 27th, 1880, whereby the first named company agreed not to extend its lines further into certain territory, operate as a surrender, as of the date of said contract, of all of its rights, from and after that date, given by the congressional act of June 8th, 1872?

3. Is the San Juan Railway constructed from Antonito, a point on one of its other lines, westerly over the continental divide to the valley of the Las Animas River and thence northerly up said valley and completed to a point north of Durango prior to June 8th, 1882, and ever since operated, and being the only line that it ever completed through that territory, a line entitled to the benefit of the grant given

by the act of June 8, 1872? Or is the roadbed some forty miles in length, but on which no track was ever laid and no railroad in any manner ever operated over the same, which it constructed at an early date from Chamita, near the junction of the Big Chama River with the Rio Grande Del Norte, northward and up said Big Chama River, the San Juan Railway as contemplated by the original articles of incorporation of the Denver and Rio Grande Railway Company?

4. Does the fact that a large part of the lands from which the timber in controversy was taken was within and a part of the Ute Indian Reservation at the time the act of June 8, 1872, was passed, operate to exclude them as not being lands contemplated by said act?

5. Do the adjudicated cases between the complainants and the Denver and Rio Grande Railway Company and Railroad Company, referred to in the bill, construing the act of June 8, 1872, together with the conduct of the complainants' agents who visited, from time to time, the mills at which the timber in question was being sawed, knew the locality and public lands from which it was taken and the manner in which it was being manufactured and their failure to object thereto, operate as an estoppel against complainants to make the claim for an accounting as sought in the bill?

6. "Were the lands from which the defendants took and were taking the timber, adjacent to the right of way of the Denver and Rio Grande Railway Company?

7. "Had the railroad company the right to take timber from government lands adjacent to its right of way to make the narrow gauge railroad which was built prior to June 8th, 1882, over into a broad gauge railroad, or to repair broad gauge railroad after such a change had been made?

8. "Had the railroad company the right to take timber from lands adjacent to one of the lines of railway numbered and specified in the original grant of its franchise to its predecessor, and use this timber to repair another of those lines?

9. "Had the railroad company or its agents the right to the surplus lumber arising from logs found inapplicable, on account of rot or other latent defects, to the uses of the railroad company, after they arrived at the mills, and from the side cuts of the logs that were used for railroad purposes?

10. "Conceding that the railroad company had the right to take timber from lands adjacent to its right of way for the purposes for which it was obtaining the timber in controversy, that the lands from which it was removing this timber were adjacent, and that the railroad company was entitled to the surplus lumber after extracting from the logs the timber it needed, was it abusing this right, wasting the timber, and recklessly and designedly creating an unnecessary excess for its own benefit or that of its agents, to the manifest injury of the government?"

Questions 2 and 3 above noted are brought into the case by amendments to the bill. Question 4 appears not to have been suggested until after much of the testimony had been taken and again on final argument. Questions 6, 7, 8, 9 and 10 were first propounded in this

case by the court of appeals (124 Fed. 159, 59 C. C. A. 579), and that court said of the first four thereof "These questions are grave and difficult. They must in any event be considered and decided at the final hearing of the case."

They will be considered in the order above given.

[1] As to question 1,—This question must be answered in the affirmative. Preteca et al. v. Maxwell Land Grant Co., 50 Fed. 674, 676, 1 C. C. A. 607; Oolagah Coal Co. v. McCaleb et al., 68 Fed. 86, 15 C. C. A. 270; United States Freehold Land & Em. Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470; Dimick v. Shaw, 94 Fed. 266, 36 C. C. A. 347;

Pomeroy's Equity Jurisprudence, Vol. 1, § 237:

"Equity therefore assumed a jurisdiction to grant an injunction restraining the commission of actual or threatened waste; and having obtained jurisdiction for the purpose of awarding this special relief, which, in many instances, is not complete, the court will retain the cause, and decree full and final relief, including damages."

Daniell's Chancery P. & P., Vol. 3, p. 1732:

"The inadequacy of the remedy at common law, as well to prevent as to give redress for waste, is so unquestionable, that a resort to the courts of law, for either of those purposes, has in a great measure fallen into disuse. The remedy by a bill in equity is much more easy, expeditious and complete."

And page 1737:

"The court will likewise interfere by injunction, where the parties committing the waste, with nothing but temporary and limited interests in the subject matter, are maliciously and wantonly abusing their legal rights to the injury of those in remainder; this is commonly called equitable waste, which may be defined to be the commission of such acts as at law would not be esteemed, under the circumstances of the case, to be waste, but which are so esteemed in the view of a court of equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them."

And page 1739:

"It is to be remarked, that the object of the Court's interference in granting an injunction to stay this kind of waste (equitable) is not by way of satisfying a damage, but in order to prevent a wrong, and, therefore, a person cannot come into equity merely for an account, unless where the waste is of that nature that the plaintiff has no remedy at law; the account depends entirely upon the injunction; it is incidental to and consequential upon it; and, if a person is entitled to the one, he is entitled to the other also, on the principle of preventing a multiplicity of suits."

It is alleged in the bill that the Denver and Rio Grande Railroad Company claimed the right to send its agents, the other defendants, upon the public lands in question and take timber under the license given it by the act of June 8, 1872, but that it was abusing that privilege and wantonly committing waste in taking complainants' timber therefrom. and that it threatens to continue such practices.

United States v. Bitter Root Co., 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550, is not to the point.

[2] As to question 2,—The proviso in the act of June 8, 1872, is as follows:

"Provided, That said company shall complete its railway to a point on the Rio Grande as far south as Santa Fé within five years of the passage of

this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof, the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road."

The southerly point, as fixed in this proviso, was to be on the Rio Grande, and such point was required to be as far south as Santa Fé. The amendatory act of March 3, 1877 (19 Stat. 405), changed this proviso so that it reads as follows:

"Provided, That said company shall complete its railway as far south as Santa Fé within ten years of the passage of this act and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void as far as respects the unfinished portion of said road."

Under this amendment the Rio Grande was eliminated as the southerly point to be reached, and the time extended from five to ten years. It was only required that said southerly point should be as far south as Santa Fé; but the proviso further required the railway company "shall complete fifty miles additional south of said point in each year thereafter." Now the provision in the contract of March 27th, 1880, made by the Rio Grande Company with the Santa Fé Railroad Company and other railroad companies, which it is claimed operated as a surrender and forfeiture by the Rio Grande Company of all future rights under the act of June 8, 1872, reads as follows:

"And the party of the third part (The Denver and Rio Grande Railway Company) hereby agrees to and with the parties of the second part (The Atchison, Topeka and Santa Fé Railroad Company, The Pueblo and Arkansas Valley Railroad Company, The New Mexico and Southern Pacific Railroad Company), and with each of them, as long as the parties of the second part, and each of them, shall keep the agreements on their behalf herein contained, not directly or indirectly to construct or promote the construction of any railroad * * * in New Mexico south of the parallel of latitude seventy-five miles south of the village of Conejos in Colorado, * * * provided, nothing herein contained shall * * * prevent the construction of a line by the party of the third part through New Mexico for the purpose of reaching Arizona, provided such line shall not, in New Mexico, south of said last mentioned parallel of latitude, be located east of the 108th Meridian, or south of the parallel of latitude ninety miles south of the northerly boundary of New Mexico."

An examination of the map of New Mexico shows that Santa Fé is approximately ninety miles south of the northerly boundary of New Mexico. The Rio Grande Railway Company was therefore at liberty, notwithstanding the contract to construct its line as far south as Santa Fé within ten years after June 8th, 1872, but if it kept the obligation of the contract that line would have been deflected westerly, from the point where it entered the territory from the north, across the northwest corner of New Mexico and into Arizona, in order to reach a point as far south as Santa Fé. This would have carried it far west of the valley of the Rio Grande, which valley would appear to be the most feasible and direct route for reaching El Paso in the State of Chihuahua. El Paso, in the State of Chihuahua, is named in the articles of incorporation as being the most southerly point to which it was proposed to construct the Rio Grande Railway, the first named line in its articles of incorporation. But conceding that

a feasible route to El Paso might have been found from the point in Arizona to which the contract permitted it to construct its road, it was, by the terms of said agreement, prohibited from thereafter reentering New Mexico with extensions of its line in order to reach El Paso. Nevertheless, extension to El Paso might have been made from the point in Arizona by extending into the Republic from Arizona and thence to El Paso. It would therefore appear that the contract did not prohibit the railway company from reaching El Paso, in the State of Chihuahua, as its most southerly terminus. The total effect of the contract in that regard was a prohibition against reaching that southerly terminus by building its line over New Mexican territory. But, even conceding that the deflection of its line far to the westward, under the requirements of the contract, would have rendered it impracticable to reach El Paso, it is not believed that the railway company's rights under the congressional grant would have been in any manner affected thereby. Congress fixed the penalty for failure to comply with the condition now being considered; and it did so without regard, so far as disclosed by the act, to the causes that might prevent construction southward; the latter part of the proviso reads:

"And in default thereof (failure to complete its railway as far south as Santa Fé within ten years of the passage of the act and fifty miles additional south in each year thereafter) the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road."

The cause of the failure to extend southward is not therefore believed to be a matter open for consideration under the terms of the act.

The second question will therefore be answered in the negative.

[3] As to question 3,—The railroad line nearest which the timber in question was cut extends from Antonito, a point in Colorado on the line designated in the railway company's articles of incorporation (1870) The Denver and Rio Grande Railway, westerly. It lies near to the dividing line between Colorado and New Mexico for many miles, being in part on one side and in part on the other, of that line. It reaches and crosses the San Juan valley. At a point on the Los Pinos River, a tributary to the San Juan, it takes a northwesterly course to Durango and thence northerly up the Las Animas River. Its construction was begun at Antonito in April, 1880, and it was completed into Durango during the summer of the next year. A map showing its definite location was received and filed by the Secretary of the Interior under the act of June 8, 1872. It has always been known and operated as the San Juan line. The route over which it was constructed conforms to the route designated in the original articles of incorporation as the San Juan Railway. The articles in that particular read thus:

"The San Juan Railway,—Commencing at a point on the said Denver and Rio Grande Railway near or accessible to the valley of the Chama, or such other western tributary of the Rio Grande as may be found most eligible, and to extend thence by such most eligible valley to the divide separating the waters of the Great Colorado from the Rio Grande, and thence to such point in the San Juan valley as may be most expedient."

Starting at Antonito this line runs westward up a tributary of the Rio Grande until it reaches the crest of the Chama Mountains, thence westward across the valley of the Big Chama River and over the continental divide, which separates the waters of the Great Colorado from those of the Rio Grande, thence down the tributaries of the Rio San Juan, thence down the San Juan valley and across it to the Los Pinos, a tributary of the San Juan, thence up the Los Pinos and on to Durango. This route complies literally with that given in said original articles of incorporation. But it is said that because the railway company constructed a forty mile roadbed up the Big Chama River from Chamita, a point on its main line far south of Antonito, which, if it had been continued, would have covered the same general section of country in Southwest Colorado as the line that was constructed, and inasmuch as the defendant has continued to pay taxes on said roadbed and claim it as its property, this should be considered the true San Juan Railway as contemplated by the original articles of incorporation. Chamita is in New Mexico far south of Antonito and on what may be called the main line, that is the one first designated in the articles of incorporation. It is referred to as the main line in Railway Co. v. Alling, 99 U. S. 463, 25 L. Ed. 438, and the other seven lines designated in the articles as feeders or branches. But this main line had not reached Chamita until a large amount of grading and track laying had been finished from Antonito westward. It was the undoubted intention of the railway company at that time to complete the line westward from Antonito as its San Juan line, and so designated in the articles of incorporation, and it has ever since adhered to and carried out that intention.

The answer to the third question therefore must be, that the defendant's line of railway from Antonito westward to and beyond Durango is its San Juan Railway, that it was completed to Durango and beyond prior to June 8, 1882, and was and is entitled to the benefit of the grant given by the act of June 8, 1872, and that the unused roadbed up the Big Chama from the main line at Chamita is not the San Juan Railway as contemplated in the original articles of incorporation.

[4] As to question 4,—When the act of June 8, 1872, was passed a large part, but not all, of the lands from which the timber in controversy was cut were within the Ute Indian Reservation. This reservation was created by treaty with the Utes and other Indians concluded March 2nd, 1868, and proclaimed November 6th of that year, and is found in 15 Stat. 619. Its eastern boundary was the 107th Meridian of Longitude, its southern boundary the southern boundary line of the Territory of Colorado, and its western boundary the west line of said Territory. The lands were "set apart for the absolute and undisturbed use and occupation of the Indians." The United States agreed that no person, except certain government officers, should be permitted to pass over, settle upon or reside in the territory described. Article 14 of the treaty provided:

"The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interests may require it that

all roads, highways and railroads authorized by law shall have the right of way through the reservation herein designated."

On May 12th, 1880, the President issued a proclamation declaring that public interests required the construction of defendant's railroad through said reservation (Complts. Ex. 8). The defendant's San Juan Railway line extends in part through the territory originally included in said reservation. On April 23rd, 1872, congress passed an act authorizing the Secretary of the Interior to make certain negotiations with said Indians for the extinguishment of their right to the south part of said reservation (17 Stat. 55, c. 115). The negotiations resulted in an agreement with the Indians, which agreement was ratified by congressional act April 29th, 1874. By this agreement the Utes relinquished to the United States all their right and interest in a strip fifteen miles wide lying immediately north of the southern boundary line of said reservation, except the right to hunt thereon (18 Stat. pt. 3, p. 36, c. 136). Thereafter, and in 1880, congress by act ratified an agreement with the Indians by which they released all of their rights in said reservation, but the act provided for allotments of lands within the bounds of said reservation in severalty to said Indians, designating the amount of land to each Indian for which patents might issue conveying the fee and prohibiting either voluntary or involuntary encumbrance or alienation until such time thereafter as the President might see fit to remove the restriction, (Act June 15, 1880, c. 223, 21 Stat. 199). These allotted tracts appear upon the maps offered in evidence under the designation "I. A." Complainants' counsel did not claim on oral argument nor in the brief that any of the cutting complained of had been done on these allotments, nor that the complainants would be entitled to the value of any timber cut thereon even if the proof showed such cutting. On the contrary, I understand the defendants to claim that there is no proof that there was any cutting on said allotments, and that, in fact, there was none. The defendants also made the claim, at oral argument and in briefs, that none of the cutting complained of was done until after the reservation had been vacated by act of June 15th, 1880. We now note that the sole contention of complainants' counsel, as we understand it, is that the lands on which much of the cutting was done being, at the time the act of June 8, 1872, was passed, within the Ute Reservation such lands cannot be considered "public lands" within the meaning of said act. The United States owned the fee in the land within the reservation. The Indians were given the right of occupancy and such use as they saw fit to make of it. The United States could convey the fee, subject to such rights as were given by the treaty, and make such use of them during the existence thereof as they saw fit, not inconsistent with the rights of the Indians. M., K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377; Spalding v. Chandler, 160 U. S. 394, 403, 16 Sup. Ct. 360, 40 L. Ed. 469; Buttz v. N. P. R. R., 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440.

In United States v. Blendaur, 128 Fed. 910, at page 913, 63 C. C. A. 636, at page 639, it is said:

"The words 'public lands' are not always used in the same sense; their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the Court not to give such a meaning to the words as should destroy the object and purpose of the law or lead to absurd results."

The Court then proceeds to approve the following found in United States v. Bisel, 8 Mont. 20, 19 Pac. 251:

"There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

The treaty of 1868 expressly provided that railroads should have the right of way through the reservation if, in the opinion of the President, the public interests required. The Ute Reservation was a vast territory; it comprised a parallelogram in the southwestern part of the Territory extending approximately two hundred miles north and south and one hundred and twenty-five miles east and west. It was apparent to congress, from the original articles of incorporation of the railway company, that both its Western Colorado Railway and its San Juan Railway would cross the reservation. The two lines last referred to, and other lines designated in the original articles of incorporation, were projected entirely through a mountainous country in which railroad building is, of course, unusually expensive. It was then an undeveloped and frontier country. The population of the Territory was less than forty thousand in 1870. It would have been an almost impossible thing to have brought the materials needed by the railroad company, and named in the act, into the reservation from points beyond its borders. Lex non cogit ad impossibilia. It cannot be believed that congress, by the act, intended to withhold from the railway company the right to take from lands adjacent to its lines within said reservation stone, timber, earth, water and other material for the construction and repair of such lines. Under such conditions "public lands," as used in the act, must be construed to include lands within said reservation, and that the act gave the right to the railway company to take the materials named therefrom for the purposes expressed, and that such right was not in conflict with the rights given to the Indians under the treaty. Beside this, the right and license given under the act of 1872 were continuing. The reservation was vacated before the San Juan line had entered it, and none of the timber involved in this suit was taken until after such vacation. Further than this, by the act of April 29, 1874, it appears that the Indians relinquished a strip fifteen miles wide on the southern side of said reservation, which strip covers almost all of the lands theretofore lying within said reservation and from which timber was taken and here complained of. Before construction on the San Juan line had been begun congress, by act of March 3, 1877, amendatory of the act of June 8, 1872, confirmed said rights given by the earlier act.

Question 4 is therefore answered in the negative.

[6] As to question 5,—The railway company was given a mere privilege or license to take timber and other material from the public lands by the act of 1872. In exercising that license from time to time

it parted with no consideration and the complainants received nothing therefor. When the defendant, through its agents, cut the timber in question and took it from complainants' lands neither it nor they rendered anything of value to complainants. Their acts in that regard produced, in fact, a detriment to complainants. The alleged acquiescence, by silent or even open approval on the part of the agents who visited the mills where the timber was being sawed and knew from what lands it came and the distance thereof from the line of the San Juan Railway, could not operate as a relinquishment on the part of complainants of their right to demand damages therefor, if the taking of the timber was not within the privilege granted by the act. Pine River Logging Co. v. U. S., 186 U. S. 279, 290, 291, 22 Sup. Ct. 920, 46 L. Ed. 1164. The case does not fall within the rule that protects a licensee who has made expenditures upon another's estate for the latter's benefit. It is therefore not believed that the alleged acts of approval by complainants' agents can in any manner be made the basis of an estoppel.

By the litigated cases set up in the answer, in which these complainants were complainants and the defendant Denver and Rio Grande Railroad Company, or its predecessor railway company, were defendants, it is sought to bind the complainants to the definition of "adjacent," as used in the act of 1872, adopted in those cases, i. e., that public lands on which timber might be found suitable for construction and repair purposes were adjacent, within the meaning of said act, if they were within reasonable hauling distance by wagon from the defendant's line of railway. It is said that in those cases it was conclusively established that the public lands from which the timber in this suit is alleged to have been taken are within the definition of "adjacent," as there given,—there the public lands from which the timber was taken being much further from the defendant's line of railway than any of the lands from which timber appears to have been taken in this case. And so it is urged that that question is res adjudicata. Those were actions in personam. They were brought to recover damages for the value of complainants' personalty taken by the defendants. The locus from which the property was taken, was material, true,—but that was an incident to the issue. Those cases were not brought to fix a status. No such question was there presented for final adjudication,—not even as to the lands from which the timber was taken in those cases, much less the lands here involved. Those suits were in no sense proceedings in rem. [6] As I understand it the plea of res adjudicata as estoppel inter omnes must be made upon a judgment in a proceeding purely in rem.

Question 5 is therefore answered in the negative.

[7] As to question 6,—In 1887 the District Judge for this district construed the word "adjacent," as used in the act of June 8, 1872, as well as in the act of March 3, 1875, to include such lands from which the timber thereon might be transported to the line of the railway by ordinary wagon haul. United States v. D. & R. G. Ry. Co. (D. C.) 31 Fed. 886. However, that holding may be considered mere dictum, for the stipulated facts in that case admitted:

"4. That the lands from which the timber was cut were along and near and adjacent to the line of railway of said company." S. c. (C. C.) 34 Fed. 838; s. c. United States v. D. & R. G., 150 U. S. 1, 14 Sup. Ct. 11, 37 L. Ed. 975.

But the construction of the act in this particular was raised by the instructions of the trial court and passed on in the appellate court in Batcheldor v. U. S., 83 Fed. 986, 28 C. C. A. 246. In that case the court of appeals for this circuit approved the wagon haul rule. That court, speaking through Thayer, Judge, said:

"Probably no better or more reasonable test can be applied than that which was first suggested by Judge Hallett in U. S. v. Denver & R. G. Ry. Co. [D. C.] 31 Fed. 886, 889, namely, that timber should be regarded as adjacent to the right of way of a railroad, without reference to township or section lines, if it is within reasonable hauling distance by wagon. It is generally the case that timber suitable for railroad construction will not bear transportation by wagon from points remote from the established line of road, by reason of the expense incident to transporting it. If railroads, therefore, are limited in their right to take timber from the public domain to such timber standing on either side of their rights of way as they can reasonably afford to haul by wagon from the place where it is cut, it is probable that they will realize the full benefit of the privilege which congress intended to confer [illegible]d that the privilege will not be abused."

And the same court, when the case now under consideration was before it on appeal from the order directing the issuance of the temporary writ, in considering this question said:

"While they insist that the timber was not taken from lands more than 12 miles distant from the right of way of the D. & R. G. Railroad Company, and that these lands were adjacent to that right of way, they concede that no definite limit to lands adjacent to a railroad under these acts of congress (acts of 1872 and 1875) has ever been fixed, and that the most rational and generally accepted definition of 'adjacent lands' under these acts is that originally given by the learned judge who granted this injunction—that they are lands upon which the timber is within reasonable hauling distance of a railroad by wagon. U. S. v. Denver & R. G. Ry. Co. [D. C.] 31 Fed. 886; Batcheldor v. U. S., 83 Fed. 986 [28 C. C. A. 246]; U. S. v. St. Anthony R. Co., 114 Fed. 722 [52 C. C. A. 354]."

These two opinions of the court of appeals for this circuit would, of course, be all-sufficient to bind this court to the wagon haul rule to be applied in determining what lands are "adjacent" to the railroad, but for United States v. St. Anthony R. R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548, opinion in which was handed down by the supreme court after the cases in the court of appeals were decided. In that case the court said:

"The important question in this case is as to the meaning of the term 'adjacent' when used in the first section of the statute of 1875."

The supreme court then expressly disapproved the wagon haul rule, saying of it, at page 534 of 192 U. S., at page 336 of 24 Sup. Ct. (48 L. Ed. 548):

"We are not satisfied of the correctness of this construction or of its reasonableness. Lands might in this way be found adjacent which were 50 or 100 or more miles away, and which could not be regarded as adjacent within any meaning of that word heretofore given, and could only be said to be

adjacent in order to serve an exigency and to allow a railroad to procure timber gratuitously from the government. The purpose may, perhaps, be good, but the meaning cannot be stretched too far, even to accomplish a possible desirable end."

And again, page 540 of 192 U. S., page 338 of 24 Sup. Ct. (48 L. Ed. 548):

"We cannot take, for the reasons already stated, the fact of wagon-road transportation as a means of deciding whether the lands are or are not adjacent, for it seems to us that it may lead us far beyond any reasonable limit to the word."

The St. Anthony Case requires me to ignore the wagon haul rule; for on the point under consideration I can see no difference between the acts of 1872 and 1875. The latter act (18 Stat. 482) in that regard reads as follows:

"Also the right to take. from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

The St. Anthony Case does not give a fixed definition of "adjacent," —it did not intend to do so. But we find much in that opinion that is helpful in reaching a correct construction of that term in each case as it may arise. At page 536 of 192 U. S., at page 337 of 24 Sup. Ct. (48 L. Ed. 548), reference is made to Stone's Case, 64 Fed 667, 12 C. C. A. 451, thus: "The trial court had charged the jury that, under the act of 1875, the term 'adjacent lands' means lands in proximity, contiguous to, or near to the road," and of this definition of that term the supreme court then said:

"This court concurred with the circuit court of appeals in adjudging the charge to be a sound interpretation of the act." * * * Page 537 of 192 U. S., page 337 of 24 Sup. Ct. (48 L. Ed. 548). "We thus have the authority of this court that lands which are adjacent within the meaning of this act of 1875 must be lands in proximity, contiguous or near to the line of the road. While 'proximity' or 'nearness' to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition brings to the mind the idea that lands which are in fact far off, or distant, are not adjacent."

The court then refers to a letter of Mr. Vilas, Secretary of the Interior, to the Attorney General dated January 10th, 1889, in which the soundness of the wagon haul rule was doubted by the Secretary, and in which he expressed the view:

"That the use of the word 'adjacent' intended and meant the right to the public lands which were conveniently contiguous to the right of way and immediately accessible from it."

And gave it as his opinion that the correct construction of that act was that:

"Material may be taken from the tier of sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of 'adjacency.'"

The court then says of the Secretary's views:

"There is in our judgment much to be said in favor of this view of the statute. It falls in with the general system adopted by the United States

for the survey of its public lands. Those sections touching the line of the road would, of course, be included within the term, while those next to them might also be included, because, although not touching, they would be near to such line, and would, therefore, come within any definition of the term as being close or near to the line without being contiguous or actually touching it. It is not at all unreasonable to say that very probably congress had in mind this general system of division of the public lands, and that the word 'adjacent' would properly be interpreted with respect thereto. If the word 'adjoining' had been used instead of 'adjacent,' those sections touching the line of the road could be regarded as the adjoining lands, and when the word 'adjacent' instead of 'adjoining' is used, it might, not unnaturally, be said to include the next tier of sections away from the line of the road. We do not think that sections still further removed could, under this rule, be regarded as adjacent. The rule also gives certainty and definiteness to an otherwise somewhat doubtful expression, and, as the Secretary says, prevents the companies from ranging the public lands to secure material for the construction of their roads, and thus raising questions of legality in cutting in almost every case where the lands were beyond the sections described by the Secretary. This alone is an important consideration. If not bounded by section lines, the term 'adjacent' becomes of more or less uncertain meaning."

And then again, evidently referring to the instructions of the trial court in the Stone Case, the court, on page 541 of 192 U. S., on page 339 of 24 Sup. Ct. (48 L. Ed. 548) says:

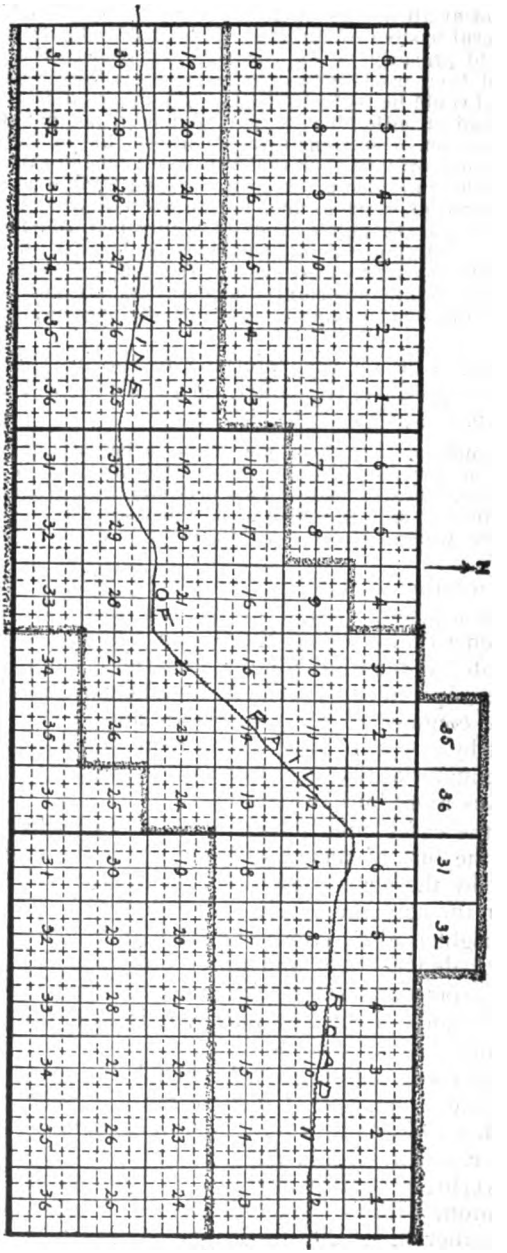
"We are of opinion that the same ought to be said of these lands. They are not adjacent, for they are not near; they are not in close proximity to this strip of land 200 feet wide. This ordinary limitation of the meaning of the word should not be enlarged for the purpose of thereby embracing lands which otherwise would not come within any fair construction of the statute."

It is also worthy of note, in considering the meaning of the term "public lands adjacent thereto" in the act of 1872, that the right was not only given to take timber therefrom but also stone, earth, water, and other material required for the construction and repair of its railway and telegraph line. The right to take any or all of these materials must be confined to the same lands and it is evident that it was not intended by congress that the railway company could go further afield for the material that could be easily transported than it could for that which was more burdensome.

Some of the cases cited have, in construing what public lands are adjacent to the line of the road from which the right to take timber was granted by the act, called attention to the use of the same term, "adjacent" in the act, wherein, in connection with the grant of the right of way, the right is also given to "public lands adjacent thereto as may be needed for depot, shops and other buildings for railroad purposes and for yard room and sidetracks, not exceeding twenty acres at any one station;" and on this, by parity, it is said the term, in both instances, means close or near to.

The rule of construction given by Mr. Vilas was highly commended by the supreme court, and if it were not for what is further said in the St. Anthony Case, it would be followed here. Under that rule the railroad company would have a license to take timber from public lands covering a variable strip of a minimum width of three miles and a maximum width of six miles, lying in part on one side and in part on the other of its 200 foot right of way. The following rough

plat outlines such a strip. The road crosses three townships from east to west. I have included sections cornering with as well as those alongside sections touched by the right of way, as being within the Vilas rule:



The San Juan Railway crosses sections in its route in almost every conceivable way, and the above plat shows that where it follows a tier of sections the Vilas rule would give it the right to take timber for a distance of scarcely more than one mile from the line of the railway on one side and slightly less than two miles on the other side. The language of the supreme court, in further reference to the question of "adjacency," is as follows, page 539 of 192 U. S., page 338 of 24 Sup. Ct. (48 L. Ed. 548):

"Lands which are 20 miles off we cannot regard as adjacent to the line of a railroad within the meaning of this statute. *On the other hand, lands within 2 miles, we assume all would agree, are so adjacent.* At what point between these two extremes lands are on one side adjacent and on the other not adjacent, is a very difficult matter to decide. It is necessarily somewhat vague and uncertain, and we are not called upon to determine it in this case. All we have to do now is to declare that lands as far off as the lands in question are not adjacent lands, and it is unnecessary to say at what point on the intervening lands adjacency begins. It is very difficult to determine just where twilight ends and night begins, but it is easy enough to distinguish noon from midnight. If we say that 2 miles would be within the term and 20 would be beyond it, it might be asked why 19 miles would not also be beyond it, or 3 miles be within it, and these questions might puzzle one to answer. It can only be said that a distance of 20 miles is beyond it any way and 2 miles would be within it."

This is certainly a clear holding that lands within two miles of the line of road are adjacent lands within the meaning of the statute, and this is in obvious conflict with the Vilas rule. It is recognized that the term is of variable significance; there is no certain meaning which can be applied in all cases. I am of opinion that in this case the limit named by my predecessor, to wit, a strip three miles in width upon either side of the railroad right of way is a fair and reasonable interpretation of the statute,—the three mile strip to be measured at right angles with the direction of the lines of the boundary of said right of way. But when the court of appeals considered this case (124 Fed., 59 C. C. A., supra) it enlarged the order of Judge Hallett which restrained the railroad company from cutting from lands beyond a line three miles from its right of way upon either side, to six miles. That enlargement may have been solely precautionary. On the other hand, it may have been made, after full consideration, as an interpretation of the term "adjacent." And if the latter it may adhere to the six mile rule. I will therefore direct that the Master to be appointed, who shall report the facts, ascertain and report the amount of timber taken from the public lands in question under the three mile rule, and that he also report separately the timber taken by each of the defendants from the public lands in question under the six mile rule upon either side of the right of way—both within and without said limits.

My answer to question 6 therefore is, that lands more than three miles from the line of the right of way, measured at right angles therewith, are not "adjacent public lands" within the meaning of said act, and that lands within said three mile limit are adjacent lands from which the defendant railroad company and its agents, defendants, had the right to cut and take timber for construction and repair of its railroad and telegraph line.

[8] As to question 7,—The articles of incorporation of the railway company do not indicate whether any of its then contemplated lines of railway were to be narrow gauge or broad gauge roads. Nor does the act of June 8, 1872, give any suggestion in that regard. But, as I understand the facts, the railway company made all of its lines constructed prior to June 8, 1882, narrow gauge. It availed itself of the congressional grant for that purpose. At the time this suit was brought it had converted parts of some of these lines constructed prior to June 8, 1882, from narrow to broad gauge roads; and it is urged by complainants that any timber used for that purpose cannot be said to have been taken for repair, within the meaning of the act of June 8, 1872. It is believed that common knowledge teaches us that the conversion of a narrow to a broad gauge road works a radical change in the line so converted in every material sense. The bed on which the ties rest must be widened, the ties must be longer and heavier for a broad gauge than for a narrow gauge road, the rails placed upon the ties and their fastenings to the ties must be larger and heavier,—this must be so in order to sustain the greater burden of the heavier rolling stock to be thereafter passed over the road. For this purpose bridges must be reconstructed of heavier timbers, and likewise longer and heavier crossties placed thereon. This would necessarily be reconstruction and not repair of a previous structure. I have not had the benefit of the views of counsel on either side on this question, although it is one which the court of appeals said must be answered on final hearing. My own investigation has not discovered any authority directly to the point. There is some, however, that is helpful by way of analogy.

In Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594, it appeared that the charter contract required the street railway company to keep certain parts of the street in which its lines were constructed and operated "in good repair and condition." The question arose as to whether the street car company could be compelled to grade, pave, macadamize, fill or plank such parts, and it was held that it could not be compelled to do so,—that such improvements did not come within the category of repairs.

In Railway Co. v. Detroit, 34 Mich. 78, the same conclusion was reached.

In State ex rel. v. Street Ry. Co., 85 Mo. 263, 276, 277 (55 Am. Rep. 361) the same question was involved and the court said:

"The only condition or burden affixed to the privilege given by the ordinance to it to construct and operate its road was that it should keep and maintain the space between its rails and a space of two feet on either side of the line of its track and all street crossings along its line in good repair. The obligation to repair a street is one thing and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. Without torturing the language of section 4 of the ordinance of 1869, and turning it away from its ordinary meaning, we cannot construe it so as to impose on defendant an obligation to reconstruct a street, when in express terms it says the street shall be maintained and kept in good repair."

In Leek Imp. Commissioners v. The Justices, 20 Q. B. D. 794, it appears that a macadamized road was changed to a paved road with granite setts and the question arose as to whether or not this could be considered "maintenance" of the road within the sense of a legislative act so as to make the county liable for one-half the cost of such charge. The trial court held the county not liable; and on appeal Lord Esher, M. R., said:

"In this case we must, in the absence of any reason to the contrary, construe the section according to the ordinary meaning of the words as applied to the subject matter. In section 13 of the Highways and Locomotives (amendment) Act 1878, the legislature are, as it seems to me, referring to the 'road' not in the abstract sense of the word as indicating the way from one place to another, but in the concrete sense, as indicating the physical thing itself. Referring to the road in that sense, the legislature speaks of expenses incurred not in the making of the road but in the 'maintenance' of the road. The question is whether what has been done in this case comes within the term 'maintenance.' This road was a macadamized road. It might be, if, owing to increased traffic, it became necessary to use harder stone than had been previously to repair such a road, so as to provide a better macadamized road to meet the requirements of the traffic, the highway authority in so doing would only be maintaining the road. But everybody knows that a macadamized road and a paved road are quite different things; and what the highway authority did in this case was not to maintain the macadamized road, but to remove it and substitute another kind of road altogether; viz., a road paved with setts of granite. It appears to me that the decision of the learned judge was right and that this appeal should be dismissed."

In this conclusion Lindley and Bowen, L. JJ., concurred, saying "that 'maintenance' as used in section 13 is equivalent to 'repair.'" Bowen, L. J., added:

"By the term 'repairs' is included, I think, whatever is necessary to keep the road in a proper condition for traffic, having regard to the character and original manufacture of the road, but nothing further. * * * It seems to me that what the plaintiffs did was really making a new road of a different kind, not repairing the old one."

To hold otherwise in this case would be to duplicate the grant giving material for construction purposes,—construction of the original road as a narrow gauge line and then reconstruction of the road as a broad gauge line. We cannot so extend its meaning and purpose.

But, as already said, neither the articles of incorporation nor the congressional act gave any suggestion as to whether the parties contemplated the construction of a narrow or broad gauge road. This was optional with the grantee. It might construct either, and having constructed the one or the other the grant gave the railway company a continuing license to take timber to repair the lines so constructed. The railway company having constructed its lines as narrow gauge roads had the right to take timber to repair them so long as they were operated as narrow gauge roads. It undoubtedly had the right to reconstruct those lines, or such parts of them as it saw fit, and at such times as it might choose, into broad gauge roads; and having so reconstructed parts of its lines at its own expense, no reason is perceived why it did not have the right thereafter to avail itself of the privilege given under the grant to take timber to repair its broad gauge road. This right was given to the railway company under the

act in the first instance, and though it exercised its right to the timber for construction purposes in making its road narrow gauge, it is not believed that this would foreclose it against successfully claiming the right to take timber for repair purposes for its broad gauge road thereafter substituted for the narrow gauge.

My answer to question 7 is, that the company did not have the right to take timber from government lands adjacent to its right of way to make the narrow gauge railroad which was built prior to June 8th 1882, over into a broad gauge railroad, but that it did have the right to take such timber to repair its broad gauge railroad after such a change had been made.

[9] As to question 8,—In view of what is said in D. & R. G. Ry. Co. v. U. S. (C. C.) 34 Fed. 838, and s. c. 150 U. S. 1, 14 Sup. Ct. 11, 37 L. Ed. 975, this question is answered in the affirmative.

[10] As to question 9,—The railway company and its successor had the right, under the act of 1872, to go upon complainants' lands adjacent to its lines of railway and take therefrom such timber as was needed for construction and repair of its railroad. In doing so there would necessarily be parts of trees, when they were felled, not suitable for those purposes. Those parts remained the property of the complainants. The act only gave the right to take timber "required for the construction and repair of its railway and telegraph line." It did not have the right to take timber for any other purpose. It was not the purpose and intention of the grant, as disclosed by its terms, that the license should extend to the taking of complainants' timber and the manufacture thereof into various kinds of lumber and the disposal thereof on the market for the benefit of the grantee. It is insisted that the parts of trees not suitable to the uses contemplated by the congressional act would be mere waste and of no value to complainants, and that therefore the railroad company and its agents were entitled to utilize trees that proved, from latent causes, to be defective and the slabs or side cuts from logs that it did avail itself of, and thus to turn them into the markets for their benefit in the way of manufactured products which it made therefrom. The argument is not convincing. By what principle has A the right to decide that certain of B's property is useless to the latter and if not devoted to some purpose it will be lost, and thus A claim the right to take it for his own benefit? At the oral argument the question was illustrated by a grant conferring a license to go upon the lands of the grantor and take timber for the making and use of rails therefrom. The grantee would certainly not have the right to make the tops of trees felled for that purpose into cordwood and then dispose of the same for his own use and benefit. The illustration was then thought to be opposite, and it is so believed yet. I think the record shows that these defective logs and side cuts of logs were appropriated by the railroad company's agents, defendants here, and that it further appears that for such a privilege enjoyed by said agents the railroad company received some compensation in the way of reduced prices on the ties furnished it by said agents from the logs so taken.

The answer to question 9 therefore is, that as to all defective logs

and side cuts of other logs which were taken from "adjacent lands" and appropriated by said agents, said agents are liable to complainants therefor; and if the railroad company received a consideration from said agents on account of such appropriation, or with knowledge of what its agents were doing in that regard, acquiesced therein, it is jointly liable with its several agents. My knowledge of the record, gained from such examination of it as I have had time to make as well as from arguments of counsel, causes confidence in the belief that the railroad company both acquiesced in such appropriation and also received compensation therefor from said agents.

[11] As to question 10,—I think this question was put by the court of appeals on account of the showing by complainants on application for the temporary writ, as to the alleged practice of the railroad company in requiring from its agents all-heart ties. In considering that matter that court observed:

"The taking of trees of the United States to make ties of this character, so that all the remainder of the trees taken should become merchantable lumber of the railroad company or its agents, goes far to show a settled purpose to create an unnecessarily large excess of merchantable lumber, which was not to be used by the railroad company for the purposes specified in the acts of congress, and to negative the claim of the appellants that they were either carefully or economically exercising the privilege of the company."

The record contains copies of many tie orders given by the railroad company to its agents, in which there appears almost invariably the requirement that the ties should be all-heart. In addition to this the answers leave the impression that the orders, as given by the railroad company, were filled by the other defendants. But the answers in that regard should hardly be taken as a specific admission that the ties were all-heart. On taking the testimony much time was spent on this matter by the defendants; the complainants, on their part, relying on the written orders for the ties. The defendants' witnesses who had to do with receiving the orders from the railroad company, who directed the filling of said orders, and who actually conducted the operation in making the ties, testified without exception: That the all-heart tie requirement was never filled, that it was in all instances ignored and that in the very beginning of the giving of such orders the agent of the railroad company, who sent them in, was notified that such requirements would not be complied with; but that notwithstanding such notice, and similar notices thereafter, the orders continued to come with such requirement. Complainants' counsel did get from witness Hobbs, an employé of the railroad company, an apparent admission that one order for one hundred thousand all-heart yellow pine cross-ties was filled as given; but when the question which elicited the answer is considered I cannot regard it as having that effect. The question directed the attention of the witness to the order, which embodied the requirement of all-heart ties, and then asked:

"For what purpose those standard gauge ties were so ordered and why the same were consigned to Salida to the care of Superintendent Burns?"

The witness answered:

"I should say that these ties were furnished for the repairs of the standard gauge line on the first division of the Denver and Rio Grande Railroad."

And then this question and answer:

"Q. To the best of your knowledge how and where was these one hundred thousand all-heart, yellow pine cross-ties used under this order of February 16th, 1899? A. On the first division of the Denver and Rio Grande."

Each question, it will be noticed, embodied two matters, the most material parts of which did not refer to the character of the ties inquired about. Attention was also called to the fact that the testimony showed a very high percentage of the excess or side cut, ranging from about thirty per cent to fifty per cent of the entire log, and not lower than twenty per cent of the merchantable product in the logs. And there is dispute as to what a reasonable per cent of waste or side cut would be in an economical taking of timber by the railroad company for its purposes. But I think a fair view of the testimony on this point leads to the conclusion that the greater weight of the proof is with the defendants on the all-heart tie proposition. No other practices of consequence in getting out the timber for the railroad company, except the leaving of tops of trees on the ground, has been urged that need to be considered on this question.

Question 10 is therefore answered in the negative.

It is hoped that these views may be a sufficient guide under which the facts may be grouped in order to enter a proper decree. Counsel, on considering what is said above, may so aid the Court that a conclusion as to the necessary facts may be easily reached without the requirement of a critical and tedious examination of the record. If not it is urged that they file written consent to the appointment of a special master, to be selected by the Court if they cannot agree on one, whose duty it shall be to examine the entire record, take additional proof if necessary and make report of the facts needful for the entering of the decree. They are requested to respond to this suggestion on or before October first next. It is possible that correct conclusions on the facts may not be reached without first fixing the three mile limit on either side of the right of way within which lands are held to be adjacent to the line of the road and beyond which not adjacent; and an additional cruising of stumpage for the purpose of obtaining measurements in accord to such limits. Likewise as to the six mile limit. Counsel are better able to determine whether that be necessary than the Court. If it be found necessary the case would, on motion, be opened for that purpose.

The Master, it is believed, will find in what has already been said a guide for his inquiry and report. He will exclude from the timber to be charged against defendants any taken from the rights of way of the three defendant railroad companies and the timber taken by the two Pagosa railroad companies for construction purposes for their roads, or any timber taken by them, if not taken by them as agents of the Denver and Rio Grande Railroad Company. He will also exclude old stumpage, if any there be in the different es-

timates, left prior to the acts charged against any of the railroad company's agents in this case. It will be necessary for him to compute the amount of the excess or side cut from timber taken within said three mile limit, and within the six mile limit, separately, and the amount thereof separately converted by each agent of the railroad company to his or its use; with such excess or side cut so used by them and coming from within said three mile limit, they will be separately charged, but jointly with the railroad company. It will be necessary for him to compute the entire amount of timber taken by defendants from complainants' lands beyond the three mile limit, and beyond the six mile limit, separately, and separately the amount so taken by each defendant as agent of the railroad company, with which amount so separately taken by each agent beyond the three mile limit such agent will be charged jointly with the Denver and Rio Grande Railroad Company. He will report whether any of the timber taken within the three mile limit was used by the railroad company for the purpose of reconstructing its narrow guage road into a broad gauge road, and if any how much. Such timber so used, if any, will be charged against the railroad company.

The St. Anthony Case, 192 U. S., 24 Sup. Ct., 48 L. Ed., gives the measure of damage, I think, in each instance, i. e. whether it be for the excess or side cut from timber taken from complainants' lands within the three mile limit or for all of the timber beyond the three mile limit,—the value of the timber after it was cut at the place where it was cut. This value the Master will report.

So far as now advised it does not appear that either of the Pagosa railroad companies ought to be held for any of the timber, but that will be finally determined when the report of the Master comes in.

Some advancement by way of deposit in court should be made for the Master's services before he is appointed.

GEORGE MELIES CO. v. MOTION PICTURE PATENTS CO. et al.
(MELIES et al., Interveners.)

(Circuit Court, D. New Jersey. July 5, 1911.)

SPECIFIC PERFORMANCE (§ 88*)—GOOD FAITH OF PLAINTIFF—INTENTION.

A party is not entitled in equity to specific performance of a contract, where he has not only failed to perform the terms and conditions of the contract on his part, which were essential parts of the consideration, but did not intend to do so when he entered into the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 226; Dec. Dig. § 88.*

Persons entitled to enforce specific performance, see note to Lawyer v. Post, 47 C. C. A. 493.]

In Equity. Suit by the George Melies Company against the Motion Picture Patents Company and the Edison Manufacturing Company. George Melies and Gaston Melies intervened. Decree for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank L. Crawford, for complainant.
Anson McCook Beard, for interveners.
J. H. Caldwell, for defendants.

BRADFORD, District Judge. This suit was brought by the George Melies Company against the Motion Picture Patents Company and the Edison Manufacturing Company. Subsequently George Melies and Gaston Melies intervened under an order made with the consent of the original parties. The bill was filed to compel the delivery or execution and delivery to the complainant of two license agreements by the Motion Picture Patents Company which had succeeded to certain patents and rights owned and possessed by the Edison Manufacturing Company. The latter company had agreed to grant certain patent licenses relating to motion pictures to the complainant upon certain terms and conditions expressly assented to and accepted by it. The evidence shows that the complainant not only has failed to perform certain promises and undertakings on its part which largely constituted the consideration for which it was to be licensed, but at the very time of so promising and undertaking did not intend to fulfill its engagements, but had an intention at that time not to observe its promises and undertakings. The vital question here is not how the violation of conditions subsequent is to be taken advantage of, or whether the mere breach of a promise, though intentional, amounts to such misrepresentation as to authorize a rescission of the contract. It is whether one is entitled in equity to demand specific performance who has not only failed to observe the terms and conditions entering into the heart of the contractual consideration, but became a party to the contract with the intention at the time not to comply with such terms and conditions. One who enters into a contract impliedly makes a representation, as a fact, that he has an intention to perform it. An intention is just as much a matter of fact as any physical phenomenon. The Circuit Court of Appeals for this circuit in Rogers v. Virginia-Carolina Chemical Co., 149 Fed. 1, 78 C. C. A. 615, said:

"There is a prima facie presumption of fairness and honesty in the dealings of mankind, and, where one man makes a promise to another as an inducement for a change of position or other action on the part of the latter, he, if not expressly, impliedly avers that he has an existing intent to fulfill his promise, and such implied averment of existing intent is of matter of fact, and, if false and fraudulent, is a fraudulent representation, which may or may not, according to circumstances, furnish the basis for an action ex delicto."

This doctrine is sustained by an overwhelming weight of authority. Nor can one, guilty of such implied and fraudulent misrepresentation, conform to the requirement of the maxim that one seeking equitable relief must come into court with clean hands. The bill must be dismissed with costs to the defendants and interveners. There is no occasion to enter a decree as to the interveners in other respects as it appears they are already in possession of the desired license. It is not necessary to refer to other alleged defenses.

NEW JERSEY LAND & LUMBER CO. v. GARDENER LACY LUMBER CO. et al.

(Circuit Court, E. D. North Carolina. September 10, 1911.)

(No. 31.)

1. COURTS (§ 371*)—FEDERAL COURTS—EQUITY JURISDICTION—REMEDIES GIVEN BY STATE STATUTE.

Where a state statute creates a new equitable right, and the other elements of federal jurisdiction exist, such as diverse citizenship, the federal court will take jurisdiction, when such enforcement will not contravene the constitutional provision entitling parties to trial by jury or provisions of Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), inhibiting suits in equity in any case where a plain, adequate, and complete remedy may be had at law, but not otherwise.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*

Jurisdiction of federal courts as affected by state laws. See note to Barling v. Bank of British North America, 1 C. C. A. 513.]

2. JURY (§ 31*)—RIGHT TO TRIAL BY JURY—SCOPE OF CONSTITUTIONAL PROVISION.

The right to trial by jury guaranteed by the seventh constitutional amendment cannot be restricted by either Congress or the courts, and the sending of an issue of fact out of chancery to be tried before a jury does not meet the requirement of such provision in cases where it is applicable.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 207; Dec. Dig. § 31.*]

3. JURY (§ 31*)—FEDERAL COURTS—EQUITY JURISDICTION—SUIT TO QUIET TITLE.

A federal court of equity is without jurisdiction of a suit to quiet title by a complainant out of possession as against a defendant who by his answer and the answers to interrogatories attached shows that he is in possession of a portion of the land involved, claiming title by adverse possession, and he alleges facts which, if proved, support such title under the laws of the state, even though a statute of the state authorizes such a suit, the issues therein being of fact, cognizable at law, and on which such defendant is entitled to a jury trial in the federal courts.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 31.*

Right to trial by jury in federal court, see notes to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

In Equity. Suit by the New Jersey Land & Lumber Company against the Gardener Lacy Lumber Company and others. On exceptions to report of special master. Exceptions overruled, and suit dismissed as to certain defendants.

Meares & Ruark, for plaintiff.
Rountree & Carr and Bellamy & Bellamy, for defendants.

CONNOR, District Judge. This cause was before the Circuit Court of Appeals upon appeal from a decree made by the late Judge Purnell, dismissing the bill, for that the complainant had an ample and complete remedy at law. In the opinion (178 Fed. 772, 102 C. C. A. 220) a history of the cause up to, and including, that time, is given.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When the cause came on for hearing upon the mandate of the court reversing the decree, an order of reference was made to E. S. Martin, Esq., special master, directing him to—

"find the facts by the record and evidence upon which arise the issues between the complainant and each of the defendants, and report in due course. The special master is advised that the purpose, primarily, of this reference, is to enable the court to determine which, if any, of the controversies between the several defendants and the complainant are properly triable in a court of law or equity, and authority is conferred upon him in his discretion to investigate and report all necessary facts to this end. He will find the facts upon which arise the controversies either as to the whole or any part of the lands described in the bill of complaint. * * * He will further find whether or not claim of title is set up by the defendant or defendants in his or their answer, and, if so, under what claim, etc. He is further directed to report which, if any, of the controversies between the parties, have been settled and should be eliminated" etc.

The special master on March 18, 1911, made his report, setting out the names of the defendants, in respect to whom judgments pro confesso, or by way of compromise, had been entered. He made an analysis of the answers filed by the other defendants, setting forth the admissions made and defenses set up by them. He states his conclusions as follows:

"That in each and all of the controversies between complainant and the respective defendants set forth above the pleadings raise issues of fact. That all of said defendants plead adverse possession of the lands claimed by them under known and visible boundaries for periods sufficient to ripen their respective titles into perfect titles, and also the statutes of seven and twenty years under grants and conveyances subsequent to the grants complainant sets out in the bill, and prior to the act of 1893 [Laws 1893, c. 490], except as to one tract claimed by Henry Smith, under a grant dated in 1900 and two tracts claimed by G. S. Ellis, under grants dated, one December 29, 1893, and one in 1900, but whether said grants are void under the act of 1893, as being on lands previously granted, the facts do not show, and three tracts claimed by N. B. Roberts under deeds dated in 1894, 1896, 1899, but as to these tracts, Roberts fails to state in his answer the date of the grants under which he claims, and therefore it cannot be determined whether or not the said deeds are void under the act of 1893. * * * That each of said defendants is entitled to have said issue tried by a jury in a court of law under the principles laid down in the opinion of the Circuit Court of Appeals for the Fourth Circuit in this suit."

Complainant in due time filed the following exceptions to the report of the special master:

"(1) The report is only an attempt at an abstract of the record of the case, and that does not purport to be a complete abstract. The record speaks for itself.

"(2) The referee has not taken any proofs as to the merits of the case, and the complainants have had no opportunity to offer these in support of the bill of complaint."

In addition to the prayer for judgment removing alleged clouds from its title, complainant prays that defendants, under oath, make discovery and answer a number of interrogatories; the first being:

"Whether or not the defendants jointly, or severally, claim any right, title, interest, or estate of any kind in and to the lands of the plaintiff, as hereinbefore described, and, if so, under what grants, deeds, claims, leases, or other

instruments or surveys they set up their claim thereto with a full and complete abstract of their alleged title."

Defendants responding to the first interrogatory, under oath, set out the title under which they claim the several portions of the land described in the bill, of which they allege they are in possession. No exception is taken to the answer, nor is any replication filed.

For the reason given in the opinion, the Circuit Court of Appeals held that in the then condition of the record the bill should not have been dismissed, that decrees pro confesso and other decrees affecting the rights of complainant, which should be protected, had been made, etc. The appeal was argued upon the theory that the order appealed from was based upon the allegations of the bill. The Circuit Court of Appeals so treated the case, and said:

"If the averments of the bill, taken as confessed, confer jurisdiction, the court must examine the answers and exhibits, and take sufficient proof to inform itself whether it has jurisdiction to proceed to final decree."

It further said:

"If it shall appear, upon taking the proofs, that any of the defendants had such grant (those declared void and not color of title under the act of 1893), and claim that they have, by an ouster, followed by seven years possession ripened into perfect title, would it not be clearly within the power of the court to declare such grants void for all purposes? No possible question for a jury could arise upon them. If, upon the contrary, it shall appear that any of the defendants are claiming and are in adverse possession under grants junior to complainant's, which are color of title, and have other muniments of title sufficient to give color, the question of ouster and adverse possession being purely matters of fact, the court would send the parties to a jury."

The large number of defendants, coupled with the somewhat confused condition of the record, induced the court to send the case for the purposes set out in the order of reference to a master. It is apparent from the bill and answers as found by the master that, as to all of the defendants, save Ellis, Smith, and Roberts (as to a few tracts), the defendants claim under grants junior to those under which complainant claims (not affected by the act of 1893), and that their title is dependent upon sustaining their allegation of an ouster followed by seven years adverse possession, which, under the statute in force in North Carolina, for more than a century, not only tolls the entry of the true owner, but confers title upon the disseisor. Rev. 1905, § 382. The answers of the defendants in respect to their title or claim—its source and basis—are clear, full, and explicit. With a few exceptions, they claim under separate and distinct grants, junior to complainant's, having no connection with each other. The alleged ousters are of different dates, and the evidence regarding their possession will necessarily be different in character, etc. The pleadings disclose a condition not unusual in this state. In the latter part of the eighteenth century (1795) the state made grants of large bodies of land —largely swamp and of small value. The grantees held, as to large portions of these lands, but a constructive possession. As the population increased, the people moving into the sparsely settled sections

made entries upon such small tracts within the boundaries of the original grants as were capable of cultivation and suitable for homes. It was the policy of the state to issue grants to any persons who complied with the statutory requirements and paid the nominal price charged therefor, without inquiring whether such entries covered lands theretofore granted. Of course, if the entry covered land theretofore granted, the grantee took no title—the land was not subject to entry and grant—but if the junior grantee ousted the senior grantee, claiming under his grant as color of title, and followed his disseisin or ouster by adverse possession for seven years the entry of the senior grantee was tolled, and such ouster, followed by adverse possession, under color of title, for the statutory period, ripened into perfect title. The answers filed by defendants herein setting up grants junior to those under which complainant claims, followed by alleged adverse possession, present questions or issues of fact upon which under the Constitution and the uniform practice of the courts they are entitled to have a trial by jury. When the cause was before the Circuit Court of Appeals, complainant based the contention that it was entitled to invoke the jurisdiction of the court of equity upon a number of grounds, all of which were rejected, except the North Carolina statute, providing a remedy for quieting title, etc. Rev. § 1589. The learned counsel for complainant insist that in the light of the pleadings and the report of the master the court of equity has the power, and that it is its duty, to hear and determine the controversies between complainant and the several defendants.

[1] In view of this contention, it may be well to briefly review the decisions of the Supreme Court in cases wherein similar state statutes have been relied upon. In one or more of these cases language may be found which, unless examined with care and in the light of elementary principles, may be thought to lead to the conclusion upon which the argument is based in this case. Before referring particularly to the decisions, it may be well to recall a few fundamental truths which must be kept constantly in view. "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." Section 723, Rev. St. (page 583, U. S. Comp. St. 1901). The jurisdiction of courts of equity to maintain bills for the purpose of removing clouds from title, or quieting title in England and in this country, at the time the federal Constitution was adopted, was well settled, and its boundaries well defined. These were recognized and enforced by the federal courts. The same limitations were enforced in the courts of those states wherein the distinction between actions at law and suits in equity and the jurisdiction between courts of law and equity were observed. Numerous decisions may be found in the federal and state court reports recognizing and enforcing the principles upon which the jurisdiction was fixed. Because of the limitations upon the jurisdiction of courts of equity to entertain these bills, they were not often filed. In North Carolina we find but few cases in which parties sought to invoke the jurisdiction. The latest are Busbee v. Macy, 85 N. C. 329, and Busbee v. Lewis, 85 N. C.

332. The bills were dismissed for want of jurisdiction in equity. The Legislatures of many of the states, including North Carolina, for the purpose of removing the difficulties which parties encountered in maintaining these suits and enlarging the class of cases in which relief could be had, enacted statutes entitling them to sue, without regard to the question of possession, and removing other obstructions to the maintenance of such suits in courts of equity. In many of the states enacting these statutes the reformed Codes of Procedure abolishing the distinction between actions at law and suits in equity were adopted and jurisdiction conferred in all civil actions upon the same court. Questions of jurisdiction in the state courts became therefore of no importance. The statutes, in conformity with the public policy upon which they were enacted, were liberally construed to advance the remedy. 4 Pom. Eq. § 1396. The question soon arose whether these statutes, in cases where diverse citizenship existed, could be enforced in the federal courts. In Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, complainant's bill was based upon the Nebraska statute, similar to the North Carolina act, alleging diverse citizenship as the ground of jurisdiction in the federal court. It was alleged that neither party was in possession. Defendant demurred for that complainant had not made or stated such a case as entitled him to the discovery or relief prayed. Mr. Justice Field, writing the opinion overruling the demurrer, citing Broderick's Will Case, 21 Wall. 520, 22 L. Ed. 599, says:

"While it is true that alterations in the jurisdiction of the state court cannot affect the equitable jurisdiction of the Circuit Court of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the state."

The learned justice is careful, however, to say:

"It does not follow that by allowing in federal courts a suit for relief under the statute of Nebraska controversies properly cognizable in a court of law will be drawn into a court of equity. * * * If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

It will be observed that the case was decided upon demurrer. In Reynolds v. Bank, 112 U. S. 411, 5 Sup. Ct. 216 (28 L. Ed. 733), the bill to remove a cloud from the title was filed under the Indiana statute. A motion to dismiss was refused, and the cause was heard upon the bill and answer. Mr. Justice Woods said:

"It may be conceded that the Legislature of a state cannot directly enlarge the equitable jurisdiction of the Circuit Court of the United States. Nevertheless an enlargement of equitable rights may be administered by the Circuit Court as well as by the courts of the state. And although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right of such character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity, admiralty, or common law."

Holland v. Challen, supra, is cited. The answer was treated as evidence and the decree for complainant was "sustained by the admissions of the answer." In Whitehead v. Shattuck, 138 U. S. 146,

11 Sup. Ct. 276, 34 L. Ed. 873, the bill was filed under the Iowa statute, which gave "an action to determine and quiet the title to real property * * * by any one having or claiming an interest therein, whether in or out of possession of the same against any person claiming title thereto, though not in possession." Mr. Justice Field wrote the opinion, saying that the statute, as construed by the Supreme Court of Iowa, permitted suit to be brought against one in possession of the property. He says:

"If that be its meaning, an action like the present can be maintained in the courts of that state where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity as exercised in the state courts, but the law of that state cannot control the proceedings in the federal court so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law, to a trial by jury. The state, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States."

The learned justice proceeds to discuss the opinion written by himself in Holland v. Challen, supra, after which he says:

"All that was there said was applied simply to the case presented where neither party was in possession of the property. No word was expressed intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate and complete remedy at law; and such inference was especially guarded against"—repeating the language heretofore quoted in Challen's Case.

In this case the decree dismissing the bill was affirmed. Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69. In Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167, the bill was filed under the Iowa statute, a demurrer was overruled, and the cause heard upon the pleadings and proofs. Mr. Justice Brown in an exhaustive opinion discusses the questions presented here. Referring to the cases wherein the jurisdiction of the court of equity was sustained under state statutes, he says:

"These statutes have generally been held to be within the constitutional power of the Legislature; but the question still remains to what extent will they be enforced in the federal courts, and how far are they subservient to the constitutional provision entitling parties to a trial by jury and to the express provision of the Revised Statutes, § 723, inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law. These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action, the laws of the several states to the contrary notwithstanding."

The learned justice proceeds to review the cases cited herein. In regard to Whitehead v. Shattuck, supra, he said:

"It was there held that, when the proceeding is simply for the recovery and possession of specific, real, or personal property, or for the recovery of a money judgment, the action is one at law. * * * The real question, then, to be determined in this case, is whether the plaintiffs have an adequate remedy at law. If they have, then section 723 is controlling, and, notwithstand-

ing a local practice under the Code, where no discrimination is made between actions at law and in equity, may authorize such suits, the federal courts will not entertain the bill, but will remit the parties to their remedy at law."

The question under examination has been discussed in a number of cases in the federal courts. In Gordon v. Jackson (C. C.) 72 Fed. 86, the bill was filed to remove a cloud from title. Williams, District Judge, says:

"These suits are, in effect, an effort on the part of an alleged owner out of possession to recover from a party in possession lands alleged to be improperly withheld."

He holds that upon well-settled principles of equity jurisprudence this cannot be done. But, he says, it may be insisted that this suit was maintainable under the provisions of the statute of Arkansas, which provided that a suit might be brought by one out of possession against one in possession to determine the estate or title of the occupant and quiet the title of the plaintiff.

"* * * There were decisions of the federal courts made with regard to similar statutes that might well have been construed by the eminent and learned counsel who brought these suits as giving force to the state statute in chancery practice in the federal courts. Later decisions, however, are directly to the effect that this cannot be the case, and show that the former decisions, properly construed, never intended to permit such practice. * * * When lands were wild and unoccupied, it had been held that the federal courts in chancery could entertain suits to quiet title in the rightful owner. But in such cases a court of law can afford the owner no remedy, and therefore there is no right to a trial by jury, since such right existed only in cases at law. It is therefore no violation of the Constitution or statute to bring such suits in equity. But, when lands are unlawfully occupied, the owner can sue the occupant at law, and the consequent right to trial by jury exists."

The learned judge proceeds to review the cases cited herein, and concludes:

"The questions presented by the pleadings and evidence in this case have regard largely to the dates when defendants entered upon and occupied the lands in dispute, the extent and character of their possession and their claim of title as arising therefrom. These are questions that are appropriately triable at law, and the defendants have a right under the Constitution and statutes of the United States to demand that they shall be thus tried. They presented their demand in apt time."

In Davidson v. Calkins (C. C.) 92 Fed. 230, it is held that under the California statute, allowing a bill to quiet title, where the defendant was in possession, did not confer jurisdiction in equity upon the federal court. The opinion reviews the decisions at much length. In Southern Pine Co. v. Hall, 105 Fed. 84, 44 C. C. A. 363, Shelby, Circuit Judge, discussing the same question under the Mississippi statute, says:

"If the record in this showed that the defendant was in the actual possession of the lands so that an action of ejectment could be brought against her for the lands, then it would appear that there was an adequate remedy at law, and jurisdiction in equity would not exist in the United States courts, although the statute conferred such jurisdiction on the Mississippi state courts. The result of the decision of the Supreme Court is that a state statute which enlarges equitable rights will be enforced and administered in the United States courts in all cases where its enforcement and administration do not conflict with the right of a party to a jury trial."

In Buchanan v. Adkins (4th Circuit) 175 Fed. 692, 99 C. C. A. 246, Judge Goff, discussing, upon demurrer, a bill filed in the Circuit Court of the United States, says:

"As we understand the bill in its entirety, * * * it clearly appears that the defendants are actually residing upon the various portions of the lands they respectively claim, holding the same by patents from the state, by deeds, by court claims, by color of title adverse to the title of the complainants; that in some instances their titles have become adversary by occupations superior to the title of the complainant," etc.

After a full and able discussion of the allegations of the bill, he concludes that the real object of the suit is to obtain by the decrees of a chancellor that which, under our jurisprudence, can only be had by a judgment rendered upon the verdict of a jury. The bill was dismissed. It was held in this case (178 Fed. 772, 102 C. C. A. 220) the bill was not demurrable, but upon the coming in of the answers and the discovery under oath, and the report of the special master, it is apparent that the defendants, claiming under various sources of title, unconnected with each other, are in possession of such portions of the land as are within the alleged boundaries. The decisions of the questions raised by the pleadings will depend upon parol evidence respecting the ouster, and the character, extent, and continuity of the alleged adverse possession. These questions are peculiarly within the province of a jury. There are with the exceptions noted by the master no grants, deeds, or other muniments of title relied upon by defendants, the cancellation of which would affect complainant's title. Defendants concede that complainants have the senior grant, and that the junior grants, under which they claim, do not convey title. Their claim is based upon a ouster under the junior grants, which are but colorable title, sufficient, however, to mark the extent of their alleged ouster and the boundaries of their adverse possession. In Brown v. Cranberry Iron & Coal Co. (C. C.) 40 Fed. 849, a bill was filed in the Circuit Court of the United States for the Western District of North Carolina for partition of the lands described therein. Defendant answered, denying complainant's title, alleging sole seisin in itself. Judge Dick retained the cause with liberty to complainant to institute an action of ejectment at law within 12 months, etc. Simonton, Circuit Judge, in 72 Fed. 96, 18 C. C. A. 444, says:

"The course pursued by the learned judge who heard this case is in strict accord with the law and practice of courts of chancery. * * * Where on a bill for partition when partition is a subject of equity jurisdiction the legal title is disputed and doubtful, the course is to send the plaintiff to a court of law to have his title first established. Equity has no jurisdiction to try the title to lands. An action at law is ordered, and not an issue out of chancery." Fisher v. Carroll, 46 N. C. 27.

The same course was adopted by Judge Pritchard in Gilbert v. Hopkins (C. C.) 171 Fed. 704, sustained by a well-considered opinion. In those cases, as here, the answers set up legal defenses triable by a jury. Carlson v. Sullivan, 146 Fed. 476, 77 C. C. A. 32. In Woods v. Woods (C. C.) 184 Fed. 159, a bill in equity for partition was filed in the Circuit Court of the United States for the Northern District of West Virginia. It appeared that certain parties had taken possession of a

portion of the lands under unlawful leases, etc. Complainants sought to have them canceled as clouds upon the title followed by a decree for partition. To the contention that the court was without jurisdiction to remove the cloud from the title Judge Goff said:

"I think it is well established that, if a court of equity has properly before it for decision a suit based on facts showing independent equity grounds relating to real estate, it will consider and decide questions concerning the title or the boundary thereof, if necessary to the proper disposition of the controversy. * * * If the complainants show an independent right to equitable relief, such as will authorize equitable jurisdiction, the prayer to quiet title will be entertained, even though they are not in possession."

The learned judge quotes the West Virginia statute, giving to the court, in proceedings for partition, power "to take cognizance of all questions of law affecting the legal title that may arise." Referring to the opinion in Buchanan v. Adkins, 175 Fed. 692, 99 C. C. A. 246, written by himself, he says:

"With the rule laid down in that case I am in full accord, and it is, I think, quite apparent that were it not for the reasons I have already referred to, relating to independent grounds of equity jurisdiction, this cause would not now be entertained."

The order was made directing that "proper issues be submitted to the jury on the law side of the docket." A careful examination of the pleadings will disclose that the case is distinguished from the Buchanan Case and the Cranberry Iron & Coal Company Case, in which the only question raised was sole seisin. The jurisdiction to inquire into the title in the Woods Case is, as said by Judge Goff, based upon the well-settled rule in equity practice that, when the court has jurisdiction to administer the primary relief sought, it will retain the cause and dispose of collateral questions which might otherwise be cognizable in a court of law. Here, while there is some suggestion in the bill, of confusion of boundary, multiplicity of suits, etc., as grounds of jurisdiction as pointed out in the opinion on the appeal (178 Fed. 772, 102 C. C. A. 220), the bill fails to set forth any grounds of equity jurisdiction other than the North Carolina statute.

[2] To the suggestion that issues of fact raised upon the pleadings be submitted to a jury, it is well settled that sending issues out of chancery does not meet or secure the right to trial by jury as guaranteed by the seventh amendment to the Constitution. This right is absolute, and may not be restricted or limited by either Congress or the courts. In ascertaining the purpose of the states in adopting and incorporating the amendment into the Constitution, we must recur to the course and practice of the courts in England and this country at that time. In Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, Chief Justice Fuller, referring to the Constitution and section 723 of the Revised Statutes, says:

"It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England and always in this country. And so it has been often adjudged that, whenever respecting any right violated a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury,

but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity."

The distinction between a trial before a jury in a court of law with its incidents and conclusive effect upon the court and an issue out of chancery for the aid and enlightenment of the chancellor, is fundamental. As said by Chief Justice Fuller in Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804:

"As the ascertainment of complainant's demand is by action at law, the fact that the Chancery Court has the power to summon a jury cannot be regarded as the equivalent of the right of trial by jury secured by the seventh amendment."

If it were a question of discretion whether the court in this case should retain the cause and submit issues to the jury, it is manifest that it should not do so.

[3] There are more than 30 defendants claiming title to separate and distinct parcels or tracts of land under separate sources of title, in the trial of each of which it is apparent the evidence will be entirely different. The trial of all of these issues before one jury would involve confusion and expenses resulting almost certainly in injustice. The plain, well-defined rules of practice and procedure at law are not only adequate to work out complete justice, but a departure from them would violate the constitutional right of the parties, and tend to oppression and injustice. Complainant is entitled to a decree, as upon a disclaimer, as to such portions of its boundary as are not included in the claims of defendants who have answered. By Act 1893, c. 490 (Rev. 1905, § 1699), all grants issued subsequent to March 6, 1893, for lands theretofore granted by the state, are declared absolutely void, and "shall in no case and under no circumstances constitute any color of title whatsoever to any person or persons whomsoever."

The master having found that defendant, Henry Smith, claims under a grant issued in 1900 and defendant N. B. Roberts claims under certain deeds dated 1894, 1896, and 1899, not stating the date of grants and defendant G. S. Ellis claiming under grant dated December, 1893 and 1900, the bill will be retained as to such defendants, and as to the lands specified in the report.

In respect to the other defendants, claiming under grants junior to complainant's, prior to March 6, 1893, followed by ouster and adverse possession, the bill will be dismissed without prejudice to complainant's right to institute actions at law to try the title. The defendants as to whom the bill is dismissed will recover their cost. Let a decree be drawn accordingly.

In re WILLIAMSBURG KNITTING MILL.

(District Court, E. D. Virginia. June 30, 1911.)

1. MORTGAGES (§ 154*)—CONDITIONAL SALES—NOTICE.
Actual or constructive notice to a mortgagee of the rights of a conditional seller of property placed on the mortgaged premises is as effective to charge the mortgagee with notice of the reservation of title as a record of the instrument containing the same.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 344–353; Dec. Dig. § 154.*]

2. MORTGAGES (§ 13*)—AFTER-ACQUIRED PROPERTY—VALIDITY.
A clause in the mortgage on the property of a knitting mill company that the mortgage should cover after-acquired property is valid.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 15; Dec. Dig. § 13.*]

3. FIXTURES (§ 27*)—SPRINKLER SYSTEM—PROVISIONS ON CONTRACT.
Where a sprinkler system installed in a knitting mill consisted of a 50,000-gallon tank tower erected on a concrete foundation, and pipes running underground into the plant, bolted to the beams of the buildings, it was a fixture, notwithstanding a provision in the conditional contract for the installation and sale thereof that it should retain its character as personal property, and that the title should remain in the seller until paid for.
[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5–54; Dec. Dig. § 27.*
For other definitions, see Words and Phrases, vol. 3, pp. 2831–2846, vol. 8, p. 7664.]

4. MORTGAGES (§ 151*)—LIEN — PRIORITY — AFTER-ACQUIRED PROPERTY — FIXTURES.
Where a mortgage on a knitting mill plant included engines, boilers, fixtures, machinery, and all other equipment in or on the premises, or which were thereafter acquired and placed thereon, the mortgage was a lien on an after-acquired sprinkler system, installed in the plant, which was a fixture, prior to the rights of a conditional seller of the system under an unrecorded contract of conditional sale, of which the mortgagee had neither actual nor constructive notice.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307–336; Dec. Dig. § 151.*]

5. BANKRUPTCY (§ 140*)—RIGHTS OF TRUSTEE—UNRECORDED CONDITIONAL SALE.
Where, under the state law, a conditional sale contract was invalid as against lien creditors unless recorded, an unrecorded conditional sale contract was invalid as against the purchasers of the trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 47, subd. a, cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840, providing that trustees in bankruptcy as to all property coming into the custody of the bankruptcy courts shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198–225; Dec. Dig. § 140.*]

In Bankruptcy. In the matter of the Williamsburg Knitting Mill. Proceedings to review referee's order holding invalid a vendor's lien

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under an unrecorded conditional sale contract as a lien against the bankrupt's estate. Affirmed.

This proceeding is now before the court upon the application of George H. Holt & Co. to review the action of Referee John B. Locke, holding the claim of the petitioners, as vendors of a certain sprinkler system furnished to the bankrupt company, not to constitute a lien as against the said sprinkler in the hands of the bankrupt's trustee, because of lack of recordation of the contract of sale prior to the bankruptcy, and also because the sprinkler system is subject to lien by a deed of trust upon the property of the bankrupt, in which the same was installed, to Henley, trustee, to secure a debt to the Peninsula Bank of Williamsburg, under the after-acquired property clause contained in said mortgage.

The facts are briefly that under contract dated August 25, 1909, but not signed by the bankrupt until the 14th of October, 1909, George H. Holt & Co. undertook to install in the bankrupt's mill at Williamsburg a complete automatic sprinkler system, supply pipes, pressure alarm and other valves, a 50,000-gallon tank, and a steel tower for the tank. Holt & Co. were to furnish the labor and materials incident to the work, except as otherwise provided in the specifications, and the bankrupt company was required to "do all necessary trenching, carpenter work, and mason work, and cartage and handling of material in Williamsburg, Va., also to furnish foundations for the 50,000-gallon tank." The sprinkler system was duly installed, the bankrupt erected the concrete foundation on which the 50,000-gallon tank tower was erected, and to which it was securely bolted, pipes were laid underground running into the plant (a large brick building) bolted to the beams in the building, and the sprinkler was ready for service in March, 1910. In the contract the following clause reserving title until the full purchase price was paid appears: "It is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party of the second part as hereinbefore provided, and that said system and equipment shall, during the period of the agreement herein provided, be, and be considered as personal property and not a part of the realty." Although this contract was duly executed, no memorandum thereof was ever recorded in the clerk's office of the circuit court of the county of James City and city of Williamsburg, as required by section 2462 of the Code of Virginia, which is as follows: "Every sale or contract for the sale of goods and chattels wherein the title thereto or a lien thereon is reserved until the same be paid for in whole or in part, or the transfer of title is made to depend on any condition, and possession be delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee until such sale or contract be in writing, signed by both the vendor and vendee, in which the said reservation or condition is expressed, and until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due theron, when and how payable, and a brief description of said goods or chattels, be docketed in the clerk's office of the circuit or corporation court of the county or corporation in which said goods or chattels may be."

The facts as to the mortgage to Henley, trustee, in favor of the Peninsula Bank are substantially that the same was executed on the 23d day of November, 1909, to secure a loan of $12,000, and duly recorded in the clerk's office of the circuit court of the county of James City and city of Williamsburg. This conveyance was made subsequent to the execution of the contract with Holt & Co., but prior to the completion of the sprinkler system equipment, which was not until March, 1910. The reservation of title in Holt & Co. was not recorded, as aforesaid, and the deed to Henley, trustee, after conveying the lands, buildings, and improvements thereon of said Knitting Mills, contained an after-acquired clause, as follows: "Together with the engines, boilers, fixtures, machinery, and all other appliances and equipments constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company plant, in and upon the premises hereby

conveyed, or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said trustee the entire plant of the Williamsburg Knitting Mill Company for the purposes hereinafter set forth."

O. D. Batchelor and Henley & Henley, for trustees in bankruptcy.

R. T. Armistead and S. O. Bland, for petitioners George H. Holt & Co.

WADDILL, District Judge (after stating the facts as above). Two questions are presented on the record for consideration by the court: (A) Whether the after-acquired clause in the mortgage of the 23d of November, 1909, to Henley, trustee, constituted a lien upon the sprinkler system, made a part of the premises, after the execution and recordation of the trust deed. (B) Whether the referee correctly ruled that under the bankruptcy act as amended on the 25th of June, 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), it was necessary for the vendors, Holt & Co., to record their contract, in order to secure a lien as against the bankrupt's estate, in the hands of its trustee. These two positions will be taken up in the order mentioned.

First. Considering the validity of the lien in favor of the Peninsula Bank by reason of the after-acquired clause in the mortgage, a preliminary point was raised, namely, that the bank took the deed with actual notice of the existence of the contract in favor of Holt & Co., and hence should not be entitled to a lien. The determination of this question depended largely upon the facts of the case. The referee saw and heard the witnesses testify, and reported in favor of the bank; that is to say, that it was not so circumstanced as to be charged with notice of the right of the vendors to the lien asserted by them.

[1] Actual or constructive notice to the bank, or its trustee in the deed of trust, of the rights of Holt & Co., would have been as effective from a legal standpoint as if the contract containing the reservation of title had been duly admitted to record. But the referee found that neither the bank nor the trustee had actual or constructive notice, and with this finding the court concurs.

[2] Under the after-acquired clause in the mortgage, as in this case, any property acquired by the mortgagor subsequent to the date of the execution and delivery of the mortgage, which was within the general description of property contained therein, became as fully subject to the lien of the mortgage, in equity, as if such property had been owned by the mortgagor on the date of the execution and delivery of the mortgage. The authorities to sustain this position are clear, and within comparatively recent date the entire subject has been reviewed by the Circuit Court of Appeals of this circuit in two cases, namely, Union Trust Co. v. Southern Sawmills Co., 166 Fed. 193, 197, 199, 200, 92 C. C. A. 101, and Tippett & Wood v. Barham, 180 Fed. 76, 80, 103 C. C. A. 430, to which cases, with the authorities cited in each, special reference is made as containing a full review of the authorities governing and controlling this subject.

[3, 4] In order for the after-acquired property clause in the mortgage in question to constitute a valid lien, of course, the property in

controversy must come fairly within the terms of such after-acquired property clause; and such after-acquired lien must be subordinate to any pre-existing valid lien upon the property at the time it was placed upon the premises. This case, however, is comparatively free from difficulties in this respect, as it is clear that the sprinkler system in question, when installed, became a fixture and such part of the bankrupt's estate as to form and become a portion thereof, notwithstanding the provision in the contract of sale that it should remain the property of the vendors, and retain its character of personalty; and was hence subject to the after-acquired property clause in a deed theretofore executed, fairly embracing the same, and whatever may have been the rights of the vendors in the property thus put upon, and which forms part of the real estate, or the correct method of legally securing and prosecuting such rights, had the same been timely and appropriately taken under the law of the state of Virginia, it is immaterial to determine here, for the reason that the vendors in this instance recorded no lien, and took no steps whatever to save their rights, if any they had, against those of the existing mortgagee, and hence, as between the two claimants of liens, the mortgage takes precedence.

[5] Second. In passing upon the correctness of the referee's ruling that it was essential under the amended bankruptcy act of the 25th of June, 1910, for the petitioners Holt & Co., the vendors of the sprinkler system in question, to record their contract, in order to make effective their lien as against the bankrupt's estate in the hands of its trustee, it becomes necessary to determine the effect of the amendment and just what title and estate the bankrupt's trustee in the light of the bankrupt law as amended takes; or, to state the question differently, to ascertain just what effect the bankruptcy proceeding has as respects those who hold liens or incumbrances upon, or have an adverse interest to that of the bankrupt in such estate. This subject cannot be said to have been free from doubt under either the present act or that of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517); that is, the authorities have not always been harmonious, though it may be fairly stated that under both acts, the consensus of opinion, and certainly the better doctrine is, that, except in cases of attachment sued out or other lien or incumbrance had and secured within the prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the procurement of such lien or disposition of property by the bankrupt is declared to be fraudulent and void, the bankrupt's trustee takes the property in the same condition that the bankrupt himself held it, and subject to all equities impressed upon the property in the hands of the bankrupt, and subject, also, to all such valid liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577.

The cases cited (and others might be given) firmly maintain the doctrine that a trustee in bankruptcy gets no better title than that which the bankrupt had at the initiation of the bankruptcy proceedings; that he is not a purchaser for value within the meaning of the recordation acts; and that, as the vendor's title under the conditional sales agreement as between himself and the bankrupt is good, it is also good against the bankrupt's estate, and the same may be said of liens generally upon the bankrupt's estate, or claims to such estate, good as between such claimants or the holders of such liens and the bankrupt. In such cases the liens upon or claims to property belonging to the bankrupt are unaffected by the bankruptcy.

The contrary doctrine is that it is the policy of the bankruptcy act to clothe the trustee with title as against secret claims, liens, and equities, and compels every one to comply with the state statutes respecting recordation; and in consequence of failure to do so to lose their claim upon, or right to, lien or equity. Under the bankruptcy law of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), the case of Bank v. Sherman, 101 U. S. 403, 405, 25 L. Ed. 866, gives strong color to this view of the law. In that case the court said:

"The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. If that were in his favor, they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes civiliter mortuus. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court, nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them."

Under the present bankruptcy act, the case of Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405, likewise apparently maintains the same view; the Chief Justice, at page 14, saying:

"It is true of the present law, as it was of that of 1867, that the filing of a petition is a caveat to all the world, and, in effect, an attachment and injunction (Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866) and on adjudication title to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court."

At first blush, the last two cases would appear to be in direct conflict with those next hereinbefore recited; but a careful analysis of the same will tend to relieve this apparent difference. The first-named cases grew out of transactions incident to the assertion of adverse claims by those claiming title to the property against the bankrupt or his trustee, or liens upon the same in the hands of the bankrupt's trustee; whereas the two last-named cases apply to controversies arising out of the attempted disposition by the bankrupt of portions of his estate after the institution of the bankruptcy proceedings. The Court of Appeals of this circuit applied the doctrine of the two last-named cases to the enforcement of the vendor's lien. Chesapeake

Shoe Co. v. Seldner, Trustee, 122 Fed. 593, 58 C. C. A. 261, as did, also, the Court of Appeals of the Sixth Circuit in Dolle v. Cassell, 135 Fed. 52, 67 C. C. A. 526, this last case being reported in the Supreme Court under the title of York Manufacturing Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782, and in it the Supreme Court reversed the holding of the lower court on the very question involved herein, and adhered to the rulings in the first-named cases. This decision is believed to be the last expression of opinion by the Supreme Court, and would be conclusive in this state, as the Ohio statute and the Virginia statute are substantially alike regarding the matters under consideration; that is, as to when it is necessary to make recordation of the vendor's lien to be effective as against the bankrupt or his trustee. The Ohio statute (section 7880, Rev. St. 1890) provides that:

"* * * Such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such conditions shall be evidenced by writing, signed by the purchaser, lessor, renter, hirer or receiver of the same, * * * until the same is deposited with the clerk of the township where the person signing the instrument resides," etc.

The Virginia statute (Code 1904, § 2462) enacts that:

"Every sale or contract for the sale of goods and chattels, wherein the title thereto, or a lien thereon, is reserved until the same is paid for in whole or in part, or the transfer of title is made to depend on any condition and possession be delivered to the vendee, shall in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee until such sale or contract be in writing, signed by both the vendor and vendee in which said reservation or condition is expressed, and until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due thereon, when and how payable, and a brief description of said goods or chattels, be docketed in the clerk's office," etc.

In neither of these acts, it will be observed, is it necessary to record the lien as between the vendor and vendee, but only against subsequent purchasers and mortgagees in good faith, and creditors under the Ohio act, and under the Virginia act "as to creditors of and purchasers for value without notice from such vendee." The York Case made it clear that only as to those specifically named in the act—that is, subsequent purchasers and mortgagees in good faith and creditors—was recordation necessary; the court saying:

"We come, then, to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate. We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act, the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply

in the shoes of the bankrupt and as between them he has no greater right than the bankrupt."

And the court cites from Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, supra, as follows:

"Under the present bankrupt act, the trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt."

In this connection it may be further remarked that the creditors referred to in the Virginia statute mean judgment or lien creditors, and not general creditors, or persons holding unsecured claims. McCandlish v. Keen, 13 Grat. (Va.) 615, 638; Dulaney v. Willis, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815; York Manufacturing Co. v. Cassell, 201 U. S. 344, 351, 26 Sup. Ct. 481, 50 L. Ed. 782; Jones on Chattel Mortgages (4th Ed.) § 245. The amended act of June 25, 1910, was passed as a result of the decision in the York Manufacturing Co. Case, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, supra, and with a view of meeting the same, as will be presently shown. The section as amended is as follows:

"Sec. 8. That section forty seven, clause two, of subdivision a, of said act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*" (Amendment italicised.)

The language used in this amendment is clear and comprehensive, and as viewed by the court unequivocally gives to the bankruptcy proceeding the effect of a lien, as is contemplated by the York Case, supra, and the same will suffice to give to those claiming rights by reason of the bankruptcy court proceedings, precedence over an unrecorded vendor's lien under the Virginia statute. The amendment does, in fact, give to the bankruptcy proceedings the force of a "caveat to all the world," and in effect "an attachment and injunction," and the same applies to cases as well of the attempted disposition of property after bankruptcy, as to those asserting title to or lien upon the bankrupt's estate arising out of transactions antedating the bankruptcy. The effect of this change is unquestionably radical and far reaching, as regards the consequence of the institution of bankruptcy proceedings, but it is what Congress had the right to do, and carries out what in the judgment of many should be the effect of such proceeding. It makes the date of the institution of the bankruptcy proceeding, the time as of which rights to, and claims against the estate, should be reckoned with and adjusted, and from and after which period no one creditor or claimant can secure or receive preference

or advantage over another. The opinion of Mr. Justice Swayne in Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866, supra, is particularly appropriate in this respect, the learned justice saying:

"The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualifications. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it. In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible from the moment its aid was invoked, whether by debtor or creditor."

This view of the effect of this amendment is taken by Remington, an author of recognized authority on bankruptcy laws. In the recent edition of his work (volume 3, p. 331), the author says:

"By the amendment of 1910 to the bankruptcy act, section 47a (2), 'this rejected doctrine' that bankruptcy operates as an 'equitable levy' as to property in the custody of the bankruptcy court, has become the accepted doctrine."

Moreover, this author shows that Congress by the amendment in question purposely sought to modify the decision of York Manufacturing Co. v. Cassell, supra. At page 331 of the same volume (3) the report of the Senate judiciary committee on the amendment of the act is set out in full, stating in terms that its object and purpose was to meet the decision in the York Case, and to adopt in lieu thereof the views herein taken. Collier on Bankruptcy (8th Ed.) pp. 541, 542, refers to this amendment approvingly, and in effect takes the same view of the act that Remington does, though he calls attention to the fact that more logically the amendment should have been to section 70 of the bankrupt act, instead of section 47.

The only decision since the amended act to which the court's attention has been called is that of In re Lausman (D. C.) 183 Fed. 647, a decision of Judge Evans, of the Western District of Kentucky. This opinion is entitled to much weight by reason of the recognized ability and experience of the judge rendering the same. The case involved, however, a small amount, and it is fair to assume was not presented as fully as has been the case here, and was decided before the publication of the recent editions of Remington and Collier, the former of which called special attention to the reason for the Senate's action, as above indicated.

It is earnestly insisted that the amended act, if given the interpretation herein accorded it, is unconstitutional as depriving the petitioners of their property without due process of law. With this view the court cannot agree, as it is in no respect a violation of one's constitutional rights to require him to conform to the recordation acts of the state in which he has property. The vendor's rights in this case would, under the plain terms of the Virginia statute, have been protected against the bankrupt's execution or other lien creditors, and remained unaffected by bankruptcy proceedings, had they seasonably complied with the statute requiring recordation of their reservation of title. The further suggestion is made that the amended act should not be given the effect contended for because of the particular section

amended; in other words, it is maintained that the amendment should have been to section 70, subsec. 5, instead of to clause 2 of section 47, subd. "a" of the act. Unquestionably the amendment should more properly have been to the seventieth section of that act, as claimed, which deals with the property as to which the trustee acquires title, instead of section 47, which relates more particularly to the duties of the trustee, but at the same time it does not follow that it should have been necessarily so made, and that Congress could not have expressed its desires and wishes as well under the section prescribing the duties of the trustee as that relating to title to property, and this is just what it apparently did, and in terms so clear, comprehensive, and specific that there can be no serious doubt as to its meaning, intention, and purpose, and the court feels bound by the plain import of the language used.

The action of the referee sought to be reviewed will be approved and affirmed.

MICHIGAN ALUMINUM FOUNDRY CO. v. ALUMINUM CASTINGS CO. et al.

(Circuit Court, E. D. Michigan, S. D. July 24, 1911.)

1. CORPORATIONS (§ 662*)—ACTION AGAINST FOREIGN CORPORATION—JURISDICTION.

Under the federal decisions, before a foreign corporation is subject to suit in a state in general, two things must concur: (1) The corporation must be doing business in the state; and (2) process must be served there on the agent who represents it in business there.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 662.*]

2. COURTS (§ 274*)—JURISDICTION—CORPORATIONS "FOUND" IN DISTRICT.

For the purpose of conferring jurisdiction on a Circuit Court of a suit for damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), which authorizes a suit "in the district in which the defendant resides or is found," a foreign corporation is "found" in the state if it is doing business therein, but not otherwise.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*

For other definitions, see Words and Phrases, vol. 3, p. 2927; vol. 8, p. 7666.]

3. COURTS (§ 274*)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

A Pennsylvania corporation maintained a permanent office in Detroit, with its name and the name of a person as manager on the door. It paid the rent of the office, and the salary of the manager from the home office, and the business it did in Michigan was substantial, amounting to a large sum per annum. It advertised its presence in the general city directory of Detroit, and in the telephone directory, and its general sales agent came frequently to Detroit to consult with the local manager and to meet customers. In the main the manager solicited orders for goods which were forwarded to the home office for acceptance, but he frequently closed contracts with customers for small orders which were filled by the company without objection. *Held*, that the corporation was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

doing business in Michigan in such sense as to be subject to suit in a federal court in that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.*

Foreign corporations doing business in state, see notes to Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Balke-Collender Co., 72 C. C. A. 622.]

4. COURTS (§ 344*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

However broad the rule in a state may be, it is the rule of the federal courts that service of process on a foreign corporation, to be valid, must be made on an agent who can be said fairly to represent such corporation in the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*

Service of process on foreign corporations, see notes to Eldred v. American Palace-Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

5. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—AGENT.

The local manager of a corporation in charge of its office and business in the state and advertised as such manager on the door of its office and its stationery is an agent who fairly represents the corporation in the state, and on whom valid service may be made in a suit against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. § 668.*]

6. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—AGENT.

The general sales agent of a Pennsylvania corporation which maintained an office and agency in Detroit for the sale of its products, who frequently visited Detroit on the corporation's business, and who exercised authority over the local manager, was an agent of the company when in Michigan, upon whom valid service might be made in a suit against the corporation in that state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. § 668.*]

7. COURTS (§ 274*)—ANTI-TRUST ACT—ACTION FOR DAMAGES—DISTRICT OF SUIT.

A suit for damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), which authorizes such suit to be brought "in the district in which the defendant resides or is found," may be maintained in the district of plaintiff's residence, against a foreign corporation, a citizen of another state, where defendant is "found" therein.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 274.*]

At Law. Action by the Michigan Aluminum Foundry Company against the Aluminum Castings Company and others. On motion by defendant Aluminum Company of America to set aside service. Motion overruled.

On motion by defendant Aluminum Company of America, upon special appearance, to set aside service of process in a suit at law under section 7, Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to protect trade and commerce against unlawful restraint and monopolies.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lucking, Emmons & Helfman, for plaintiff.
Gray & Gray, for defendant Aluminum Company of America.
M. B. & H. H. Johnson and Leo. M. Butzel, for defendant Aluminum Castings Co.

ANGELL, District Judge. The plaintiff is a Michigan corporation. The defendant Aluminum Company of America is a Pennsylvania corporation, with its home office in that state. Service of the original summons was made in Detroit upon one E. H. Brown, a sales agent of the defendant who resides in Grosse Pointe township, Mich., and does business in Detroit. Service of an alias summons was made at Detroit upon one E. K. Davis, general sales agent of the defendant, who resides in Pennsylvania.

The defendant insists that the service is not sufficient. Several affidavits have been filed in support of the motion, and one in opposition thereto. The testimony of E. K. Davis and other persons was taken by deposition on the part of the plaintiff. When the motion came on to be argued on these affidavits and depositions, the defendant asked that the questions of fact involved be submitted to a jury. The plaintiff's counsel objected to the delay in the determination of the motion which would ensue if the request should be granted. The request was denied, and a prolonged argument was had before the court.

The controlling facts in the case are substantially uncontradicted, and appear to be as follows:

The defendant has never filed articles of incorporation in Michigan nor paid the franchise fee, nor appointed an agent for the service of process, as required by the Michigan statute in the case of a foreign corporation which desires to do business in the state. Defendant has no plant or property, except as hereinafter stated, within the state of Michigan. It has no warehouse or stock of goods in the state. None of its officers or directors reside in the state, nor any of its employés except Brown. In the latter's office, maintained as hereinafter stated, were some samples of its manufactured products. Orders for goods to be delivered in Michigan were filled from its factories in other states. Shipments were ordinarily made f. o. b. cars at these factories.

For some years past the defendant has employed one Rutherford as its sales agent for Michigan and Ohio with headquarters at Cleveland, Ohio. Rutherford employed as his salesman, and paid, one E. H. Brown, who also lived in Cleveland. The latter was in Michigan a great deal in endeavoring to sell and in selling goods. In November, 1909, it was deemed best to have this Brown establish himself in Michigan, and in that month he took up his residence in Grosse Pointe, and opened an office in Detroit. After a little this office was leased by the owner of the building to the defendant, whose name appears on the door with Brown's name as manager. On the stationery used by Brown the defendant's name appears likewise. The defendant's name has been inserted for a year or two in the Detroit city directory, and in the telephone directory of Detroit. Defendant pays the rent of the office and Brown's salary. His incidental expenses are

paid directly or indirectly by Rutherford. In the office mentioned Brown transacts the business of the defendant.

This business in itself appears to differ in no essential respect from that which he did when employed by Rutherford and traveling to Michigan from Cleveland. He is kept informed as to prices. He solicits formal orders for goods, and takes them and reports them either to Rutherford or to the defendant's principal office in Pennsylvania. These orders are subject to approval or disapproval by his superiors in the sales department of the company. In fact, they seem rarely, if ever, to have been disapproved. It appears from the affidavits and depositions of Brown's superior officers that he had never been given express authority to make a bargain which was not subject to disapproval or rejection by these superiors. In many cases, however, of what Brown calls "small business," he has made definite agreements to sell without referring the matter to headquarters. On cross-examination by defendant's counsel he was asked:

"Q. Are there any instances where you undertook to make a binding agreement on behalf of the Aluminum Company of America with the trade, without either having first obtained special authority for the particular instance from the Pittsburg office, or having it understood that the order would have to be forwarded and approved before it would be effective? A. Yes, sir.

"Q. Under what circumstances would any such orders be taken? A. Well, in the case of where we have a customer of long standing, not under contract, for instance, or in the general run of small business.

"Q. Is that authority given you by the Pittsburg office, or was that a business risk you assumed on your own responsibility? A. I might say it is the authority which has grown up from the authority which Mr. Rutherford has always given me.

"Q. Does that authority come from Mr. Rutherford or from the Pittsburg office? A. It has always come from Mr. Rutherford.

"Q. Are those exceptional cases or are they frequent—those where you would undertake to sell to an old customer direct? A. Oh, they are quite frequent—quite usual."

On redirect examination he testified that such bargains for "small business" would be made probably once a week, might be oftener, and maybe not; that by "small business" he meant "orders for say fifty pounds of sheet or a hundred pounds, or five hundred, orders—scattered orders from people who do not use much"; that it might mean as much as one hundred dollars a week. "Q. That kind of business you handle entirely yourself, do you not? A. Yes, sir."

He further testified that these "small business" orders were transmitted by him to the Pittsburg office and filled by shipments from the manufacturing plants of the corporation. He further testified that the defendant had the right to refuse to carry out such sales, though he mentions no case of refusal to abide by his agreement of this kind, and said that he did not always advise the buyer of the company's right to refuse. Occasionally Brown, at the request of the company's treasurer, pressed delinquent debtors in Michigan for payment of overdue accounts. Occasionally scrap metal from factories in Michigan was bargained for by Brown, but apparently more often the bargain was made by some nonresident agent of the company.

Davis, the other person served, was the head of the sales department

of the defendant's business. He had full authority to make agreements to sell goods which should be binding on the defendant. He had general supervision of the defendant's local selling and soliciting agents. He traveled a good deal, visiting such agents, advising them, and instructing them, and aiding them to get business. He called upon customers to ascertain their requirements, and generally to keep in touch with the trade. He came frequently to Detroit in the course of his trips, as often as five times in six months prior to the date of service upon him. On the day when was served with the alias summons, he was in Detroit on the defendant's business. He was in conference with Brown, and with one large customer of the company. He called with Brown upon the manager of the Ford Motor Company with a view to getting a large order. No order was, however, procured, and no sale was made by him or by his assistance on that day.

Upon these facts defendant contended (a) that it was not doing business in Michigan in such sense that it was subject to suit in this court when this action was brought; (b) that, if it was doing business in Michigan in the sense mentioned, neither Brown nor Davis were such an agent as that service upon him was binding.

Plaintiff contended (a) that the defendant "was found" in the district; and (b) that Brown and Davis were proper agents upon whom to serve the writs.

[1] The question raised must be determined by the principles of the federal decisions, even if such service as was had would be upheld as sufficient in the state courts. Barrow Steamship Co. v. Kane, 170 U. S. 111, 18 Sup. Ct. 326, 42 L. Ed. 964. By these decisions it is settled that before a foreign corporation is subject to suit in a state, in general, two things must occur: (1) The corporation must be doing business in the state; and (2) process must be served there on the agent who represents it in business there. Peterson v. Railroad Co., 205 U. S. 390, 27 Sup. Ct. 513, 51 L. Ed. 841.

[2] First. Does the fact that the act in question uses the phrase "resides or is found" obviate the necessity of showing that the corporation is "doing business in the state"? It would appear not. In the absence of authoritative decisions on this act of 1890, exactly in point, rulings on a similar act may be examined with profit. Under the act of 1875 (Act March 3, 1875, c. 137, § 1, 18 Stat. 470 [U. S. Comp. St. 1901, p. 587]) which used the phrase "is found," it was held that, a foreign corporation "was found," for the purpose of service, "where it was doing business." Merchants' Mfg. Co. v. Grand Trunk Ry. (C. C.) 13 Fed. 358; Mohr v. Insurance Co. (C. C.) 12 Fed. 474 (Matthews, J.); Block v. Atchison, etc., Co. (C. C.) 21 Fed. 529 (Brewer, J.); Spencer v. Kansas, etc., Co. (C. C.) 56 Fed. 741; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; New England Ins. Co. v. Woodworth, 111 U. S. 146, 4 Sup. Ct. 364, 28 L. Ed. 379. There seems no reason to give a broader meaning to the words in the act of 1890 than to those in the act of 1875. The ruling in Caledonian Coal Co. v. Baker, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540, an action in part under the act now in question, is at least not inconsistent with this conclusion, if, indeed, it does not by fair implication

require it. If, however, the corporation was "doing business" in Michigan, it must be held to have been "found" there provided the proper agents were served.

[3] Second. The next question, then, to be determined is whether the defendant was doing business in Michigan, when this action was begun, in such sense that it was subject to suit in this court. This question is not free from difficulty. The decisions affecting it are numerous and not entirely harmonious, nor is it easy to ascertain from them what is the proper test to apply for determination of the question. The defendant maintained a permanent office in Detroit with its name and the name of Brown as manager upon the door. It paid the rent of this office and Brown's salary from the home office. The business it did in Michigan was substantial, amounting to a large sum per annum. Its presence in the state by its agent was continuous, and not occasional or casual. It advertised its presence in the general city directory of Detroit and in the telephone directory. Its general sales agent came frequently to Detroit to consult with the Detroit manager, to meet customers, and generally, to look after sales in the city and state.

Expressions in several cases would indicate that what was done was clearly a doing of business in Michigan by the defendant for the purpose of giving jurisdiction. See St. Louis Wire, etc., Co. v. Consolidated Wire Co. (C. C.) 32 Fed. 802; Doe v. Springfield Boiler Co., 104 Fed. 684, 44 C. C. A. 128; Frawley v. Penn. Cas. Co. (C. C.) 124 Fed. 259. And a recent case in New York, in effect, so holds. Chadeloid Chem. Co. v. Chicago, etc., Co. (C. C.) 180 Fed. 770.

If policies of insurance are in force in favor of residents of a state, on which premiums are to be paid, and under which losses may have to be paid and investigations and adjustments made in the state, the insurance company is for purposes of suit doing business in such state. Conn. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Lumberman's Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Commercial Mutual Acc. Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782.

The last decision of the Supreme Court to which my attention has been called (International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. [N. S.] 493) it seems to me tends to the same conclusion, although the precise question under consideration was not involved. In this case, in view of the following facts, it was held that the plaintiff was doing business in Kansas. The company maintained no office in the state. It paid a resident agent who solicited and forwarded to it applications for scholarships in the plaintiff's correspondence schools. and collected and remitted deferred payments on scholarships. The plaintiff sent to the pupil text-books and instruction papers, and gave its instructions through the mail. A statute forbidding recovery to the plaintiff in a suit brought by it because it was doing business without complying with a state statute was held inapplicable because a burden on interstate commerce, not because the company was not carrying on business in Kansas.

Upon the facts here it might well be held, in view of the doctrine of the cases mentioned, that the defendant was doing business in Michigan so as to be subject to suit there, notwithstanding its business is interstate commerce.

It was, however, strongly urged upon the argument that what was done in Michigan was in the main only solicitation of interstate trade, and that by doing such business the corporation did not subject itself to suit here. It appears to be generally agreed that, if a foreign corporation sends its salesmen through a state to solicit orders for goods to be shipped into it, the corporation is not subject to suit in the state as doing business there. Wm. Grace Co. v. Henry Martin Co., 174 Fed. 131, 98 C. C. A. 289; Bruner v. Kansas Moline Co., 168 Fed. 220, 93 C. C. A. 504; Strain v. Chicago, etc., Co. (C. C.) 126 Fed. 831; Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819. The same rule is applied to a traveling solicitor of advertising to be published in another state. Boardman v. S. S. McClure Co. (C. C.) 123 Fed. 614. In this district this rule has been followed in at least two unreported cases. Globe Tobacco Co. v. Bloch Bros. Co., No. 3939 in Equity (no written opinion); Whitney v. Anheuser-Busch Co., No. 8363 (no written opinion).

But the fact that the salesmen are itinerant is not the criterion. If a railroad company maintains an office and a resident agent in a state where it has no lines, but that agent only solicits traffic for its lines outside the state, the business done does not subject it to suit in the state of the agent's residence. This has been repeatedly and at length authoritatively held. Green v. Chicago, B. & Q. R. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; Maxwell v. Railroad Co. (C. C.) 34 Fed. 286; Fairbank v. Railroad Co., 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; Wall v. Railroad Co., 95 Fed. 399, 37 C. C. A. 129; Earle v. Railroad Co. (C. C.) 127 Fed. 235; McGuire v. Railroad Co. (C. C.) 155 Fed. 230. The same rule has been applied to resident agents soliciting advertisements to be published outside the state. Union Asso. Press v. Times Star Co. (C. C.) 84 Fed. 419. And to an agent soliciting the purchase of goods. Case v. Smith, etc., Co. (C. C.) 152 Fed. 731; Hefner v. Amer. Tube, etc., Co. (D. C.) 163 Fed. 866. See, also, Dixie Mattress Co. v. Stearns, etc.. Co., 185 Fed. 431, 107 C. C. A. 501.

Against the argument based on these cases plaintiff urged that the rule is that if the agent has authority to close a bargain for goods, and not merely to solicit an order which may be approved or rejected by his nonresident principal, in such case the principal is doing business in the state where the agent resides. Irons v. Rogers (C. C.) 166 Fed. 781; Palmer v. Chicago Herald Co. (C. C.) 70 Fed. 887.

Plaintiff further urged that the evidence in the case showed that Brown had power to close bargains in Michigan and exercised it. Ought the doctrine of the solicitation cases to be held to cover this case, if it is true that the agent had power, express or implied from a course of dealing, to make binding contracts of sale? If this case is not governed by the general principles announced in the cases first above mentioned, in my opinion defendant must be held, at least for

purposes of jurisdiction, to have been doing business in the state provided its resident agent had power to do more than merely solicit interstate trade.

Upon his own testimony it is clear that he did frequently, and over a considerable period of time, close bargains with his employer's customery in Michigan for what he calls "small business." In the main these transactions were verbal, but they were referred to headquarters and the employer carried them out.

Defendant insists that Brown had no authority to make such bargains. But it cannot well deny knowledge of what he did nor adoption of his course, since it shipped goods to carry out the bargain. Chicago Pneumatic Tool Co. v. Philadelphia, etc., Co. (C. C.) 118 Fed. 852.

Upon these facts and under the test of selling in the state as distinguished from soliciting orders in the state, as well as under the doctrine of the cases first referred to, it must be held that the defendant was doing business in Michigan so as to give jurisdiction to the court of this case.

[4] Third. If the company must be held to have been doing business in Michigan, it remains to consider whether the service made was sufficient. Under the Michigan statutes, service may be had on "any officer or agent." It is not clear whether a case like this should be held to fall under section 10442, Comp. Laws 1897, as amended by Pub. Acts 1909, p. 7, or in view of Showen v. Owens Co., 158 Mich. 321, 122 N. W. 640, 133 Am. St. Rep. 376, under section 10468, affecting domestic corporations, and foreign corporations doing a local business in the state. If the Michigan statutes are to determine the sufficiency of service, it was sufficient under either statute. Howsoever broad the rule in a state may be, the rule that service of process to be valid must be on an agent who can be said fairly to represent the foreign corporation in the state may be deemed settled in the courts of the United States. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Conn. Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Peterson v. Railroad Co., 205 U. S. 390, 27 Sup. Ct. 513, 51 L. Ed. 841. The service made was sufficient even under this rule.

[5] (1) Service upon Brown, the local manager, was service on an agent who fairly represented the corporation in Michigan. He was held out by the defendant as its representative; was put in charge of its local office, resided in the county; was described by it on its stationery and on its office door as its manager. He says he was practically a general agent for the company's business in Michigan. His duties and status were such that he is fairly to be deemed a representative of the defendant in the state rather than a mere subordinate employé. That he may not have had express authority to accept service is not material. Commercial Mut. Co. v. Davis, 213 U. S. 255, 29 Sup. Ct. 445, 53 L. Ed. 782. My conclusion, if sound, results in holding that the company was bound by the service on Brown. See Board of Trade v. Hammond Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111.

[6] (2) The service on Davis must also be held binding on the corporation. Davis was here on the corporate business. He came on that business frequently, if not regularly. His presence can hardly be said to be casual. He was the head of an independent department of the corporate business, and the man in its employ highest in authority of those who came on its affairs frequently into the state. His own testimony and that of the president leaves no doubt of his large authority in all matters relative to selling the corporation's product, not only in Michigan, but elsewhere. He was an agent upon whom service could properly be made because while in Michigan he represented, with authority, the corporation in the selling department of its business. Conn. Mut. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

[7] Fourth. After the conclusion of the arguments, counsel, by request, submitted in writing their views upon the application to this cause of the doctrine announced in Macon Grocery Co. v. Atlantic, etc., R. R. Co., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300. That case was a bill in equity brought in the Circuit Court of the United States for one of the districts of Georgia by citizens of Georgia against various railroad companies doing business in Georgia, each of which was organized under the law of some other state than Georgia. The action was brought to enforce rights alleged to accrue to complainants under the laws of the United States, namely, Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and the act of 1890, under the latter of which the action at bar is brought. In view of the language of the judiciary act of 1875 as amended in 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 587]) and corrected in 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 587]) the court held that the action would not lie in Georgia against the defendants for the reason that jurisdiction was not wholly based on diverse citizenship. In the case at bar there is diverse citizenship between the complainant and the defendant. The action is brought in the district of which the complainant is an inhabitant. But jurisdiction is not based on diverse citizenship alone, if at all. It is based on the right conferred on plaintiff by Act July 2, 1890. The case in this regard is like the Macon Grocery Case, and the question whether that case governs this is fairly presented. No case is pointed out in which this question has been actually and necessarily decided. It has been several times held by federal courts in well-considered cases that section 4 of the act of 1890 confers power only on the United States, and not on private individuals, to take proceedings in equity to restrain unlawful combinations. No other section gives expressly a right to relief in equity. The Supreme Court in the Macon Grocery Case does not base its decision upon any lack of power in the complainants to file the bill.

Attention in the litigation seems to have been given to the interstate commerce act rather than to the act of 1890. The former act contains no provision like that in section 7 of the act of 1890, and a controversy under it would doubtless be governed by the act of 1888. Whether or not the decision is to be deemed by implication to uphold

the right of individuals, acting under the act of 1890, to restrain by equitable proceedings an unlawful combination and to settle the venue of such proceedings, the question remains whether the decision controls an action at law brought under section 7 of the act in question.

In the Macon Grocery Case there was no allusion to section 7, nor was the action one at law for the recovery of damages. That section confers no express right to file a bill, but does confer expressly a right to sue for damages wherever the defendant "resides or is found." The act of 1890 was passed some two years after the act under consideration in the Macon Grocery Case, and it may properly be assumed with the language of that act in mind. The seventh section of the act of 1890 does not by its phrasing suggest that Congress intended an action to be brought where the defendant was "found" only when diverse citizenship did not exist between the parties. I am not satisfied that the rule in the Macon Grocery Case applies to an action at law under section 7, even if the plaintiff and the defendant are inhabitants of different states, nor that the Macon Case holds that the action must be brought in the state of which the defendant is an inhabitant, notwithstanding it may be "found" in the state of plaintiff's residence. My view finds support in the language used by the court in the course of argument in Ware Tobacco Co. v. American Tobacco Co. (C. C.) 178 Fed. 120.

In the absence of some clear decision to the contrary, my conclusion is that this action at law should not be dismissed merely because there is diverse citizenship between the parties.

From these conclusions, it follows that the motion to set aside service of process upon the defendants must be denied.

SOUTHERN STEEL & IRON CO. v. HICKMAN, WILLIAMS & CO. et al.

(Circuit Court, N. D. Alabama, S. D. October 5, 1911.)

No. 1,291.

1. SALES (§ 81*)—CONTRACT—CONSTRUCTION—"SHIPMENT."

Plaintiff's assignor purchased from defendants 300 tons of English ferro-manganese iron by a written order providing for "shipment," 100 tons each in September, October, and November. Defendants immediately contracted with an English concern to ship the ore, their contract with plaintiff providing for "shipments," as distinguished from "deliveries," in September, October, and November, their contract with the English sellers requiring deliveries in New Orleans in October, November, and December. *Held*, that the word "shipment," as used in the contract of sale, did not mean "delivery," and, that shipment of 100 tons having been made in September, there was no breach of contract by failure to deliver such amount in that month.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*

For other definitions, see Words and Phrases, vol. 7, p. 6489.]

2. BANKRUPTCY (§ 114*)—CONTRACTS—BREACH—WAIVER.

Plaintiff's assignor prior to bankruptcy purchased from defendants 300 tons of English iron to be shipped in September, October, and No-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vember, 1907. The first 100 tons arrived October 7, 1907, and, bankruptcy having intervened before delivery, the buyer's receivers sent defendant an order for the 100 tons, which recited that such order substituted the order given by the bankrupt for 300 tons. The quantity and terms of payment were different, but in other respects the orders were identical. The receivers finally refused to receive the remaining 200 tons. *Held*, that the receiver's action in accepting the 100 tons did not relieve the bankrupt's estate from liability for breach of contract as to the balance, nor did the substitution of the orders operate to discharge the estate from such liability.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

At Law. Action by the Southern Steel & Iron Company against Hickman, Williams & Co. and others. Defendants pleaded an offset, and paid the balance of the claim. Offset allowed, and judgment against defendants, for costs.

Campbell & Johnston, for plaintiff.
Tillman, Bradley & Morrow, for defendants.

GRUBB, District Judge. This is a suit in assumpsit by the plaintiff, as transferee of a claim of the Southern Steel Company, its predecessor, against the defendants. The defendants owed the Southern Steel Company the balance of an account as its selling agents at the time of its bankruptcy, approximately $3,300. They claimed an offset to this amount by virtue of a claim for damages for breach by the Southern Steel Company of a contract of purchase of 300 tons of iron, of which only 100 tons were accepted under the contract. The conceded amount of the offset, if allowed, is $2,610, and the balance of the account has been paid by defendants since the institution of this suit. A finding for plaintiff on that issue would call for a judgment in its favor for the amount of the offset and costs, and a finding against the plaintiff would entitle it to a judgment for costs only. The case was submitted to the court without a jury upon a stipulation also setting out the agreed facts on which judgment was to be rendered. Two questions are controlling of the decision: The construction of the original order of the bankrupt for 300 tons, as to the time of its fulfillment; and the construction of a subsequent order given by the receivers, as to whether it operated to release any cause of action the defendants had for breach of the contract evidenced by the original order and its acceptance.

[1] The Southern Steel Company, through its purchasing agent, ordered over the telephone from the defendants, who were iron commission men, 300 tons of English ferro-manganese iron. On the same day the defendants wrote the Southern Steel Company a confirmation of the acceptance of the order, and forwarded to them a form of contract, embodying the terms of the order as they understood them. On the same day the Southern Steel Company also mailed defendants a form of order, embodying the conditions of the telephonic order, as understood by it. These letters crossed each other in transit. The Southern Steel Company accepted in writing the contract sent it by defendants. The defendants did not sign an acceptance of the form of order sent them by the Southern Steel Company. The contract which was signed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by both parties to the transaction provided for shipment of the 300 tons ordered, 100 tons each in September, October, and November. The form of order which was prepared by the Southern Steel Company and transmitted by it to defendants, but not signed by them, called for September, October, and November deliveries in equal proportions. The telephonic order was silent as to time of shipment or delivery. The question in controversy involves the construction of the sale contract as to the time of delivery required by it. The plaintiff contends that a proper construction of the contract required deliveries to be made under it in equal quantities in September, October, and November. The defendants contend that it required only that the iron should be shipped from point of origin in equal quantities during those three months. Shipments were made from the English point of origin in September, but no iron was offered for delivery to the Southern Steel Company at the plant, nor did any arrive in this country until October. A breach of contract is predicated on this delay, and plaintiff relies on it to defeat defendants' claim for damages arising out of the subsequent failure of the Southern Steel Company and its receivers and trustees in bankruptcy to accept and pay for 200 tons of the iron ordered by it.

If the contract, properly construed, did not require September delivery for the first 100 tons of iron, the defendants did not breach their contract. One hundred ton shipments were made in both September and October. It is clear that the binding contract of sale was the written contract, prepared and signed by defendants, and forwarded to and accepted by the Southern Steel Company. In this contract the word "shipment" is employed to express the terms as to delivery. Defendants' letter acknowledging the order of the steel company and their letter inclosing the form of contract adopted each employs that word. The form of order sent to defendants by the steel company, but which was never acted upon, employed the word "deliveries." If the two words differ in meaning, it is clear that the word employed in the contract adopted by both parties must govern. That the words "September shipment" have a different signification from the words "September delivery" is indisputable. The former requires only that the seller start the iron on its journey to the purchaser during that month. The latter exacts of the seller completion of the journey and the turning of it over to the purchaser during the same period. The defendants in this case, at least, seem to have employed the term advisedly. The stipulation shows that the sellers were not the manufacturers of the commodity sold. They had to purchase it to fill their sale contract and in a foreign country. Acting in view of this necessity and of the consequent long journey and uncertain transportation, it was only natural for them to decline to assume the risk of carriage. The contract which defendants made with Crocker & Co. to enable them to comply with their contract with the steel company shows that they understood the latter to require of them September, October, and November shipments only, and not similar deliveries. That contract provided for October, November, and December deliveries at New Orleans by Crocker & Co., and its terms in this respect could not have enabled defendants to have carried out their contract with the steel company, as construed by

plaintiff, since Crocker & Co. were not obliged to deliver any iron in this country until October, and hence defendants could not have insisted on delivery to them of any iron under it in time to have enabled them to deliver it to the steel company at its plant in Alabama in September. It is hardly credible that defendants would have made such a contract with Crocker & Co. to enable them to fulfill their contract with the steel company if they had construed the latter as plaintiff contends it should be construed. This is convincing that the defendants used the word "shipment" in its ordinary acceptation, and whatever may have been the understanding of the steel company as to its signification, if it differed from its ordinary acceptation and was not shared in by defendants, it could not control the construction of the contract.

Entertaining this view of the construction of the contract, it is not necessary to consider the right of the Southern Steel Company to declare the contract terminated because of a delay in shipment, or the question as to whether it had waived such right, if it existed.

[2] The plaintiff also contends that the claim of defendants for breach of sale contract, if they had any, was compromised by a subsequent agreement between the receivers in bankruptcy of the Southern Steel Company and the defendants. The order for the iron in controversy was given July 26, 1907. The first 100 tons were shipped from England on September 13, 1907, arriving in New Orleans October 7, 1907. On October 24, 1907, an involuntary petition in bankruptcy was filed against the Southern Steel Company, and on the next day receivers were appointed and were authorized to continue the business of the bankrupt. Correspondence was entered into between the defendants and the receivers or their agent regarding the acceptance and disposition of the iron, then in New Orleans. On November 14th the receivers, through their agent, sent defendants an order for the 100 tons in New Orleans, which recited that "this order substitutes order 4898 given by the Southern Steel Co.," which was the original order for the 300 tons purchased by that company. The quantity and terms of payment expressed in the latter order were different from those of the original order, but in other respects it duplicated that order. Upon this order the 100 tons in New Orleans were delivered to the receivers at their plant in Alabama. The receivers, after operating the plant for a short time, decided to shut it down. This took away their opportunity to use the iron ordered by the bankrupt of defendants. The receivers consequently declined to accept the remaining 200 tons, and asked the defendants to sell the 100 tons which they had already accepted for their account. The contention of the plaintiff is that the order of the receivers, which was acted upon by defendants, constitutes a release of the estate from damages for the breach of the sale contract by the bankrupt, upon the idea that the defendants accepted the agreement of the receivers to take the 100 tons already in New Orleans in full satisfaction of the original order, basing their contention on the language of the "second order," "this order substitutes order 4898 given by the Southern Steel Co." Of the remaining 200 tons 100 tons were shipped to defendants from England October 11, 1907, and 100 tons October 19, 1907, arriving at New Orleans, respectively,

November 1, 1907, and November 6, 1907, and were afterwards sold by defendants on the market at less than the contract price.

The receivers had the right to adopt the bankrupt's contract or reject it, as burdensome, leaving the other party to his claim against the estate for its breach. If the receivers had continued to operate the plant and in its operation had required the amount of iron contracted for by the bankrupt or part of it, it would probably have been to the interest of the estate to take from the defendants the whole or part of the iron, and to that extent relieve the estate from defendants' claim for its breach. When the receivers ceased operations and required no more iron, their interest in the adoption of the onerous contract was at an end. Their adoption of it in that event would have been detrimental to the estate, for the claim would in that way have been paid in full by the receivers, instead of pro rata with the other creditors. Acting upon this idea, the receivers agreed to receive the first 100 tons, which they thought they could use, at the contract price, though it then exceeded the market price. To protect the estate against loss from so much of the original order as was thus accepted, the receivers' order recited that the 100 tons, so ordered by them, were to be accounted as part of the original order, given by the bankrupt, and not as a new and additional quantity. The receivers were interested primarily in getting iron for use in their operation of the plant and incidentally in releasing the bankrupt estate pro tanto from defendants' claim. The jurisdiction of the receivers to treat with defendants arose solely from their need of this iron. As receivers, they had no authority to compromise claims against the bankrupt estate. Their action in so doing independently of their need for the iron would not have been binding upon the trustee. In trading for this iron, it was competent for them to incidentally protect the estate by making the amount received apply on the original order. This being the extent of their jurisdiction and authority in the premises, the parties will be held to have negotiated within these limitations, of which knowledge is imputed to them. It is clear that defendants dealt with the receivers as a separate entity from the bankrupt in accepting the new order, and not as one authorized to compromise the claim for it. The object of both parties was to arrange for the delivery of the 100 tons then supposed to be needed by the receivers, and which had been thrown back on defendants by the bankruptcy upon equitable terms. It was equitable if the receivers took the iron and paid defendants the price specified on the original order that the iron so received should be credited upon the original 300 tons, relieving the estate to that extent from defendants' claim. The language of the receivers' order, construed in the light of the situation of the parties and the subject-matter and the purpose of the negotiations, means that the receivers' order for 100 tons was to be substituted for that amount of the iron agreed to be purchased by the bankrupt and from the defendants. The release of the liability of the bankrupt estate for the difference in price of the balance of undelivered iron was a subject-matter with which the receivers were not then concerned, and with reference to which there was no purpose on their part to contract. The language of the con-

tract is easily susceptible of a construction that would thus limit it, viz., that it was a substitution of the 100 tons ordered by the receivers pro tanto upon the order of the bankrupt without any stipulation as to the rest of the iron, either as to its future delivery to the receivers, or as regarding the claim of defendants against the bankrupt estate if the receivers declined to receive it. The subsequent correspondence shows that this was the interpretation placed on it by the defendants, and, if not with the acquiescence of the receivers and trustees, at least not against their express protest until long after the claim had been presented to them and declined on other grounds.

Counsel for the plaintiff makes no insistence based upon the non-provability of the offset as a claim against the estate in bankruptcy.

The result arrived at requires under the terms of the stipulation a judgment against the defendant for the costs of the suit only.

In re KNIGHT, YANCEY & CO.

(Circuit Court, N. D. Alabama, N. E. D. October 14, 1911.)

No. 1,665.

BANKRUPTCY (§ 195*)—CLAIMS—PREFERENCES.

A bankrupt, having sold a quantity of cotton to German buyers, obtained payment of its drafts on forged bills of lading, and thereafter shipped cotton to cover such bills. Becoming bankrupt in the meantime, the trustee claimed the cotton in transit to Germany by ocean steamships, and the German creditors, on being advised of the fraud, caused attachments to be levied on the cotton on arrival, by which they secured a priority of claim. The German courts refusing to recognize the American bankruptcy proceedings, thereafter by a stipulation between the bankrupt's receivers and the German creditors, it was agreed that the cotton should be delivered to the German creditors on their paying $3.50 a bale in settlement of the claim of the receivers and certain Liverpool creditors, including the attachment case. *Held* that, such German creditors having secured the benefits of their settlement to the detriment of the trustee by asserting in the attachment suit that the cotton belonged to the bankrupt, they could not thereafter repudiate such position and assert ownership in themselves to claim dividends on an equal basis with unpreferred creditors while retaining their preference; and hence they were only entitled to be paid the balance after crediting on their dividends that part of the value of the cotton which was turned over to them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 195.*]

In the matter of bankruptcy of Knight, Yancey & Co. On petition to review a referee's ruling, allowing in part and disallowing in part the claims of certain German creditors against the bankrupt estate. Affirmed.

Candler, Thomson & Hirsch, for certain creditors.

Percy, Benners & Burr, for trustee in bankruptcy.

GRUBB, District Judge. This is a petition to review the ruling of the referee, allowing in part and disallowing in part claims of certain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

German creditors against the bankrupt estate. The creditors and trustee each ask a review; the creditors seeking allowance in full, and the trustee complete rejection of the claims. The referee applied as a credit on dividends paid on the claims, as a condition to allowance, that part of the value of certain cotton attached by the German creditors under proceedings had in Germany which was turned over to them under an agreement of settlement between the German creditors, the trustee and certain attaching English creditors, who acted in harmony with and at the instance of the trustee. The trustee did not insist upon his review upon the hearing.

The facts are agreed upon, and are set forth in a stipulation on file. The German creditors' claims arose out of the payment of drafts of the bankrupt with forged bills of lading attached calling for certain cotton which had never been delivered to the carrier by the bankrupt. Subsequently cotton corresponding to a part of that represented by the forged bills of lading was delivered by the bankrupt to the carrier and genuine bills of lading taken by the bankrupt for it, some of which were surrendered to the trustee, after bankruptcy, by the bankrupt and some of which were never forthcoming. At the time of the filing of the petition in bankruptcy, this cotton was in transit to Germany by ocean steamships. The receivers, upon learning of this situation, cabled the German creditors that they claimed the cotton for the bankrupt estate, and that the bills of lading held by the German creditors were forged. The German creditors thereafter instituted attachment proceedings against the bankrupt and the cotton under the German law. The receivers, being advised that the German law did not recognize the American bankruptcy or the rights of the trustee under it, induced certain English creditors, holders of similar forged bills of lading, to institute in the German courts similar attachment proceedings against the cotton in transit. Priority of right, according to the German law of attachments, is determined by priority of levy of the attachment. The German creditors were successful in securing the earlier levy of their writ of attachment upon the arrival of the cotton in the German port of destination. The English creditors had agreed that the receivers or trustee in bankruptcy should have the benefit of their levy and be chargeable with the cost thereof. The law of England recognized the validity of the American bankruptcy proceedings. In this attitude of the parties, an agreement was afterwards entered into between the German creditors, the trustee, and the English creditors, whereby the attachments were released and the cotton surrendered to the German creditors upon the payment by them to the English creditors for the benefit of the trustee in bankruptcy of $3.50 a bale for the cotton involved in the attachment proceedings, and some cotton still in transit similarly situated, except that it had not yet been levied upon, and which was also to be surrendered to the German creditors.

The referee held that the attachment of the cotton in proceedings against the bankrupt was an election by the German creditors to treat the cotton as the property of the bankrupt, and to enforce collection of the claims, now sought by them to be allowed against the bankrupt

estate, out of this cotton as the property of the bankrupt, and that; so far at least as they obtained any benefit from the attachment, it operated as a payment pro tanto of their claims against the estate, and should reduce the dividends payable on their claims to that extent, upon the idea that they should be required to surrender the preference obtained by the attachment before participating in dividends. As this court concurs with the referee on this question, other questions raised need not be considered or decided.

Clearly, if the German creditors had proceeded to reduce their claims to judgments in the German courts and had subjected the attached cotton to the payment or partial payment of the judgment, this would have been a full or partial satisfaction of the claims represented by the judgment. If such satisfaction were partial and the German creditors sought to prove the unsatisfied balance of their claims in the American bankruptcy proceedings, the condition of the allowance of such claim would be the surrender of the preference acquired by the collection of part of the debt in the German attachment proceedings, which had been instituted less than four months before the adjudication. No dividends would be allowed the German creditors until the other creditors were placed on a basis of equality with them, and this could only be done by applying the amount received by the German creditors from the attachments as credits on their dividends in bankruptcy. This principle applies, though the bankruptcy law of this country is not recognized extraterritorially by the German courts so as to prevail against the German attachment proceedings.

The question remains whether the stipulated facts show that the German creditors obtained the proceeds of the attached cotton less the amount paid the trustee, by virtue of the attachment proceedings instituted by them in the German courts, since the estoppel depends upon their having secured at the expense of the trustee a benefit therefrom. The agreement between the parties, under which the benefit was obtained, as set out in the stipulation, construed in the light of the situation of the parties with reference to the German law, controls this question.

The German creditors, relying on the nonrecognition of the American bankruptcy by the German courts, instituted an attachment suit against the bankrupt in the German courts, and caused the attachment writ to be levied on such of the cotton as had arrived in the German ports, and were successful in procuring the first levy. The English creditors instituted an attachment suit at the instance and for the benefit of the American trustee in bankruptcy; but, failing to get their writ levied upon the cotton that had arrived in the port before that of the German creditors was levied, their lien was postponed to that of the German creditors, whose claims secured by it aggregated more than the value of the attached cotton. The trustee could assert no claim superior to the attachment of the German creditors by virtue of the bankruptcy, since it was not recognized, as against the attachment, under the German law. So long as the German creditors continued to rely on their attachment, the trustee and the English creditors held no showing against the cotton already arrived, and could, at most, only

hope to secure a prior levy upon that still on the ocean. If the German creditors had elected to rely upon their claim to the cotton under the forged bill of lading, and dismissed the attachment before the agreement of settlement was made, it is clear the receipt of the cotton or its proceeds under the settlement would not prevent the German creditors from proving and receiving dividends along with the other creditors upon the balance due on their claims. At the time of the settlement, however, the attachment was still held by the German creditors operative, and both they and the trustee contracted with the knowledge that the attachment was subsisting and created a prior lien to any claim either the trustee or the English creditors could assert to the cotton. The existence of the attachment at the time of settlement was of value to the German creditors in inducing the trustee to settle and of corresponding detriment to the trustee. This would be true, even though the German creditors in negotiating with the trustee relied also upon their claim to the cotton, independent of the attachment and under the forged bills of lading. In order to defeat the estoppel against the German creditors, it must appear that in making the settlement with the trustee their claim to the cotton by virtue of the attachment was not relied on by them or asserted against the trustee. The recitals of the agreement may afford an inference that the parties in making the settlement considered the claim of the German creditors arising out of the forged bills of lading as well as under the attachment. There is no room for inference, however, that the claim of the German creditors under the attachment was ignored. Section 7 of the stipulation contains this statement:

"That the attorneys for the receivers were advised by cable of the fact that the Bremen creditors had succeeded in serving the first arrest or attachment, and were also advised by their lawyers in Bremen that there was nothing to do except to settle the case on the best terms possible; that after negotiations a proposition of settlement was made by the Bremen creditors, the substance of which was that they would pay the sum of $3.50 a bale for all the cotton in settlement of the claim of the receivers and of the Liverpool creditors; that this proposition was transmitted to the attorneys of the receivers in America, and they refused to accept it, but, in turn, offered to accept the same terms, provided there was added to such agreement as submitted a new paragraph (paragraph 8 of the agreement). Thereupon this proposition was accepted by the Bremen creditors and settlement was made upon said terms, the settlement when made and duly executed being, when translated from the German into English, in words and figures as follows."

This extract from the stipulation conclusively shows that the settlement included the attachment "case" instituted by the German creditors, and that the pendency of this attachment suit was at least partly operative to induce the trustee to enter into the agreement. There are recitals in the translated agreement rather indicating that the claim of the German creditors as owners of the cotton was under consideration. The parties were contracting with reference to the future surrender of the cotton to the German creditors, and words apt to accomplish this end would naturally occur to them, rather than those expressive of the exact relation of the German creditors to the cotton.

The agreement also covered cotton that had not yet reached its destination, and had not, as yet, been levied upon by the attachment, but

the recitals of paragraph 1 indicate that it was presumed that it would upon arrival take the same course as that already subject to the levy, and the agreement provided that it should be treated on the same basis and in the same manner as that already under levy. The agreement also provided for the distribution of the total 9,750 bales among the German creditors according to the amounts called for by the forged bills of lading, and not by the amount of their respective claims in the joint attachment suit. The distribution, however, was a matter of mutual interest and arrangement solely between the German creditors in which the trustee and English creditors had no concern, and so loses its significance. Even without the last paragraph of the agreement, its language rather indicates that the claim of the German creditors under the forged bills was considered by the parties than that their claim under the attachment writ was ignored. The last clause, providing that nothing in the agreement should confer rights on the German creditors in the bankruptcy other than they would have had, in the absence of the agreement, takes away such significance from it, as the language and terms of the agreement might otherwise create.

Construed by the language of the stipulation, the settlement under which the German creditors secured the attached cotton was at least partly a settlement of the attachment suit. Having secured the benefits of this settlement to the detriment of the trustee by asserting in the attachment suit that the cotton belonged to the bankrupt, they cannot now be allowed to repudiate that position, and assert ownership of the cotton in themselves for the purpose of claiming dividends on an equal basis with unpreferred creditors while retaining their preference. The election made by the German creditors, when they accepted the settlement, was made with full knowledge of the status of their claim to the cotton through the forged bills of lading, as the recitals of the agreement clearly show.

The petitions of review are denied, and the order of the referee confirmed. The costs of said review are equally taxed against each party thereto.

UNITED STATES ex rel. BUCCINO et al. v. WILLIAMS, Com'r of Immigration.

(Circuit Court, S. D. New York. October 10, 1911.)

1. ALIENS (§ 54*)—EXCLUSION OF IMMIGRANTS—REVIEW OF ORDER OF IMMIGRATION OFFICERS.

Where the board of immigration inspectors have an alien immigrant before them so that they may themselves inspect and examine him, there is sufficient evidence to warrant his exclusion on the ground that he is liable to become a public charge if in their discretion they reach such conclusion, and their order to that effect cannot be set aside by the courts as unsupported.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ALIENS (§ 54*)—IMMIGRANTS—EXAMINATION BY INSPECTORS.

On the examination of an alien immigrant by the board of inspectors in respect to his qualifications for admission, he is not entitled to be represented by counsel.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

3. ALIENS (§ 54*)—IMMIGRANTS—EXAMINATION BY INSPECTORS—RIGHT TO COUNSEL—TREATY WITH ITALY.

The provision in the treaty of commerce and navigation between Italy and the United States ratified April 29, 1871 (17 Stat. 856, art. 23), giving citizens of either party free access to the courts of justice of the other, with the right to employ counsel in all trials at law, has no application to the examination by the board of immigration inspectors of incoming Italian aliens with respect to their qualifications.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

Habeas corpus by the United States, on relation of Thomas Buccino and Salvatore Buccino, against William Williams, Commissioner of Immigration at the port of New York. Writ denied.

This cause comes here upon habeas corpus, sued out by relators, who are Italian aliens, seeking to enter this country, and who are held by the immigration officers for return to the country from which they came. Thomas is 48 years of age. His son Salvatore is 11. The board of special inquiry, three inspectors sitting, held that they were liable to become public charges, and they were ordered deported. Appeal was taken to the Secretary of Commerce and Labor, and decision affirmed. Subsequently, for what reason does not appear, a rehearing was ordered. This was heard by three inspectors other than those who composed the first board. They had the aliens before them, took some testimony, and reached the same conclusion as the first board. Their finding was transmitted to the Secretary with the record and approved by him.

Hobart S. Bird, for petitioners.
Daniel Day Walton, Jr., Asst. U. S. Atty., for respondent.

LACOMBE, Circuit Judge (after stating the facts as above). Upon the hearing petitioner withdrew all charges in the petition against the good faith and conduct of the immigration officers, resting application upon three propositions only, viz.:

(1) That the finding of the board that the alien was likely to become a public charge was a nullity for the alleged reason that the board had no evidence before it tending to sustain such finding.

(2) That upon the examination of the alien before the board he was denied the privilege and right to appear by counsel.

(3) That in examining into the alien's qualifications without counsel he was deprived of a right secured to him by a treaty between this country and Italy.

[1] 1. As to the first of these propositions, the board had before it the certificate of the examining surgeons that Thomas Buccino was undersized, and "had varicose veins of the left leg which affects his ability to earn a living." Moreover, the alien was present in person, and they had opportunity during the examination which they conducted to form an opinion as to his physical and mental qualifications for earning a livelihood. Ever since the decision of the Supreme Court in Nishimura Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

336, 35 L. Ed. 1146, it has, so far as I know, been held in this circuit that, if the board of inspectors had the alien before them so that they might themselves inspect and examine him, there was sufficient before them to warrant his exclusion on the ground that he was liable to become a public charge if in their discretion they reached such a conclusion. Nothing which has been presented on this argument persuades me to reverse this holding. It seems to me at least to be in strict conformity to the rule enunciated in the Ekiu Case and to the proposition enunciated in a host of other cases that the decisions of these boards are not to be set aside by the courts, because they think the weight of testimony does not support the board's conclusion. Speaking for myself, I may also say that, if I were a member of one of these boards of inspection, I should find the statements of relatives and friends that they would look after the new-comer far less persuasive than the enlightenment as to his qualifications to support himself which I might obtain from seeing and talking with him.

[2] 2. No authority is cited which sustains the proposition that upon the examination of an alien arriving in this country by the board of inspectors he is entitled to be represented by counsel. In Ex parte Loung June (D. C.) 160 Fed. 251, and in Re Tang Tun (D. C.) 161 Fed. 618, the relators were contending that they were native-born citizens. In Glavas v. Williams, 190 Fed. 686 (C. C. S. D. of N. Y. Feb. 3, 1911), the question was not passed upon. In Bosny v. Williams, 185 Fed. 598, an attempt was being made to deport aliens who had been permitted to enter and had lived here for years. There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examination and cross-examination of them. On the contrary, Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right of appeal to the Secretary of Commerce and Labor. Nor do the rules provide for the presence of counsel at such examinations. The only rule cited regulates the amount of fees which the attorney of an alien may exact. I can find in the record the denial of no right which the laws of this country accord to the alien.

[3] 3. The treaty of commerce and navigation with Italy, ratified April 29, 1871 (17 Stat. 856), contains the following clause (article 23), to which petitioner refers:

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives; they shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their trials at law, and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the Tribunals, in all cases which may concern them; and likewise at the taking of all examinations and evidences which may be exhibited in the said trials."

These boards of inspectors are not "courts of justice," nor are the examinations by them of incoming aliens touching their qualifications "trials at law." There is nothing in the treaty which secures to Italian aliens seeking to enter this country any rights superior to those possessed by aliens of other races.

The writ is dismissed and relators remanded to the immigration officers.

In re BIG CAHABA COAL CO.

(District Court, N. D. Alabama, S. D. October 11, 1911.)

No. 9,849.

BANKRUPTCY (§ 288*)—JURISDICTION OF COURT—PROPERTY IN POSSESSION OF ADVERSE CLAIMANT.

A coal company prior to its bankruptcy entered into a contract with a railroad company for the construction of a spur track from its line to the bankrupt's mine, which was built partly on the railroad right of way and partly on a right of way furnished by the bankrupt, but conveyed to the railroad company. The grading and ties were furnished by the bankrupt, and the rails were furnished and laid by the railroad company, but were paid for by the bankrupt, which was to be reimbursed by the railroad company by a rebate on each ton of coal shipped for 4½ years; the railroad company having the right in the meantime to use the track for other purposes, which it did prior to the bankruptcy. After that the trustee rejected the contract as burdensome and sold the track material in place. *Held*, that such material was in possession of the railroad company under the contract, and that the bankruptcy court was without jurisdiction to take it from such possession by a summary order, without the railroad company's consent and against its claim of ownership.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In the matter of the Big Cahaba Coal Company, bankrupt. On review, on petition of the Southern Railway Company, of order of referee. Reversed.

J. T. Stokely, for petitioner.

Ullman & Winkler, for respondents Shook & Fletcher.

GRUBB, District Judge. This was a petition filed by the Southern Railway Company to review an order of the referee restraining the railway company from interfering with the removal of certain track material by the purchaser thereof from the trustee in bankruptcy of the Big Cahaba Coal Company. The question of the jurisdiction of the bankruptcy court to determine the title to this property in a summary way is raised by the railway company.

The referee found that the bankrupt was in possession of the track material at the time of the filing of the petition, that his possession passed to the receiver in bankruptcy, and from him to the trustee. If the receiver and trustee had possession of the property in question, it was only by virtue of the prior possession of the bankrupt. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

record shows that there was no independent taking of possession of this property by either. The receiver, upon his appointment, designated the mine foreman of the bankrupt to take possession of all of the assets then in possession of the bankrupt for him, and he did so. At that time the bankrupt had not scheduled the track material in controversy. The receiver discovered the bankrupt's interest in it, and the trustee thereafter filed an application to the court to be allowed to sell it at private sale. This is the only taking possession by the bankruptcy court by its officers supported by the record. It might suffice, in the absence of outstanding claim and possession in another than the bankrupt. This question, therefore, resolves itself into the status, as to possession, of this property at the time of the filing of the petition.

The material was in a spur track, part of which was on the general right of way of the railway company and part on a right of way furnished the railway company by the bankrupt, or at its expense, and the title to which was vested in the railway company. The spur track was graded and cross-ties furnished and laid by the bankrupt, and the track material was furnished and laid by the railway company, but was agreed to be paid for by the bankrupt upon completion of the track. The railway company agreed to reimburse the bankrupt for this payment by rebating them five cents on each ton of coal shipped for 4½ years after completion of track, at which time, manifestly, the title to the track and material was to vest in the railway company under the terms of the contract. During the 4½ years the track was to be operated exclusively by the railway company for the benefit of the bankrupt and others. The provision of the contract in this respect is:

"(7) That the railway company shall have entire control of said tracks and the operation thereof, and may use the same as well for the business of third persons, not parties hereto, as for that of the coal company: provided, however, that such operation of said tracks for the benefit of third persons shall not unreasonably interfere with the business of the coal company."

After the completion of the track, a few cars of coal were handled over it by the railway company under this arrangement before bankruptcy, and either before or after bankruptcy some slight use was made of it for the benefit of others than the bankrupt. The record tends to show that the bankrupt's permission was first obtained for this additional use; but clearly it was not required by the terms of the contract. The railway company claimed possession and the right to it by said contract. This was the status of the possession at the time the petition was filed.

The finding of the referee is from practically undisputed facts, set out in the record, and, when the finding is an inference drawn in this way, it is entitled to no presumption in its favor. As I see it, the only inference which the facts admit of is that the railway company was in possession of the track, and with it the track material, claiming rights in it under the contract adverse to it and to its trustee. The bankrupt's interest was in the contract, and not in the specific material, the possession of which had been intrusted exclusively to the railway com-

pany to enable it to carry out the contract. As long as the contract was a subsisting one, and during its life, as between the parties, the railway company was alone entitled to possession of the material. This conclusion deprives the bankruptcy court of jurisdiction to deprive the railway company of possession of the track material by a summary proceeding, and renders decision of the remaining questions unnecessary.

However, as it may shorten litigation, it may be proper to express my views on the merits. I am quite clear that the contract provided for removal of the track material only in the event of the abandonment of the mine by the bankrupt, and then only at the option of the railway company. Excluding this contingency, the bankrupt had no right to remove the track material during the 4½ years, and had no interest in it after this period. Its interest during that period was confined to the rebate required to be paid it on each ton of coal until the amount it had advanced to the railway company for the value of the track material was reimbursed to it. The railway company furnished the bankrupt the track material necessary to carry out the contract, for which the bankrupt paid it, and then refurnished it to the railway company for use in carrying out the contract, with the provision that the railway company could acquire title to the whole, or so much of the material as it paid the bankrupt for by rebates, or to the whole, or so much of it as remained unpaid for by rebates on shipments, at the expiration of the 4½ years from the time of the completion of the track, if the contract then remained effective. Until so paid for, and within the 4½ years, the ownership of the track material remained in the bankrupt, subject to the rights of the railway company conferred by the contract.

This was the status when the petition in bankruptcy was filed. The bankruptcy conferred on the trustee the right for the estate to adopt or reject the contract. He elected to reject it as burdensome. While this conferred on the railway company a claim against the estate for damages for breach of contract, it did not authorize the railway company to appropriate the property of the bankrupt used by the railway company in connection with the contract. Upon the termination of the contract by the bankruptcy and the rejection of it by the trustee, the rights of the parties to the property being used in its execution, and which was in the possession of the railway company to that end, were the same as before the contract was entered into. This being true, the trustee would have the right to reclaim that part of the property which was owned by the bankrupt and furnished by it to the railway company for use under the contract.

The filing of the claim by the railway company worked no estoppel against it to assert what rights, if any, it had to the track material. The contract itself provided that it should be paid for the cost of labor and material consumed upon completion of the track. The filing of its claim was pursuant to, and not inconsistent with, whatever rights were given it thereby to the track material. If the trustee had assumed, instead of rejecting, the contract, the railway company would have been entitled to dividends on its claim, and also to the possession of the

track material, with the right to acquire title to it by the payment of rebates, or upon the expiration of the contract period of 4½ years, just as it would against the bankrupt, had the bankruptcy not intervened.

The election to reject the contract was exercised by the trustee by selling the track material, and its rejection was followed by the consequences before set out. However, as the method by which the property is sought by the purchaser to be reclaimed by summary proceeding is beyond the jurisdiction of the bankruptcy court, the purchaser must be remitted to his remedy by plenary suit to recover it.

MICHIGAN ALUMINUM FOUNDRY CO. v. ALUMINUM CO. OF AMERICA et al.

(Circuit Court, E. D. Michigan, S. D. October 16, 1911.)

No. 8,700.

1. COURTS (§ 357*)—FEDERAL COURT—STATUTES.
Where acts of Congress make specific provision for costs, they are controlling; but, if no provision for certain kinds of costs is made, the federal courts may follow the state statutes, if they do not result in injustice in the particular case.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 357.*]

2. COSTS (§ 173*)—ATTORNEY'S FEES—STATUTES.
Rev. St. §§ 823, 824 (U. S. Comp. St. 1901, p. 632), providing specifically that attorneys shall be allowed certain fees, and no others, are exclusive on the subject of attorney's fees, so that, since no provision for attorney's fees on motions is made, no fee could be allowed on a motion to set aside the service of process.
[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 688–690; Dec. Dig. § 173.*]

3. COSTS (§ 173*)—DOCKET FEE—"FINAL HEARING."
Since the hearing on a motion to set aside the service is not a final hearing of the cause, no statutory docket fee can be taxed therefor.
[Ed. Note.—For other cases, see Costs, Dec. Dig. § 173.*
For other definitions, see Words and Phrases, vol. 3, pp. 2799–2801.]

4. COSTS (§ 154*)—ATTORNEY'S FEES—DEPOSITIONS.
Rev. St. § 824 (U. S. Comp. St. 1901, p. 632), providing for an allowance of $2.50 for each deposition taken and admitted in evidence in the cause, relates to a deposition admitted at the trial or final hearing, and hence does not authorize the taxation of such sum for depositions taken and used in resistance of a motion to set aside the service.
[Ed. Note.—For other cases, see Costs, Dec. Dig. § 154.*]

5. COSTS (§ 154*)—DISBURSEMENTS—TRAVELING EXPENSES—DEPOSITIONS.
Traveling and other expenses of an attorney in taking depositions to be used in resistance of a motion to set aside the service cannot be taxed as a part of the costs.
[Ed. Note.—For other cases, see Costs, Dec. Dig. § 154.*]

6. COSTS (§ 153*)—DISBURSEMENTS—WITNESS FEES—DEPOSITIONS.
Comp. Laws Mich. 1897, § 11,254, providing that, on motions in actions at law, such allowance may be made as the court shall deem best, refers only to attorney's fees, and does not authorize an allowance of disburse-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ments for the fees of witnesses and examiners, etc., in taking depositions to be used on the hearing of a motion to set aside the service of process.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 153.*]

At Law. Action by Michigan Aluminum Foundry Company against Aluminum Company of America and others. On motion for an order for an allowance of costs on the denial of motion to set aside service of process. Denied.

Lucking, Emmons & Helfman, for plaintiff.
Gray & Gray, for defendants.

ANGELL, District Judge. This is a motion for an order for allowance of costs to the plaintiff upon the denial of motions by the defendant Aluminum Company of America to set aside service of process.

It appears from the record that after the first motion was made plaintiff got an order of the court to take depositions before an examiner to be used in opposition to the motion; that the depositions of two employés of defendant, and of one other person, were taken and used on the hearing. It appears, also, that after the second motion was made plaintiff took out a commission, and under it took depositions of three other agents or officers of defendant, residing at or near Pittsburgh, Pa., which were used on the hearing.

The court is asked to allow the witness fees of the persons examined, amounting to $7.08; the amount paid the examiner in Detroit, $12.50; that paid the commissioner in Pittsburgh, $44.50; that paid the marshal in Pittsburgh, for serving subpœnas, $2.42; the expenses of the attorney in going to Pittsburgh to take the depositions, $25; an attorney fee of $2.50 for taking each of six depositions, in all, $15; and a further reasonable attorney fee.

[1] If acts of Congress make specific provision for costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes may be followed (Scatcherd v. Love, 166 Fed. 53, 91 C. C. A. 639, and cases cited), at least if they do not result in injustice in a particular case (Primrose v. Fenno [C. C.] 113 Fed. 375). Such seems to be the prevailing doctrine at this time.

[2, 3] Sections 823 and 824, Revised Statutes (U. S. Comp. St. 1901, p. 632), distinctly provide that attorneys shall be allowed certain fees, and no others. On the subject of attorney fees this act controls. It makes no provision for attorney fees on motions. Hearing on a motion is not a final hearing of the cause, upon which the statutory docket fee may be taxed. No attorney fee can be allowed on the motion.

[4] There is a provision for an attorney fee of $2.50 for each deposition "taken and admitted in evidence in a cause." This means a trial or final hearing, and not an interlocutory hearing. Stimpson v. Brooks, 3 Blatchf. 456, Fed. Cas. No. 13,454; Nail Factory v. Corning, 7 Blatchf. 16, Fed. Cas. No. 14,197; Spill v. Manufacturing Co. (C. C.) 28 Fed. 870.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[5] There is no authority in the statutes, and I know of none in our state decisions, for allowing the traveling expenses of the attorney in going to Pittsburgh. See Wooster v. Handy (C. C.) 23 Fed. 60. There can, therefore, be no allowance made for the attorney's fees and attorney's expenses asked for.

[6] As to the other matters, the items of disbursement for witnesses, examiner, etc., on a motion of this kind, the acts of Congress contain no express provision. Plaintiff urges that, therefore, they are allowable under the statute of the state, Comp. Laws 1897, § 11,254, last paragraph. That paragraph provides that on motions in law cases such allowances may be made as the court deems just. It is plain, however, from the title and the body of the act, that it refers only to attorney fees, and not to disbursements of the kind here in question. No case is found by which the Supreme Court of Michigan has permitted the language to be extended to cover such disbursements. The court is aware of no settled practice to make allowance for such disbursements under the paragraph. If the matter of attorney's fees only is covered by it, it cannot be acted on here, since attorney's fees, as above stated, are governed by Revised Stats. §§ 823 and 824.

It may be said with some force that to deny plaintiff costs to the extent of disbursements for witnesses', examiner's and marshal's fees is a hardship, especially in view of the order of Judge Swan that depositions be taken, and of the fact that the more important deponents would not make affidavits. If I could see my way to do so, I should be inclined to award as costs, under the circumstances of this case, the disbursements now under consideration. But it is to be remembered that costs are in the main, if not entirely, statutory allowances, and that in a case at law it is rare that depositions are taken in support of or in opposition to motions.

I am compelled, by the foregoing considerations and in the present state of the statutes, to deny the plaintiff's application.

In re RICHTER.

(District Court, D. Connecticut. October 26, 1911.)

No. 2,524.

BANKRUPTCY (§ 404*)—FORMER PROCEEDINGS—APPLICATION FOR DISCHARGE—NECESSITY—OMISSION OF DISCHARGE—EFFECT.

Where a bankrupt in former proceedings failed to apply for a discharge within the time specified by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), the fact that such failure was due to his poverty was no ground for allowing him a discharge in subsequent proceedings with reference to the debts previously scheduled.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Jacob Richter. Application by the bankrupt for discharge. Denied.

Abraham S. Aaronson, for petitioner.

Leonard Bronner, David Strouse, and Sol. J. Freudenheim, for objecting creditors.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PLATT, District Judge. The essence of the report is embalmed in its opening page. Here it is:

"There was no question as to the facts. Bankrupt had previously, in 1905, been adjudicated bankrupt in New York on an involuntary petition. He was ordered to file schedules, and did so. Most of his property had previously been taken by creditors under chattel mortgages, and only $48 came into the hands of his trustee in New York. He obtained work in New Haven, and was notified by his attorney to send on money to apply for a discharge. He had not the money, and did not so apply. There was no money in the estate to pay the expenses of his discharge. Bankrupt was in no way to blame for not making the application in the former case, and was prevented from doing so by poverty. The debts from which he now seeks to obtain a discharge are the same which were scheduled in the former proceeding. The sole question is whether his former involuntary bankruptcy, no discharge being applied for, is a bar to obtain a discharge now from the debts scheduled by him in the former proceeding. It is claimed by the objectors that the decisions of the courts are uniform in their favor, and that the decision of this court in Re Levenstein, 180 Fed. 957, 24 Am. Bankr. Rep. 822, absolutely decides the present case. Nevertheless, as this case is one where the bankrupt ought to have a discharge, if it is possible to grant it, and the court must be desirous of granting a discharge, I will review the cases and submit the matter to the court."

He then reviews them at great length, and, except for a brief statement of his views as to the proper procedure in case the specification of objection shall be sustained, closes with the words now to be quoted:

"As it seems probable that, whichever way the District Court decides these cases, there will be an appeal, it has seemed to be best, in view of In re Elkind & Schwartz and In re Bluthenthal & Jones, to cite the different cases so far as I have found them, and submit the question to the court, although in view of In re Levenstein, I do not feel authorized to recommend a discharge. By request of counsel for objectors to a discharge, I state that the bankrupt was the only witness called, that he left New York shortly after being adjudicated in the former proceeding, and that the debts enumerated in his schedules in this proceeding are the same as enumerated in the former proceeding."

It will be noticed by the most casual reader of the excerpts from the master's report that he expresses an opinion, rather than states a fact, when he says that the bankrupt ought to be discharged, if it can possibly be done, and that the court must be desirous to grant it. There are no facts before me which warrant such an expression. The bankrupt's actions in the former proceedings do not invest him with an obvious badge of merit for good conduct. The master says he did not send money to his New York attorney, because he had none. That statement is based, as the master himself finds in the last excerpts, upon the statement of the bankrupt alone.

In some unknown way, the sympathies of the master seem to have been aroused. The present writer hopes that he is constitutionally as capable of a proper feeling in a deserving case as the master, and he certainly has no disposition to be critical; but, if everything was all right down in New York, at the time when the bankrupt's creditors practically drove him up to New Haven in search of work, it does seem queer that, within a year and a possible six months beyond, the bankrupt could not have saved some scattering remnants from the

gains of his honest toil, and with that help have been enabled to bring his case before the court down there, and have gotten the clean bill of health, which the master at this eleventh hour thinks the court must be seeking a chance to give him.

Until this report came up, I had supposed that the question at issue here had been settled for all time, so far as I could settle it, by my decision in Re Levenstein, 180 Fed. 957, 24 Am. Bankr. Rep. 822. When I examined the law and the facts in that case, I came to the definite conclusion that the Congress by the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) had made it a condition precedent to favorable action by the court that the bankrupt shall apply for his discharge within the time limited by the statute. To avail himself of the benefit, he *must* take positive action within the time, and is not entitled to make excuses of any kind.

If Congress had intended that the courts should accept the excuse of poverty, it was the easiest thing in the world for Congress to have said so. It could not have escaped their attention, because the general subject of poverty was the thing they were legislating about. The main purpose of the statute, as I have said before, was to open a refuge for the poverty-stricken to escape from their immediate worriments, by turning over all that they have, or ought to have, to a trustee for the benefit of all their creditors. Incidental to that relief, and as an extra act of kindness, they can, if they are honest men, come to the court within the time limited by the statute and obtain a discharge from the burden of their debts, so that they can start again in the life struggle, with clean hands and courage and hope. But they must come within the time limited and ask, or their chance for that further relief has vanished, and nothing but time is left to heal their hurts.

In re Elkind, 175 Fed. 64, 99 C. C. A. 86, does not seem to me to be in any sense relevant to this discussion. In that case the bankrupts had done their part, but a typesetter's error had made the name of one of them appear to be *Max Elkund,* instead of *Max Elkind,* in the printed notice to creditors. For that trifling error they were refused by the court the relief which Congress intended them to have. It is impossible to think that any creditor could have been misled to his disadvantage by the interchange of vowels, and the reasoning of Judge Ward in support of the decision is convincing. The ancient rule of de minimis ought to take care of even a greater mistake than that.

It will be noticed, however, that the Circuit Court of Appeals did not reverse the order denying the second discharge, which was based upon the failure of the bankrupts to obtain their discharge in the earlier case. It appeared by the court records that, although the judge's memorandum warranted that action in the earlier case, the actual entry had never been made, and therefore the Circuit Court of Appeals intimates that it would be well for them to go back and have that done, and then appeal from that order. This would seem to indicate that the Circuit Court of Appeals has no disposition to evade the plain mandate of the bankrupt act.

The case of Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390, has no relevancy to our issue here. Further words seem unnecessary; but, in closing, let me repeat: Every one *must* realize that, if he wishes to be helped by the bankruptcy act, it is his duty to follow the exact course pointed out to him in the law.

No matter how honest a man may be, he has certainly put his creditors to all the worry and trouble which they ought to bear, when he has not only prevented them from getting full payment for their debts, but has subjected them to the annoyance of watching him during one trip through the bankruptcy court. If he asks for his discharge at the end of that trip, they are bound to stop it, if they can, or accept it gracefully, if they cannot; but after watching him through his trip, and then for one year and a possible extra six months thereafter, and finding that he has not asked for a discharge, they are entitled to forget the matter, and rest in the assurance that they shall never again be bothered by the same matter.

The specifications of objection to the discharge are sustained, and the discharge refused.

In re COOLIDGE REFRIGERATOR & CAR CO.

(District Court, D. Massachusetts. April 14, 1911.)

No. 16,092.

BANKRUPTCY (§ 72*)—CORPORATIONS—MANUFACTURING—"ENGAGED PRINCIPALLY IN MANUFACTURING."

Where a Massachusetts corporation was organized to deal in and manufacture refrigerators, refrigerator cars, and accessories, appliances, etc., but, at the time an involuntary bankruptcy petition was filed against it, it had never manufactured anything, or begun business, beyond authorizing its directors to make an endeavor to get contracts, it was not subject to adjudication as a corporation "engaged principally in manufacturing," within Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), prior to its amendment by Act Cong. June 25, 1910, c. 412, 36 Stat. 838.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 8, p. 7650.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

In Bankruptcy. In the matter of involuntary bankruptcy proceedings against the Coolidge Refrigerator & Car Company. Adjudication denied. Petition dismissed.

Marvin M. Taylor, for petitioning creditors.
Roberts, Roberts & Cushman, for objecting creditor.

DODGE, District Judge. This involuntary petition alleges that the corporation, whose adjudication as a bankrupt is sought, has admitted in writing its inability to pay its debts and its willingness to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

adjudged a bankrupt upon that ground. The petition also alleges the corporation to be "engaged principally in manufacturing."

George F. Mead, claiming to be a creditor and a stockholder, has answered the petition, and denies that the corporation is or ever was engaged principally in manufacturing, as the petition alleges. The answer further sets up that the corporation is not and never has been engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, and is, therefore, not amenable to the bankruptcy act.

Under a reference to ascertain and report the facts, the referee has submitted an agreed statement of facts, filed before him, upon which agreed statement the hearing here has been had. I therefore find the facts to be as set forth in the agreed statement thus before me. It may be referred to in connection herewith.

The alleged bankrupt, a Massachusetts corporation, incorporated November 12, 1904, was incorporated, as appears from its charter (Exhibit A), for purposes which undoubtedly included manufacturing and dealing in refrigerators, refrigerator and other cars, conveyances for transportation in cold storage, refrigerating systems and plants, and all accessories and appliances useful or necessary in connection therewith. The charter purposes also include manufacturing and dealing in ice, ice machinery, tools, etc., capable of being used in connection with said business. If it can be said to have been engaged principally in manufacturing when this petition was filed, on June 4, 1910, the controverted allegation in the petition is sustained; otherwise not. If not "engaged principally in manufacturing," there can be no adjudication; the petition having been filed before section 4 of the bankruptcy act had been made to include "all moneyed, business or commercial corporations," by the amendment which took effect June 25, 1910.

The corporation appears to have entered upon its business career, owning the refrigerator car which had previously been built under Mr. Coolidge's patent, been tested, and proved satisfactory. A fair summary, in brief, of what it has since done, according to the agreed facts, is believed to be as follows:

It began by trying to sell its stock, in order to raise working capital, and to that end made demonstrations or tests of the car, supervised by Mr. Coolidge as its employé. In January, 1905, the directors discussed a proposition for building 10 similar cars, but took no action. Its efforts to interest possible investors and raise the required capital by selling stock continued for three or four years, during which the company maintained offices in Boston for some time, incurred expenses, and contracted debts. It became necessary, early in 1906, to turn over the car to certain directors as security for advances, and thereafter to hire the car from them. They still own it, and under the lease from them it has, from time to time, earned a little money for the company. Toward the end of 1907 the Boston & Maine Railroad Company built 10 similar cars, under license from the company, and under Mr. Coolidge's supervision, but built them at its own expense, without paying any royalty, and re-

taining the cars as its own property; the company permitting this in order to advertise its cars and induce contracts for their construction. Authority was given the directors, at about the same time, to enter into contracts for building such cars upon a royalty.

It is not claimed that the company has ever actually manufactured any car, or any of the other things the manufacture whereof its charter authorized, or ever actually began such manufacture. Nor can I find from the agreed facts that it has ever taken any such actual steps preparatory to manufacturing as might enable me to hold that the manufacturing contemplated by its charter had been undertaken, as in White Mountain, etc., Co. v. Morse & Co., 127 Fed. 643, 62 C. C. A. 369. However broad the construction of section 4 sanctioned by the Court of Appeals for this circuit in that case, I am unable to regard it as sufficiently broad to warrant me in holding a concern engaged principally in manufacturing, which has never gone beyond authorizing its directors to make and endeavor to get contracts, and has never done anything which I am able to regard as a step taken in or preparatory to actual manufacture.

It is well settled that a charter authorizing manufacture is not enough, of itself, to make a manufacturing corporation for the purposes of the bankruptcy act.

The petitioners argue that the amendment of so much of section 4 as relates to corporations should be taken as declaratory of the real meaning of the provisions concerning corporations set forth in that section as it stood before the amendment; but this seems to me impossible, in view of the decisions in this circuit which have construed the provisions in question, the latest of which is Cate et al. v. Connell et al., 173 Fed. 445, 97 C. C. A. 647.

I am unable to believe that this corporation can lawfully be adjudicated, and must, therefore, dismiss the petition.

ILLINOIS CENT. R. CO. v. INTERNATIONAL ASS'N OF MACHINISTS, et al.

(Circuit Court, E. D. Illinois. October 23, 1911.)

1. INJUNCTION (§ 114*)—LABOR ORGANIZATIONS—STRIKES.

Members of a labor organization, by their membership of the union and their election of officers and agents, who were promoting and governing strikes, were subject to an injunction restraining members of the union from trespassing on the property of a railroad company against which a strike had been ordered, and from interfering with its business, though they personally claimed they had not been guilty of any trespass or violation of the law, and had endeavored to persuade others of their fellows not to do so.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. § 114.*

Restraining boycotts, strikes, and other combinations by employés interfering with commerce or business, see note to Shine v. Fox Bros. Mfg. Co., 86 C. C. A. 313.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INJUNCTION (§ 101*)—STRIKES—TRESPASS—INTERFERENCE WITH INTERSTATE COMMERCE.

Where a labor union instituted a strike against an interstate carrier, the latter was entitled to an injunction restraining the union and its members from trespassing on the carrier's property or interfering with its business as an interstate carrier, etc.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

In Equity. Suit by the Illinois Central Railroad Company against the International Association of Machinists and others. On motion by complainant for an injunction restraining defendants from trespassing on its property and from interfering with its business as an interstate carrier. Granted.

W. S. Horton, John G. Drennan, and W. W. Barr, for complainant.
Jonas & Haley, for certain defendants.

WRIGHT, District Judge (orally). In this motion by the complainant for a temporary injunction as prayed in the bill of complaint, there is no substantial dispute as to the facts. That the private property of the complainant has been and is being trespassed upon, that its business of an interstate carrier, the carriage of the United States mail, its obedience of the law to provide and keep in repair the safety devices commanded by the government, has been and is being interrupted, to the irreparable injury of the complainant, as well as the public, is undisputed—in truth, is undisputable. All of this is due, directly or indirectly, to the effort to make effective the strike ordered by the heads of the labor unions involved.

[1] Although due notice of this motion has been given, none have appeared in this court in an endeavor to refute the plain case of the complainant, as it has been briefly stated, save alone members of the union at Centralia, who, being represented by counsel, have appeared and endeavored to show to the court that they personally and as members of the unions have obeyed the law, and have counseled and endeavored to persuade others to do likewise, and for such reason such of the defendants as reside there should be excepted from this injunction. Against this contention it is again undisputed that much trouble, agitation, trespassing, and undue interference with complainant's business occurred and is occurring at this place, notwithstanding the alleged good offices and intentions of these respondents.

I greatly sympathize with these men in their futile attempt to stay the tide of ruthless aggression initiated by the order of the heads of unions, and kept alive by the effort to make the strike effective, in fanning the flames of zeal supposed to have its repository in the minds of the common members. These good-intentioned men voluntarily joined the union, and thus submitted to its authority to such an extent that they felt for the time being morally bound to obey and respect its resolutions. They joined by their suffrages in electing the heads of unions, who thereafter became, were, and are their agents in producing the conditions that now surround them. Of these conditions they now repent, and seek to evade the consequences of them, while at the same

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time they are unable to control the agencies they have personally assisted in creating, that produce such a situation of unlawful combination and aggressive force, requiring the interposition of the courts of justice to protect private and public property and rights from irreparable loss and injury.

Defendants so situated have voluntarily placed themselves between two fires, as it were, and now, being unable to escape, must bear the heat of both. Being unable to control the agencies they aided in creating, they must now answer for the conduct of their own agents, and be alike held as principals with them for the unlawful combinations and conduct described in the complainant's bill of complaint, and supported by the numerous affidavits read upon the hearing of this cause.

[2] So far as the law of the case is concerned, it is of the most elementary character, and is of the fireside variety. Every person is entitled to the enjoyment of his private property without interference or trespass by others. No one has the right to walk across the yard, lot, or farm of another against the objection of the owner, without being subject to a fine for so doing under the criminal Code of our state. Every person is entitled to conduct his own lawful business, without the interference of others by force, intimidation, threats of violence or injury, or by combinations and conspiracies to unlawfully injure, impede, or coerce such person in any manner. In other words, the right to life, liberty, and the pursuit of happiness is the foundation of all enlightened civilization, and, when this is taken away, or unprotected by the government, nothing is left worth maintaining.

The complainant, the railroad company, in this case, is entitled to the same rights, no more, no less, than individual persons. Courts administer justice without respect to persons, and do equal right to the poor and the rich. In addition to its private rights being entitled to respect and protection under the law, the complainant, the railroad company, has certain duties to perform of a public nature, and in which all the people are interested. It is bound to carry the United States mail with safety and dispatch. It is bound to carry interstate passengers and freight in conformity to the laws of the United States. It is bound to keep its cars, engines, and safety devices in good order, in obedience to the laws of the United States. And, this being an absolute duty, nothing can be interposed as a defense for a failure in that regard, and the penalties of the law thereby be avoided.

The right of the complainant to the injunction prayed for is clear, and founded upon the most elementary principles of the law; and it is ordered that it issue.

NIXON v. MARR.†

(Circuit Court of Appeals, Eighth Circuit. October 9, 1911.)

No. 3,586.

1. VENDOR AND PURCHASER (§ 134*)—CONDEMNATION PROCEEDINGS—TIME OF PASSING OF TITLE OR RIGHT—CONSTITUTIONAL PROVISIONS.

Under section 24 of the Bill of Rights of the Constitution of Oklahoma, which provides that where private property is condemned for a public use, "until the compensation shall be paid to the owner or into court for the owner the property shall not be disturbed or the proprietary rights of the owner divested," the mere pendency of condemnation proceedings relating to property does not affect the right of the owner to sell the same, nor his power to convey a perfect title; and where the owner sold certain lots, which he contracted to convey free of incumbrance, received half the purchase money, and executed a warranty deed, which was placed in escrow, to be delivered when the other half was paid, the fact that the city had filed a petition to condemn right of way for a street across the lots before the contract was made, on which an appraisement and award of damages were subsequently made, but no further action taken, did not entitle the purchaser to recover damages by way of set-off when sued on the contract, but as the equitable owner of the property he was entitled to the award when paid by the city.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 250–254; Dec. Dig. § 134.*]

2. EMINENT DOMAIN (§ 197*)—CONDEMNATION PROCEEDINGS—RIGHT TO DISMISS.

As a general rule of law, in the absence of statutory provisions, a condemning party may dismiss or abandon condemnation proceedings at any time before the easement title passes and the rights of the parties become vested.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 527; Dec. Dig. § 197.*]

3. VENDOR AND PURCHASER (§ 269*)—REMEDIES OF VENDOR—ENFORCEMENT OF LIEN—TITLE RETAINED AS SECURITY.

A vendor of real estate by a contract under which he surrendered possession and deposited the deed in escrow, to be delivered on payment of the final installment of the purchase price, has the right to treat the contract as a mortgage, and foreclose the same by suit in equity, on default in payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 269.*]

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Suit in equity by S. W. Marr against J. Truman Nixon. Decree for complainant, and defendant appeals. Affirmed.

Haskell B. Talley, for appellant.

A. J. Biddison (Harry Campbell, on the brief), for appellee.

Before SANBORN, Circuit Judge, and MARSHALL and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. The parties in this case, on the 20th day of September, 1909, entered into an agreement, by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 11, 1911.

terms of which Marr agreed to convey to Nixon in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed, lots 1, 2, 3, 4, 5, and 6, in block 4, Hodges' addition to the city of Tulsa, Okl.; Marr to pay the taxes on lot 4 for the year 1909, and Nixon to pay the taxes for said year on the remaining property, and Marr to have the privilege of keeping a hay barn on the lot until the hay was removed, and to thereafter remove the barn from the premises, not later than July 1, 1910. Nixon agreed to pay for said property the sum of $4,975—$100 on signing the contract, as earnest money, $2,387.50 on delivery of a good warranty deed and abstract, and $2,487.50 in 60 days from the said 20th day of September; said warranty deed and abstract to be deposited in escrow in the Bank of Commerce during said 60 days. Two days thereafter, on the 22d day of September, Marr and wife executed a deed to said premises with full covenants of warranty and deposited the same, with abstract of title, in escrow in the Bank of Commerce. Nixon paid the $100 and the $2,387.50 as agreed, and went into possession of the premises. Failing to pay the $2,487.50, Marr, on the 12th day of March, 1910, brought this action to recover the balance of such purchase money, and to have the same declared a lien upon said premises, and the same sold in payment therefor.

Nixon, in his answer, admits the execution of the contract and the deed, payment of a portion of the purchase price, and that the last payment of $2,487.50 was unpaid, but claims that the city of Tulsa had, prior to the executing of said contract and deed, taken steps to condemn a street 65 feet wide across said lots, by filing the proper petition in the district court for Tulsa county for the appointment of commissioners to appraise the damages. By reason thereof Nixon claimed damages.

From the record it appears that on May 28, 1909, the board of commissioners of the city of Tulsa filed a petition in the proper district court, alleging that, on the ——— day of May, 1909, said board of commissioners passed a resolution declaring the necessity of opening and extending East Second street over, through, and across certain lots, among them being lots 1, 2, 3, 4, and 5, in block 4, in Hodges' addition. The petition prayed for the appointment of three commissioners to assess the damages. No action seems to have been taken on this petition until the 7th day of October, when Marr was served with a notice by the sheriff of Tulsa county that an application for the appointment of such commissioners to assess damages would be made on the 18th day of October, 1909, at 9 o'clock a. m., or as soon thereafter as counsel could be heard, to the judge of the district court in said county, at his chambers, etc., which notice Marr gave Nixon, on what date is not disclosed. On the 14th day of October, 1909, the board of commissioners of said city filed in said district court an amended petition for the same purpose, describing the property to be taken more minutely. No notice seems to have been served of this petition. On the 18th day of October the application of the board was heard by the judge of the district court, and commissioners appointed, who appraised the

damages and reported the same to the court. No further proceedings appear to have been taken.

[1] The real question presented is whether in this action Nixon is entitled to have set off against the balance of the purchase price damages sustained by reason of the diminution in value of the property by reason of an appropriation of a portion thereof by the city for a street. This, we think, depends upon whether, at the date of the contract of sale, the city had appropriated or acquired a vested right to the property in question for street purposes.

Section 24 of the Bill of Rights of the Oklahoma Constitution provides as follows:

"Private property shall not be taken or damaged for the public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all the parties in interest. * * * Until the compensation shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner divested."

The statute of the state of Oklahoma, relative to eminent domain procedure, is in harmony with this constitutional provision; provides for an application or petition to the judge of the district court, upon 10 days' notice to the opposite party, for the appointment of commissioners to assess the damages; and provides that upon payment by the corporation to the clerk of the court, for the use of the owner, of the sum assessed as damages by the commissioners, the party may enter upon the premises and construct the improvement. The statute also provides for an appeal by either party from the award of damages.

Under the foregoing constitutional provision, it seems clear that the owner of the property cannot be disturbed in his possession, or in any of his proprietary rights, until the compensation due him has been first ascertained by the commissioners appointed for that purpose, and the amount thereof paid to the party or into court. The commissioners, on the 3d day of November, 1909, made a report, assessing the damages. The clerk of the district court testified as a witness that:

"The report was the last thing ever done; no order made after that."

It seems clear, under the constitutional provision before mentioned, that the city did not, by such proceedings, acquire a vested right to the premises for street purposes. This it could not do, under the constitutional provision, without first paying to the owner, or into court, the amount of the damages assessed, which it has not done.

It is unnecessary to review the numerous and conflicting decisions in the several states, relative to at what stage of condemnation proceedings property may be said to be appropriated. Most of the decisions brought to our attention are based upon statutory provisions respecting the matter, and not upon a constitutional provision, expressly providing, as does the Oklahoma Constitution,

that *"until the compensation has been paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner divested."* (Italics our own.) Up to such time the owner has a clear and perfect right to sell and convey the premises, either by executory contract or by deed passing the fee-simple title.

In Lewis on Em. Dom., vol. 2 (3d Ed.) § 895, it is said:

"The passage of an ordinance to widen or extend a street, or the filing of a map of a proposed street, or the doing of other similar acts of a preliminary nature, does not affect the property proposed to be taken; and a transfer of the property after such acts will have the same effect as though made before, and will vest in the grantee the title to the property and right to the compensation when the taking is consummated. Where the title vests in the condemnor by virtue of certain ex parte acts, such as the making and filing of a location, as is permitted in some of the states, the right to compensation vests in the person who is owner at the time the title vests in the condemnor. * * * After the right to compensation has once vested, it becomes a personal claim, and does not pass with the land. * * * A conveyance pending proceedings to condemn transfers to the vendee the right to the award when made. Where the confirmation of the award vests the right to compensation and obligates the condemnor to take and pay for the property, a transfer of the property after the confirmation does not transfer the right to the award. But where the award or judgment merely fixes the price at which the condemnor may take the property, and the condemnor has the option to take or not, a conveyance vests the right to the compensation in the vendee."

The author cites numerous authorities, which fully support the text, and they need not be referred to here. See, also, note to Fort Wayne & S. W. Traction Co. v. Fort Wayne & W. R. Co., 16 L. R. A. (N. S.) 537.

[2] It may be stated, as a general rule of law, in the absence of statutory provisions, that a condemning party may dismiss or abandon condemnation proceedings at any time before the easement title passes and the rights of the parties become vested. District of Columbia v. Hess, 35 App. D. C. 38, 28 L. R. A. (N. S.) 91, and note; 7 Enc. Pl. & Pr. 674. So, here, the city had a perfect right to abandon the proceeding, and if the city should take no steps to pay the damages awarded, and conclude the proceedings within a reasonable time, it might well be presumed that they had been abandoned.

In this case, the contract of conveyance was made and one-half of the purchase price paid before the city took any steps towards condemnation proceedings other than filing the petition in May preceding, and, at the time of the filing of the amended petition, giving notice of the application for the appointment of appraisers, Nixon was the equitable owner of the premises and entitled to the compensation.

In Lewis on Em. Dom. § 518, supra, the law is stated as follows:

"In case of an executory contract of sale, it is generally held that the vendee is entitled to the compensation, on the ground that he is the equitable owner of the property and that what is taken is subtracted from what he is to receive from his contract, while the vendor remains entitled to the whole amount of the purchase money agreed to be paid."

Counsel for appellant cite and place much reliance upon the cases of Cavenaugh v. McLaughlin, 38 Minn. 83, 35 N. W. 576, and Kares

v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271. In the former case, the Supreme Court of Minnesota held that a resolution by the city council, declaring the necessity for an appropriation of the property for a highway, prior to the conveyance, constituted such an appropriation that the vendee was entitled to rescind. In the latter case, the Supreme Judicial Court of Massachusetts held that where a party had given a bond for a conveyance free from incumbrance, and subsequent to the giving of such bond, but prior to the giving of a deed, a portion of the land was appropriated for highway purposes, the vendee was entitled to rescind. In this case, appellant is not claiming a rescission, but damages. To entitle him to rescind, he should offer to surrender back to Marr the possession of the premises.

Cases more nearly identical to the one at bar, which have been called to our attention, are Stevenson v. Loehr, 57 Ill. 509, 11 Am. Rep. 36, in which it was held that, where the owner of a tract of land sold it, giving a contract for a deed of general warranty to be made on final payment, and between the sale and the making of the deed a portion of the premises was condemned under the right of eminent domain for a railway track, the incumbrance thus created was not one for which damages could be recovered in an action on the covenants in the deed, and that in an action on a promissory note by the payee against the maker the damages to the defendant arising by reason of the incumbrance thus created on the land could not be set off against the note.

Kuhn v. Freeman, 15 Kan. 423, was a case in which the vendor of a piece of land gave to the vendee a title bond, and received in return one half of the purchase money in cash down, the other half in two promissory notes. Afterwards the vendee died, and subsequently, by certain condemnation proceedings, a railroad company obtained a right of way for its road across said land, and paid the damages assessed to the county treasurer. In a suit upon the notes against the administrator, it was held that the party could recover the amount of the notes and interest, as the amount awarded in the condemnation proceedings belonged to the vendee.

We are clearly of the opinion that no proprietary right of Marr to the premises in question had been appropriated by the condemnation proceedings, and that he had good right to make a perfect sale; that Nixon, as purchaser, took subject to the power of the state to exercise the right of eminent domain; that he was entitled to receive the damages assessed, and, if dissatisfied with the same, could have intervened and appealed from such award; that the damages resulting from the condemnation proceedings are no defense to the action for the recovery of the balance of the purchase price.

[3] It is further claimed upon the part of appellant that the court had no jurisdiction of the case as one in equity; that Marr's remedy was simply to recover the purchase price at law. We think, however, that the equitable title was in Nixon, that the retention of the legal title by Marr was merely as security, and that he was entitled to treat the contract as a mortgage and foreclose the same in a court of equity.

This view is fully sustained in Smith v. Kirchner, 7 Okl. 166, 54 Pac. 439; Lewis v. Hawkins, 23 Wall. 119, 23 L. Ed. 113.

The judgment of the court below, in favor of Marr, as prayed, was right, and is affirmed.

SANBORN, Circuit Judge (dissenting). Marr expressly agreed in the contract of sale to convey the real estate to Nixon 60 days after September 20, 1909—that is to say, on November 19, 1909—"in fee simple, clear of all incumbrances whatever by a good and sufficient warranty deed," and Nixon agreed to pay him on that day the $2,487.50 for which this suit was brought. A deed in escrow is not delivered, and does not take effect, until the party holding the escrow delivers it to the grantee, and an agreement that the deed in escrow shall be delivered to the grantee at a certain time is an agreement that it shall then first take effect. Washington v. Ogden, 66 U. S. 450, 456, 17 L. Ed. 203; Durham v. Hadley, 47 Kan. 73, 81, 27 Pac. 105; O'Neill v. Douthitt, 40 Kan. 689, 20 Pac. 493; George v. Conhaim, 38 Minn. 338, 37 N. W. 791, 792; Murphin v. Scovell, 41 Minn. 262, 265, 43 N. W. 1; Michigan Home Colony Co. v. Tabor, 141 Fed. 332, 336, 337, 72 C. C. A. 480; Century Dictionary, title "Escrow"; Black's Dictionary, title "Escrow."

When the time came for this conveyance and payment, the city of Tulsa had, by the exercise of its power of eminent domain, acquired the indefeasible right to take a strip through this land for a public street, by paying the award which the commissioners had made therefor. Nixon alleged in his answer that, without notice of any condemnation proceedings, he made the contract to buy this land free from all incumbrances "for the special and particular purpose, which purpose was well known to the complainant, of using said property as a storage yard for pipes, steel derricks, casings, building, and outhouses"; that the right which the city had acquired to take the property by paying the award constituted an incumbrance on the title on November 19, 1909, which diminished its value $2,487.50, so that Marr could not then convey it clear of incumbrances, as he had agreed to do; and he asked that the amount of his damages be set off against Marr's claim to recover the $2,487.50. The majority of the court say, upon this state of facts:

"The real question presented is whether in this action Nixon is entitled to have set off against the balance of the purchase price damages sustained by reason of an appropriation thereof by the city for a street. This, we think, depends upon whether, at the date of the contract of sale, the city had appropriated or acquired a vested right to the property in question for street purposes."

But this is a suit in equity instituted by Marr to enforce specific performance of this contract of sale, and there is no doubt that in such a a suit the vendee may remain in possession of the property and recoup any damages he has sustained on account of any failure or inability of the vendor to comply with his agreement to convey a good title free from incumbrances. Williams v. Neely, 134 Fed. 1, 5, 67 C. C. A. 171, 175, 69 L. R. A. 232, and cases there cited; Farmers' Loan & Trust Co. v. Denver Railway Co., 126 Fed. 46, 50, 51, 60 C. C. A.

588, 592, 593; Burnes v. Burnes, 137 Fed. 781, 791, 70 C. C. A. 357, 367.

On November 19, 1909, the date on which Marr, on September 20, 1909, had agreed to convey the title to this land clear of all incumbrances, it was subject to the indefeasible right or option of the city of Tulsa to purchase the strip through it for a street for the fixed price, for the amount of the award of the commissioners. This option or indefeasible right neither Marr nor Nixon could remove. And the unavoidable effect of these facts seems to me to be that this right in the city to take this strip by paying the fixed price was an incumbrance upon Marr's title, that he could not convey the title subject to this incumbrance clear of all incumbrances, as he had agreed to do, and that Nixon had the right in this suit in equity to recoup or set off the damages he had sustained on account of Marr's inability and consequent failure to convey, or to offer to convey, the title clear of this incumbrance. And an examination of many opinions of courts has convinced my mind that the stronger reasons and the great weight of authority—indeed, as it appears to me, all the direct authority on the precise question here at issue—sustains this conclusion. Johnston v. Callery, 173 Pa. 129, 33 Atl. 1036; Maloy v. Holl, 190 Mass. 277, 76 N. E. 452, 453; Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; Cavenaugh v. McLaughlin, 38 Minn. 83, 35 N. W. 576; Copeland v. McAdory, 100 Ala. 553, 13 South. 545, 546.

In the case last cited, which was an action for the breach of a covenant against incumbrances in a deed on account of a right of way for a street, the court, after reviewing numerous authorities, said upon this subject:

"When, as in this case, there is not a failure of title, the fee remaining in the grantee, but a part of the land is subject to a perpetual easement, which may not be removed by the payment of money, the measure of damages is the depreciation of value by reason of the incumbrance."

Conceding now, as the majority contend, that from the date of the contract, September 20, 1909, Nixon became the equitable owner of this land, that he was entitled to the subsequent award for its taking by the city for a street, and that the title to the right of way over this street had not vested in the city, because it had not paid the award on November 19, 1909, the date on which Marr had agreed to convey the land to Nixon clear of all incumbrances, nevertheless the incumbrance, the city's option, its indefeasible right to take this strip by paying the award, Marr's inability to convey the title on November 19, 1909, clear of this incumbrance, as he had agreed to convey it, and Nixon's damages for Marr's breach of his agreement, and his right to recoup these damages in this suit in equity or to set them off against his contract to pay for the land remained in effect.

The fact that after the contract was made Nixon was the equitable owner of the land and entitled to any award for its condemnation did not deprive him of Marr's agreement to convey the legal title to him on November 19, 1909, clear of all incumbrances, nor of his right to recoup, set off, or recover his damages for the breach of that agreement. The equitable ownership and possession of land by a vendee

under an executory contract neither satisfies nor releases his vendor's covenant therein to convey the legal title to him free from incumbrances at some future time. And, in my opinion, the vendee's ownership in equity, his right to the award, and the condition of the title when the contract was made and dated are immaterial in this case, and the only question it presents is: Was Marr's legal title clear of all incumbrances on or after November 19, 1909, the date on which he had agreed so to convey it? The condition of the title at the date of the contract is immaterial, because the removal of any incumbrance then existing prior to November 19, 1909, would have enabled Marr to convey the property free from that incumbrance.

Nor is it to my mind any answer, to the claim of Nixon that the title to this land was incumbered, that the city had not on November 19, 1909, exercised its option, had not enforced its right, had not paid the award and acquired the perpetual easement which it had the right to acquire by the payment of that award. The claim here is not that the legal title or the proprietary right to the land or to the easement had vested in the city on November 19, 1909, but it is that the city then had an option to purchase it for a fixed price, and therefore an incumbrance upon it. Any right to or interest in land, consistent with the passing of the fee, which diminishes its value or its use, is an incumbrance. 3 Washburn on Real Property, § 2385; 1 Tiedemann on Real Property (3d Ed.) § 617. And an indefeasible option or right in a third person to purchase land, or a perpetual easement over it for a price certain, is an incumbrance upon the title of the owner, although that option has not been exercised or enforced, and such a right the city had acquired before the day on which Marr had agreed to convey the title to this property clear of all incumbrances.

To the suggestion that Marr can and will convey to Nixon the land and the right to the award, subject to this right of the city to take the strip through the land for a street upon payment of the award, the answer is that this is not what Marr contracted by his written agreement to convey. He agreed to convey the title to this land free of all incumbrances, and a conveyance of the land subject to the right of the city to take the strip through it for a street upon the payment to Nixon of a price certain is not such a conveyance. Would a conveyance by a vendor of a tract of land worth $10,000, subject to an indefeasible right in a third party to purchase it by paying $5,000 to the vendee, constitute a performance of a vendor's prior contract to convey a good title to the land to the vendee free of all incumbrances? If the city had condemned for streets all the tract of land in this case for which Nixon agreed to pay $4,975, and the commissioners had awarded only $1,000 damages for the taking, before November 19, 1909, the day Marr had agreed that he would convey the property clear of all incumbrances, would his conveyance of this land and the right to the $1,000 have constituted a conveyance of the land and its title clear of all incumbrances? No more is his tendered conveyance of this land and the right to the present award of the commissioners, subject, as the title is, to the city's right to take the strip for a street upon its payment of the award already made.

If, subsequent to the date of the contract and prior to November 19, 1909, the lien of taxes had attached to this land, that lien would have constituted an incumbrance, and Marr could not have performed his contract to convey on the latter day free from incumbrances until he had removed that lien. Densmore v. Haggerty, 59 Pa. 189, 190; Wilson's Ex'r v. Tappan, 6 Ohio, 172, 175; Nunngesser v. Hart, 122 Iowa, 647, 649, 98 N. W. 505; Clinton v. Shugart, 126 Iowa, 179, 183, 184, 101 N. W. 785; 1 Warvelle on Vendors (2d Ed.) § 179.

In Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271, the vendor gave a bond for a deed of a good title free from all incumbrances, and between the date of the bond and the time for the delivery of the deed about one-fourth of the land was condemned for a highway. The vendee sued to rescind the contract and to recover back what he had paid, and the vendor defended on the grounds that: (1) The title was to be free from incumbrances at the date of the bond for the deed, and not at the time fixed for the delivery of the deed; but the court said:

"It would seem to be clear that, when by the terms of this preliminary contract it is provided that when the time comes for the execution of the final contract the land is to be conveyed by a good and sufficient warranty deed of the obligor, conveying a good and clear title to the same free from all incumbrances, the language refers to the title which is to pass by the deed, and not to the state of things existing at the time of the preliminary contract."

And this is clearly so in the case in hand, for Marr could have conveyed on November 19, 1909, free of any incumbrance on the property on September 20, 1909, which he had removed prior to November 19, 1909, and it was doubtless with the purpose of giving him an opportunity so to do that the contract to convey free of incumbrance 60 days after its date was made. (2) That the vendee became the equitable owner of the land from the date of the bond for the deed, and consequently the agreement to convey at a future time related to the date of the bond, and not to the date of the delivery of the deed; but the court decided that the contract of the vendor was to convey at the time of the delivery of the deed a title clear of incumbrances. (3) That the agreement was to convey free of any incumbrance the vendor created; but the court held that it was to convey free of all incumbrances, that a condemnation proceeding constituted an incumbrance, and that the vendee should recover.

In Cavenaugh v. McLaughlin, 38 Minn. 83, 35 N. W. 576, the vendee paid $250 in part payment for a contract of sale of land and took a contract from the vendor which provided that the sale should be completed within 15 days after the delivery of the abstract of title, that if the title should be found defective the agreement should be void and the $250 should be refunded, but that if the title was found good and the vendee did not complete his purchase he should forfeit the $250. An examination of the records disclosed the fact that the common council of the city of St. Paul had made an order for the widening of a street and the taking of 10 feet off the east side of the contracted premises for the purpose, but no award of damages had been made or paid. Nevertheless the vendee refused to take the property, and

brought a suit to recover back the $250 on the ground that the title was defective, and the Supreme Court of Minnesota sustained his action. Answering the contention made in that court, as it is here, that the vendee could not recover because he was the equitable owner of the property and would receive the award of damages for the taking for the street, Chief Justice Gilfillan said:

"A conveyance, indeed, at any time before the condemnation proceedings had culminated in a vested title in the city, would have passed to the grantee the right to receive the damages allowed for the taking; but, evidently that alone was not what the plaintiff expected to get, and the defendant expected to pass to him. The land and a good title (without defects) was what was stipulated for. It must be concluded that by good title was meant one indefeasible by reason of anything existing and affecting the land at the time."

In the opinion of the majority the two cases which have just been cited are noticed, and the suggestion is made that the vendees in those cases rescinded their contracts, while Nixon enforces his and seeks to recover damages for the breach thereof. But these decisions are even more compelling than they would have been if the actions there had been for damages, because an action for damages is maintainable in every case of this nature that will sustain a rescission, but there are many cases of this class which will sustain actions for damages, but will not sustain suits for rescission, because the parties cannot be put in statu quo. In every case of this nature, as the Supreme Judicial Court of Massachusetts well said in Kares v. Covell, 180 Mass. at page 208, 62 N. E. at page 245, 91 Am. St. Rep. 271:

"The plaintiff may, at his election, take what the defendant can give him, and hold the defendant answerable to him in damages as to the rest, or, where the parties may be put in statu quo, he may rescind the contract and recover back the money he has paid."

Nixon has elected to take what the vendor can give him and to hold him answerable in damages for the rest, and according to these decisions he is entitled to his damages in this suit.

It was the settled law in the state of Pennsylvania that the title of the owner of land was not divested by condemnation proceedings until compensation was made for the taking or security therefor was given. In Johnston v. Callery, 173 Pa. 129, 33 Atl. 1036, a contract of sale was made whereby the vendor agreed to convey the land free of incumbrances, and the Supreme Court of that state held that it was a good defense to an action for the purchase price that before the time for the delivery of the deed a railroad company had selected and adopted a line of railroad across the land, although no award of damages had been made and no compensation for the proposed taking had been made or secured.

The majority cite in support of their view Stevenson v. Loehr, 57 Ill. 509, 11 Am. Rep. 36, and Kuhn v. Freeman, 15 Kan. 423; but neither of those cases involved the liability for the breach of an executory contract to convey land or title clear of all incumbrances, while that question, as we have seen, was involved, was carefully considered, and determined in the three cases which have just been reviewed. Stevenson v. Loehr was an action on promissory notes of

vendees, and their defense was that the covenants of a general warranty deed which they had accepted had been broken to their damage by the condemnation by a railroad company of a right of way across the land before they received the deed. The court held that the condemnation conferred special benefits upon the land which the defendants purchased far in excess of the damages caused thereby, so that in these benefits they had received all the damages they had sustained by the condemnation and more, and that they could not recover these damages again by setting them off against their notes to the vendor. It also held that the purchaser was, after the contract of sale was made, the equitable owner of the land and entitled to any damages awarded for its taking. But these questions are not involved in this suit, nor is their decision controlling, and the liability of a vendor for the breach of an executory contract to convey clear of incumbrances by reason of a condemnation after the date of the contract and before the time for the delivery of the deed was neither presented, argued, considered, nor decided in Stevenson's Case.

Kuhn v. Freeman was an action on the promissory notes of a deceased vendee against his legal representative. It presented by demurrer the single question whether or not the complaint on these promissory notes stated any cause of action. The plaintiff pleaded that the vendee had agreed to purchase the land for $3,000, that he had paid $1,500 and had given the notes for the balance, that he had died intestate, that one of the defendants was the administrator of his estate, that the vendor had tendered to the heirs of the vendee deeds of the property subject to a right of way for a railroad across it which a corporation had acquired by condemnation proceedings after the date of the contract of sale, and for which it had paid the award of the commissioners, $219.80, to the county treasurer. The court rightly overruled the demurrer, for the pleading clearly stated a cause of action on the notes, and there was no plea or suggestion that the incumbrance diminished the value of the land more than the $219.80 to which the defendants were entitled. The contract for sale in that case was a bond for a deed. Bonds for deeds commonly except from the agreement to convey free from incumbrances all incumbrances accruing subsequent to their dates (Dunn v. Yakish, 10 Okl. 388, 61 Pac. 926), and the probability is that there was such an exception in the bond in that case, for nothing is said about an executory agreement to convey free from incumbrances. There is in the opinion some desultory discussion of the effect of a condemnation of land upon the covenants in a deed, but no consideration or decision of the question in the case at bar—the question whether or not an executory covenant to convey at a stated future time clear of all incumbrances can be performed without removing the indefeasible right which a stranger has acquired after the contract and before the agreed date of conveyance to purchase a perpetual easement over a portion of the land for a street or a railroad by paying a fixed price therefor. The opinions of the courts which treat that question hold, and what seem to me the stronger reasons persuade, that it cannot.

In my opinion the defendant below was entitled to prove and to recoup the damages he sustained on account of the right which the city of Tulsa acquired to purchase the perpetual easement over the strip of land through his property for the amount of the award of the commissioners, and it was reversible error to deny him that right.

DEXTER HORTON NAT. BANK OF SEATTLE, WASH., v. HAWKINS et al.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1911.)

No. 2,018.

1. APPEAL AND ERROR (§ 71*)—APPEALABLE ORDERS.
Receivers appointed for an insolvent bank doing business in Alaska obtained a writ of assistance, under which certain boxes of coin and bullion that had been shipped by the bank to petitioner, its Seattle correspondent, in payment of overdrafts, were seized from the express company and delivered to said receivers. Petitioner by leave filed a petition in the cause, asking that the order granting the writ be set aside, and the receivers directed to deliver to it the coin and other treasure. After a hearing, the court found that title to the shipment had not passed to petitioner, and dismissed its petition. *Held*, that such findings determined petitioner's right in the property on the merits, and the order based thereon, whatever its form, was a final order, and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 71.*]

2. APPEAL AND ERROR (§ 143*)—PARTIES ENTITLED TO APPEAL—INTERVENER.
One not originally a party to an equity suit, but who claims property in the hands of receivers appointed therein, on being granted leave to file a petition for an order on the receivers to surrender the property, becomes a party to such an extent as to give him the right of appeal from an adverse decision on his claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 921; Dec. Dig. § 143.*]

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska.

Suit in equity by the Tanana Valley Railroad Company and John Zug against the Washington-Alaska Bank. From an order dismissing a petition filed by leave by the Dexter Horton National Bank of Seattle, Wash., such petitioner appeals. On motion to dismiss appeal. Motion denied.

A. R. Heilig and Peters & Powell, for appellant.
Fink & White, for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. The appellee, Washington-Alaska Bank, is a corporation organized under the laws of Nevada, and was on January 5, 1911, doing a general banking business at Fairbanks, in the territory of Alaska. On that date the Tanana Valley Railroad

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company and John Zug, being creditors, and the latter a stockholder, of the bank, instituted a suit against the bank for dissolution, with a view of finally winding out its business. As a means to that end, the appellees F. W. Hawkins and E. H. Mack were appointed receivers of its properties and effects. The appellee Fred G. Noyes was later appointed receiver to succeed Hawkins and Mack. Prior to the institution of this suit the Dexter Horton National Bank was its correspondent at Seattle, Wash. The former bank, on December 24, 1910, had largely overdrawn its account with the latter, and, upon the insistence of the latter, the former on the 26th, 28th, and 30th days of December delivered to the Yukon Express Company, a common carrier, three packages in gold coin, currency, and bullion, aggregating $101,000, consigned to Dexter Horton National Bank, at Seattle, Wash., charges prepaid. The packages were forwarded by the express company from Fairbanks to Chitna, and thence by rail to the coast at Cordova, in Alaska. The receivers, claiming to be the owners of the treasure thus consigned to Dexter Horton National Bank, made demand upon the transportation company for a redelivery of the possession to them, and, being denied, applied on January 7, 1911, to the court for a writ of assistance, which being issued, the marshal seized the treasure at Cordova, and on January 27, 1911, delivered the same to the receivers.

On January 19th the appellant filed a petition in said cause, showing the facts as above related as they existed up to that date, and expressing the desire that it be given an opportunity to be heard in support of the same, to the end that the order made on January 7th be rescinded and set aside, and the receivers directed to restore the treasure to it; the Dexter Horton National Bank claiming that the property belongs to it. The entry of the court shows that the petition was presented and read, and by leave of the court was filed in the cause, whereupon it was ordered that a hearing be had in said court upon the matters and things set forth in said petition. Testimony was taken in due course, and a hearing had, resulting in a denial and dismissal of the petition. The court found, among other things, that under the agreement between the two banks and the invariable custom the title to such shipment of money, bullion, and evidence of indebtedness passed to the Dexter Horton National Bank only when actually received over the counter of that bank. Thus it was held in a negative way that the title to the three boxes of treasure so shipped and consigned to the bank at Seattle did not pass to that bank by the shipment and consignment. Based upon this finding, the petition was dismissed.

The appellee, the Washington-Alaska Bank, now moves to dismiss the appeal, for the reason that the order dismissing the petition is not a final order, and hence not one from which an appeal will lie. Counsel in his brief and argument presents two points for decision, namely, that appellant is not a party to the record, hence is not entitled to appeal, and that the order is not final, and will not support an appeal.

[1] There was and could be but one purpose on the part of the Dexter Horton National Bank in petitioning the court to rescind its order granting the writ of assistance, which was to have the court determine its right and title to the shipments of coin, bullion, and evidence of indebtedness that had been made by the Washington-Alaska Bank, and was, when taken under the writ, in transit to the Dexter Horton National Bank at Seattle. The prayer of the petition is explicit that the receivers and the marshal be directed to restore to petitioner the said coin, bullion, and currency. In the end, the question as to whether the order should be rescinded was made to depend upon the question whether title passed from the Alaska bank to the Washington bank by what was done in forwarding the coin, bullion, etc., by the former to the latter. This was the very gist and essence of the controversy.

[2] It is said that the court made no order determining the ultimate rights of the appellant to the specific property, but simply refused to vacate the order granting the writ of assistance. We think the form of the order is immaterial. The effect of it was to adjudicate the rights of the parties in and to the treasure, and the refusal to vacate the writ of assistance was, in effect, to say that the marshal and receivers were entitled to the property as against the claim of the petitioner. Such being the case, it makes but little difference by what form of procedure the controversy was brought into the record, whether by intervention, or by petition pro interesse suo. The fact remains that the parties to the suit, including the petitioner, were all agreeable to it, the court entertained it, and the trial proceeded to a practical adjudication of the differences between the parties. The petition was in the nature of an intervention in the original suit, and was filed by leave of the court. This was sufficient to constitute the party petitioning a party to the procedure, and thus gave it a standing by which it was entitled to appeal, that its rights might be finally determined.

In the case of Winchester et al. v. Davis Pyrites Co., 67 Fed. 45, 14 C. C. A. 300, it was held that, "where property in the hands of receivers is claimed by persons not parties to the suit in which they were appointed, the proper procedure is to file a petition asking the court for an order on the receivers for delivery of the property"—affirming the lower court (C. C.) 64 Fed. 664. The quotation is from the headnote. The case at bar is by petition in the original suit by a person not a party thereto to have the property in controversy restored to it.

In the case of Gumbel v. Pitkin et al., 113 U. S. 545, 5 Sup. Ct. 616, 28 L. Ed. 1128, Gumbel gained a standing in court by petition of intervention, claiming certain property which the marshal had taken into his custody. This standing was deemed sufficient upon which to justify a right of appeal as a party; the court saying, among other things:

"If the plaintiff in error has a just foundation for his assertion of error in the judgment against him, it would be a great and apparently irremediable injustice to dismiss his writ."

Speaking on the subject of procedure, the Supreme Court, in the case of Krippendorf v. Hyde, 110 U. S. 276, 287, 4 Sup. Ct. 27, 32, 28 L. Ed. 145, says:

"The form of the proceeding, indeed, must be determined by the circumstances of the case. If the original cause, in which the process has issued or the property or fund is held, is in equity, the intervention will be by petition pro interesse suo, or by a more formal, but dependent, bill in equity, if necessary. Relief, either in a suit in equity or an action at law, may properly be given, in some cases, in a summary way, by motion merely, supported by affidavits. * * * In whatever form, however, the remedy is administered, whether according to a procedure in equity or at law, the rights of the parties will be preserved and protected against judicial error, and the final decree or judgment will be reviewable, by appeal or writ of error, according to the nature of the case."

According to these authorities the Dexter Horton National Bank became and was a party to the cause and is justly entitled to prosecute its appeal.

That the order was final is supported by Gumbel v. Pitkin, supra, and Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888. In the latter case it is said:

"If he [the receiver] would have had a right to appeal, surely the opposite parties have the same right."

One can scarcely doubt that, if the order of the trial court had been for restoration of the property to petitioner, the receivers would have been entitled to appeal.

It follows, from these considerations, that the motion to dismiss the appeal should be denied; and it is so ordered

---

G. & C. MERRIAM CO. v. SAALFIELD

(Circuit Court of Appeals, Sixth Circuit. October 28, 1911.)

No. 2,097.

1. JUDGMENT (§§ 665, 714*)—JUDGMENT AS BAR—NATURE AND REQUISITES OF FORMER ADJUDICATION.

In order to constitute an estoppel by a judgment or decree in a former suit, it must have been between the same parties as those in the subsequent suit in which the former judgment is interposed as a bar, or their privies, and the subject-matter on which the former judgment rests must be the same, or, if not the same, it must have involved some point or question bearing upon the main issue and material to its decision, in which case the judgment is conclusive upon that question.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1177, 1244; Dec. Dig. §§ 665, 714.*]

2. JUDGMENT (§ 681*)—PERSONS CONCLUDED—PERSONS SUCCEEDING TO INTERESTS PENDENTE LITE.

One who took over the business of publishing certain books from another, pending a suit against the latter for infringing the trade-name of another publisher in the title of such books, was bound by the decree subsequently entered in such suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. § 681.*]

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TRADE-MARKS AND TRADE-NAMES (§ 96*) — UNFAIR COMPETITION — CONSTRUCTION OF DECREE.

A decree enjoining the defendant from using the name "Webster" on the title page of dictionaries, unless accompanied by an explanation that the publication was not that of complainant, the original publisher of such dictionaries, and prescribing the language of such statement, while conclusive of the general equities of the parties, is not conclusive as to the precise form of statement required in another suit in a different district against one in privity with the first defendant for a different trespass; but whether or not the defendant therein infringes the rights of complainant is to be determined on the facts of the case.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 109; Dec. Dig. § 96.*

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

4. TRADE-MARKS AND TRADE-NAMES (§ 71*)—UNFAIR COMPETITION.

The use by defendant of the name "Webster" in connection with dictionaries published by him, unaccompanied by a proper explanatory statement, *held* in violation of the rights of complainant, whose publication had become known to the public under that name, although its right to the exclusive use of the name had expired with the copyright.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 71.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

Suit in equity by the G. & C. Merriam Company against Arthur J. Saalfield. Decree for defendant, and complainant appeals. Reversed.

Frank F. Reed and William B. Hale (Charles N. Judson and Edward S. Rogers, on the brief), for appellant.

George F. Bean and Charles R. Miller, for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and McCALL, District Judge.

SEVERENS, Circuit Judge. This is a suit by bill in equity, brought by the above-named complainant, the G. & C. Merriam Company, against the defendant, Saalfield, wherein the complainant alleges that for a long period of time it has been engaged in the publication and sale of a series of dictionaries, some large and comprehensive, and others abridgments thereof, all founded on the original dictionary prepared and published by Noah Webster, and severally bearing the name and title of "Webster's Dictionary." From this long use of that name in association with the name of the complainant, it is claimed that the distinctive name "Webster" has acquired a secondary meaning, and has long since come to be known, and is still known, by the public to signify the dictionaries published by the complainant. And thereupon the bill charges that the defendant is publishing and selling a parallel series of dictionaries, purporting to be Webster's dictionaries, and bearing his name prominently on the title page and backs thereof, and is advertising its publications to the public as genuine Webster's dictionaries, without any recognition of the prior right of complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

And it is claimed that this action of the defendant is intended to, and in fact does, lead the public to understand that his dictionaries are the genuine Webster's dictionaries published and sold by the complainant, and that by this alleged fraudulent conduct the public is deceived and induced to purchase the defendant's dictionaries, whereby the complainant's business is greatly injured.

It appears from the record that the dictionaries of the complainant, which at the time of the commencement of this suit were being published and sold, and which are supposed to be counterfeited by the defendant's dictionaries, have been copyrighted, but that these copyrights had expired. At all events, nothing is now claimed from any infringement of copyrights, and the case is planted solely upon the charge of unfair competition in business. But the fact that they have enjoyed the exclusive privileges afforded by the copyright law is one of much importance; for after that the exclusive privilege of the publisher is gone. He has agreed that it should be, as the price of the protection he has been accorded; and it is not now to be doubted that the name of the author is part and parcel of the matter copyrighted.

The case was brought to the attention of the Circuit Court by a motion for a preliminary injunction. But at the hearing thereof the case was by stipulation of counsel submitted as upon final hearing on the pleadings and proofs; it being agreed that the affidavits already filed should be treated as depositions, and certain other specified depositions taken in a case formerly depending in the Circuit Court of the United States for the District of Massachusetts between the present complainant and one Geo. W. Ogilvie should be considered as if taken regularly in the case before the court. The case was thereupon fully heard by Judge Tayler, who presided. The bill was dismissed, the court being of opinion that the present controversy was concluded by the decree of the court in the Massachusetts case above referred to; it appearing that Saalfield was in privity with Ogilvie, who, as has been stated, was a party to the former suit, and that, as the court thought, the issues were the same as in the present case. The opinion of the court, which comes up with the transcript, indicates that the court, considering the facts to be the same as in the former suit, forbore to further consider the merits.

The case in the Massachusetts court comprehended an original bill filed by Ogilvie against the Merriam Company for the purpose of protecting its right to publish and sell a comprehensive dictionary which it was about to publish under the title of "Webster's Imperial Dictionary." It was therein complained that the Merriam Company was publicly denying the right of the complainant to publish the dictionary with that title and threatening to prosecute all persons engaged in the publication or sale thereof. The Merriam Company answered the bill, and claimed to justify its opposition to the publication of the dictionary of the complainant upon the ground that it, the Merriam Company, had acquired by long-continued use an exclusive right to the use of the word "Webster," which was the characteristic of the title of Ogilvie's dictionary, in its own publications of dictionaries, and that Ogilvie's intended use of it in his own publication would be an im-

pairment of that right. By leave of the court the defendant in that suit filed a cross-bill, in which was set forth a history of its publications, in their several forms, of Webster's dictionaries having the name of "Webster" by way of distinction in their several titles, and that its predecessors in business had also acquired the good will of the business built up under that name, and claimed that by long-continued association of that name with the business of the company, as well as by the purchase of the good will from the Webster estate, it had acquired an exclusive right to use it. The cross-bill then alleged that Ogilvie had been, and then was, in various publications of dictionaries trespassing upon this right of the cross-complainant; and the relief prayed was that the cross-defendant be enjoined from using the name as descriptive of its publications, either alone or in combination with other words. To this cross-bill Ogilvie filed an answer, in which he reiterated his claim of right to use the name of "Webster," asserted in his original bill, and denied that he was transcending the proper limitations thereof, or had any purpose to do so. Thus by the pleadings of the parties substantially the whole controversy between them as it then existed was brought before the court for its determination. Upon hearing the pleadings and proofs, Judge Colt in a clear and concise opinion held that both parties were asserting claims which exceeded their respective rights—the Merriam Company in claiming an exclusive right to use the name "Webster" in connection with its publication of dictionaries and in denouncing the claim of right set up by Ogilvie to use it; and Ogilvie, although conceding his right to use it, in not taking the proper measures to explain to the public that his dictionaries were not the dictionaries of the Merriam Company. The court so held in regard to the duty of Ogilvie, because it found that the Merriam Company had for so long a time employed the name of "Webster" in association with its dictionaries that it had acquired a secondary meaning, namely, that it was a production of the Merriam Company, and that by its use without explanation the public would understand that the dictionaries published by Ogilvie and offered for sale by him were the dictionaries of the Merriam Company, which latter the public would desire to have. A decree was entered in conformity with these conclusions. Ogilvie v. G. & C. Merriam Co. (C. C.) 149 Fed. 858. An injunction was ordered, but in terms which, as the Court of Appeals for that circuit held, was not sufficiently specific to define the duty of the cross-defendant. The Merriam Company appealed from the Circuit Court's decree. The Circuit Court of Appeals confirmed the rulings of Judge Colt upon the law and facts, but, for the reason that the injunction ordered was thought not to be sufficiently specific, reversed the decree and remanded the case for the entry of a decree such as the Court of Appeals thought would better fit the circumstances of the case. G. & C. Merriam Co. v. Ogilvie, 159 Fed. 638, 16 L. R. A. (N. S.) 549. From the decree entered by the Circuit Court on receiving the mandate, the Merriam Company again appealed, insisting that the following words should be ordered by the injunction to be made unmistak-

ably to appear in the title-page of every volume of the class of dictionaries to which that litigation related, namely:

"This dictionary is not published by the original publishers of Webster's Dictionary or by their successors."

This amendment was sanctioned by the Circuit Court of Appeals, and the case was remanded for the entry of a final decree. 170 Fed. 167, 95 C. C. A. 423. Thereupon the following decree (omitting formal and irrelevant parts) was entered in the Circuit Court:

"That a perpetual injunction issue in this suit, restraining the defendant, the G. & C. Merriam Company, its officers, agents, attorneys, and servants, and all others claiming or holding through or under it, from publishing or issuing circulars, advertisements, or notices stating in form or effect, or in any manner claiming, that it, the defendant, or any other person, firm, or corporation claiming under or through it, has exclusive right to the use of the name 'Webster' in the title of dictionaries.

"That a perpetual injunction issue in this suit, restraining the cross-defendant, George W. Ogilvie, his agents, attorneys, servants, employés, and all persons claiming or holding through or under him, from using as the name or title of his said dictionaries described in the amended cross-bill herein, to which this litigation relates, the words 'Webster's Dictionary,' or 'Webster's Imperial Dictionary,' or 'Webster's Universal Dictionary,' or any equivalent thereto, upon the title-page, or upon the back or cover of said dictionaries, or in any advertisement, circular, notice, or announcement referring to said dictionaries, unless accompanied by the following statement, plainly printed upon the title-page, and in each said advertisement, circular, notice, or announcement, namely: 'This dictionary is not published by the original publishers of Webster's Dictionary, or by their successors'—and especially from publishing or issuing in their present form the title-pages and backs of his said dictionaries and the circulars and advertisements in this suit adjudged misleading or deceptive, or in any other form of title-page, back, circular, or advertisement that is in any way calculated to deceive purchasers into purchasing complainant's dictionary under the belief that it is a Webster's dictionary published by the G. & C. Merriam Company."

A petition for a writ of certiorari to the Supreme Court of the United States was filed by the Merriam Company, but the petition was denied. The foregoing final decree of the Circuit Court is the one which Judge Tayler held conclusive of the present controversy.

[1] In order to constitute an estoppel by a judgment or decree in a former suit, the following conditions must exist: The former suit must have been between the same parties (or their privies) as those in the subsequent suit in which the former judgment is interposed as a bar, and the subject-matter on which the former judgment rests must be the same, or, if not the same, it must have involved some point or question bearing upon the main issue and material to its decision, in which case the judgment is conclusive upon that question. We need only to cite the two leading English and American decisions: The Dutchess of Kingston's Case, 2 Smith's Lead. Cas. 424, and Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[2] Guided by this rule, we proceed to consider whether the former judgment is binding upon the parties to this suit, and, if so, to what extent and upon what questions it is binding. It is contended by counsel for the complainant that the parties are not the same, nor privies to those parties, because Saalfield was not a party to the former suit, and so not bound by the judgment, and, as estoppels must be mutual,

the complainant is not bound. Let us refer to the facts. The suit in Massachusetts was commenced on August 9, 1904. The cross-bill was filed September 20th of the same year. The answer to the cross-bill was filed January 9, 1905. Replication to the answers to the bill and cross-bill were filed as early as February, 1905. Judge Colt's decision was filed January 9, 1907, and his decree, so far as it determined the rights of the parties, was affirmed by the Circuit Court of Appeals on January 30, 1908. In May, 1908, the defendant Saalfield "took over" the business of publishing the dictionaries from Ogilvie. The final decree was entered April 21, 1909. What was the precise nature of the contract between him and Ogilvie does not appear, and Saalfield refuses to disclose it. The court might well presume, if need be, that the contract was only of an agency and did not transfer a substantial right. But it is not material. The case was already pending, and the whole controversy had been submitted for the judgment of the court. Though not a party, Saalfield was bound by the final decree of the court. If a third party may thus come into the acquisition of rights involved in pending litigation without being bound by the final judgment, and require a suit de novo in order to bind him, he might, pending that suit, alienate that right to another with the same result, and a final decree bearing fruit could never be reached.

[3] The remaining question is one of more difficulty. We think it clear that the decree of the Circuit Court in Massachusetts concluded the general equities of the parties. It determined that the Merriam Company had not an exclusive right to use the name "Webster" in the publication of their dictionaries; that the defendant, Ogilvie, in common with the public generally, had the right to use it in connection with its publications, but upon the condition that its use should be accompanied by an explanation that the publication was not that of the Merriam Company, which, the court determined, had previously acquired the right to use as designating its own publications. But the difficulty comes in assenting to the claim that the judgment is conclusive in respect to the particular conduct of the parties required in that case for the future in order to perpetuate the enjoyment of the rights of the parties, for we more than doubt that that was of the essence of the court's decree. It is difficult to believe that the court meant to decide that the precise explanation that the defendant was required to make in using the name, and no other, should always be used. We are inclined to think that the language of the decree in this particular should be construed as meaning that the particular explanation required would exonerate the defendant from liability for using the name in association with his dictionaries. If this be so, it must follow that in the present case, which is founded upon other transactions and trespasses than those involved in the former case, the question whether the alleged conduct of the defendant is in violation of rights of the complainant is an open one, and must be determined upon its own facts, and not upon the assumption that they are to be judged of merely by comparison with the requirements of the decree in the Massachusetts case.

It is not to be implied from what we have said that we regard the

terms of the injunction ordered by the Circuit Court of Appeals for the First Circuit as an unreasonable or unjust limitation of the defendant's rights. On the contrary, we should be quite willing to adopt it, if the facts of this case should seem to call for it. The decisions of the Supreme Court in the cases of Singer Company v. June Company, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and Herring Safe Co. v. Hall's Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616, amply justify the provisions of such an order. Moreover, the courts of this circuit have no authority to superintend the enforcement of the decree in the First circuit. That province belongs exclusively to the court which pronounced the decree. An independent suit was necessary to be instituted in this circuit, if the rights of the complainant required an injunction for protection against wrongful acts committed here.

[4] On looking into the pleadings and evidence in the record before us, we are convinced that at the time when the suit was commenced the defendant in his advertisements, his publications, and sales of his dictionaries, was not observing his limitations. It seems to us that he studiously disregarded them. He constantly made use of the name "Webster" to promote his trade, and in doing so did not unmistakably indicate that his publications were not the publications of the well-known Webster's dictionaries published by the complainant. His references to other dictionaries were obscure. They might start a supercritical purchaser upon inquiry; but the general public would be likely to assume that a dictionary offered them, having the title "Webster's Dictionary," was the dictionary published by the old and well-known publishers of Webster's dictionaries, and accept the book with that tacit understanding. The defendant's constant abstention from all reference to the complainant is indicative of a purpose not to direct the attention of buyers to the fact that his own publications were not the publications they were looking for.

The averment of his answer that his publications are in conformity with the decision of the court in Massachusetts is too general. It gives no date from and after which he so conformed, and it is proven that at the time when the bill was filed he was not doing so. Moreover, the averment amounts to a mere conclusion of his own, and furnishes no data upon which the court can judge whether his opinion is correct or not. In response to an interrogatory attached to the bill, the defendant appends to his answer copies of his business advertisements and circulars to the trade, to which he refers as indicating his observance of the requirements of the Massachusetts injunction. But an inspection of them fails to show any purpose to do this. On the contrary, they show, by what they contain and what they omit to state, a purpose to keep in obscurity what his duty was to make plain. Copies of pictures of the defendant's dictionaries are shown in some of these advertisements and circulars; but only the lettering on the back and the outside of the front covers is displayed, and in this the name "Webster" is prominent, but there is no hint to distinguish the book from the original Webster's or its successors. We can only conjecture what appeared on the title-page. In short, we cannot doubt

that the defendant has, since the Massachusetts decree was pronounced, not merely neglected to make clear that his dictionaries were not in the line of the original publication of Webster's dictionaries and its successors, but has purposely attempted to mislead the public into the belief that his publications were legitimate successors in the line of the publications of the well-known Merriam Company, with which the general public associated the name of "Webster."

With respect to the matter of an accounting, the case is beset with the same difficulties that were present in the Massachusetts case, and were alluded to by Judge Putnam in the final opinion of that case, and for the present we shall make no order in that regard. This, however, we will do without prejudice to a motion for rehearing in that behalf, if the complainant is advised to make such an application.

The decree of the court below must be reversed, with costs, and a decree for the complainant should be entered, awarding an injunction such as indicated by this opinion. For the sake of conformity, we will direct the form of the injunction to be entered to be that awarded at the final decree in the First circuit, copied in the foregoing opinion.

KNAPPEN, Circuit Judge. I concur in the foregoing opinion of Judge SEVERENS upon the construction thereof that what is there said regarding the defendant's failure to conform to the limitations imposed upon him is confined to the situation existing at the time of the filing of the bill in the case before this court (which was December 26, 1908), and which situation continued until after the final decree and injunction in the Massachusetts case (which were made and issued April 21, 1909), at some time after which date the defendant changed the title-pages and inscriptions of his new issues of dictionaries, as well as of his new advertising matter, for the apparent purpose of conforming to the injunction in the Massachusetts case. I think defendant's liability is to be tested by reference to the requirements of that final decree and injunction.

WOODS v. BRUNSWICK-BALKE-COLLENDER CO.†

(Circuit Court of Appeals, Ninth Circuit. October 9, 1911.)

No. 2,006.

BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE CONTRACT.

Under Pierce's Code Wash. § 6547, which provides that a memorandum of all conditional sales of personal property "shall be filed in the auditor's office of the county wherein * * * the vendee resides," a petitioner which made and installed café fixtures in the place of business of a corporation in Seattle under a contract reserving title until full payment, which contract was filed in the auditor's office of that county on the day after its execution, was entitled to reclaim the property on the bankruptcy of the corporation, and proof that the purchase price had not been paid, although its petition did not expressly allege that the bankrupt resided in that county, where such fact was shown by the record.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

In the matter of the Luneta Company, bankrupt. On appeal from an order directing the surrender of property by B. T. Woods, Jr., as trustee, to the Brunswick-Balke-Collender Company. Affirmed.

Leopold M. Stern and H. E. Porter, for appellant.

R. S. Jones and James A. Snoddy, for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. This case presents a contest between the seller of certain bar and café fixtures and furniture and the trustee in bankruptcy of the vendee. The appellee was the seller of the property, which, having passed into the hands of the trustee of the estate of the bankrupt vendee, it asked by petition duly presented and filed for the return of the property to it on the alleged ground that the title thereto all the time remained in it, and that the possession of the property passed to the vendee under and by virtue of a valid conditional sale only, the terms of which had not been complied with. Issue upon the petition having been joined, the matter came on for hearing before the referee in bankruptcy, where the case was submitted upon the evidence offered by the petitioner; the trustee having announced that it had none to offer. The referee having thereupon granted the petition and directed the surrender of the property to the petitioner necessarily determined all the material facts in favor of the petitioner. Upon the petition of the trustee for a review of that order by the District Court, the evidence so given came up for the consideration of the court below, which held it amply sufficient to sustain the facts thus necessarily found by the referee. We are of the same opinion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied November 6, 1911.

The petition alleged that the petitioner on or about September 20, 1910, as a result of negotiations made with one George A. Bundy and others for the use and benefit of the corporation hereinafter mentioned, contracted to "furnish, manufacture, conditionally sell, and install" certain specifically described personal property in the place of business to be thereafter occupied by the Luneta Company, a corporation then in contemplation and process of organization, and later, and prior to December 20th of the same year, further covenanted with that company and the persons "organizing, managing, and controlling" the same to manufacture, conditionally sell, and install certain other specifically described articles in the place of business of the Luneta Company in the basement of the Grand Opera House, in the city of Seattle, King county, Wash.; that by the original and subsequent agreements of the parties mentioned the Luneta Company was to pay the petitioner the aggregate sum of $2,358 for the property, $250 of which were paid in cash and the balance to be paid in one payment on or before January 10, 1911; that, pursuant to the said agreement, the petitioner caused the various articles referred to to be manufactured and to be shipped to and installed in the aforesaid place of business of the said company, completing the delivery and installation thereof on the 20th day of December, 1910, and on that day, pursuant to the agreement, took from the company a conditional contract of sale, wherein and whereby all of the said property was described, the terms of the said sale specified, and wherein it was expressly agreed "that the said goods and chattels shall remain absolutely the property of the Brunswick-Balke-Collender Company until" the purchase price thereof should be fully paid; that within 10 days after December 20, 1910, the petitioner caused "a copy of such conditional sale contract to be filed for record in the office of the county auditor of King county, Wash., the county in which said property is located; that the said vendee did not make the payment contracted for in said contract, nor any part thereof, but was thereafter adjudged a bankrupt in this proceeding."

The effect of the testimony given on behalf of the petitioner, which, as has been said, was the only evidence introduced before the referee, was that the agreements alleged were made, that the articles stipulated for were furnished, delivered, and installed in the aforesaid place of business of the Luneta Company, such delivery and installation being completed on the 20th day of December, 1910, on which day the conditional contract of sale agreed upon was executed by the Luneta Company, and on the next day, to wit, December 21, 1910, was filed in the office of the auditor of King county. The evidence further shows that no part of the purchase money remaining due was paid or tendered either by the bankrupt or any one else.

The provision of the statute of the state of Washington (Pierce's Code, § 6547) applicable to the case reads as follows:

"All conditional sales of personal property * * * shall be filed in the auditor's office of the county wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The petition alleged that the contract in question was filed for record in the auditor's office of that county. Its further allegation that the property was also "located" in that county is unimportant. The record of the bankruptcy proceedings, of all of which both the District Court and the referee in bankruptcy, of course, had official notice, as well as the evidence, showed that the place of business of the bankrupt concern was in King county, which must be held to have been its residence. The contract of conditional sale was therefore filed for record in the required county.

The appeal in our opinion is entirely without merit, and the judgment is accordingly affirmed.

PIONEER MINING CO. et al. v. MITCHELL.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1911.)

No. 1,965.

1. MINES AND MINERALS (§ 51*)—PLEADING—NATURE OF ACTION.
   Under Carter's Ann. Code Civ. Proc. Alaska, § 1, which abolishes forms of action, a complaint alleging that defendants, by their lessees of an adjoining claim, entered upon plaintiff's mining claim and extracted gold therefrom, which they converted to their own use, defendants receiving a share of the same as royalty, states a cause of action in the nature of trover, which entitles plaintiff to recover as damages the value of such royalty.
   [Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]
2. MINES AND MINERALS (§ 71*)—RECOVERY FOR CONVERSION OF MINERALS—JOINT LIABILITY.
   Where defendants, who were owners in common of a mining claim, which was leased, with notice that their lessees were taking gold from plaintiff's claim adjoining, received royalties therefrom, they were jointly liable to plaintiff therefor.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 198, 199; Dec. Dig. § 71.*]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Action at law by Charles Mitchell against the Pioneer Mining Company and A. H. Dunham. Judgment for plaintiff, and defendants bring error. Affirmed.

This is an action to recover for certain gold extracted from a mine of which defendant in error, being plaintiff below, claims to be the owner. The complaint sets forth that plaintiff is, and was during the times mentioned therein, the owner of a certain mining claim, known as "No. 1 Flat Creek," particularly describing the same; that in June, 1909, defendants wrongfully, unlawfully, and willfully entered upon the southerly portion of said claim, and thereafter, during the months of July and August, 1909, they and their agents and lessees wrongfully, knowingly and willfully, and against plaintiff's consent, mined the said claim, and extracted gold from the gold-bearing gravel thereon, to the amount and value of $5,606.88, and appropriated and converted the same to their own use; that defendants, with full knowledge of plaintiff's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rights therein, continued to mine said premises, against plaintiff's will, and actually received as royalty from the mining operations of their agents and lessees gold in amount and value of $991.91; and that, by reason of the premises, plaintiff has suffered damages in the sum of $5,606.88. The prayer is for judgment in that amount.

The answers of defendants (they answering separately) show that defendants are the owners of a mining claim known as the "Gold Belt Fraction," which adjoins and overlaps the No. 1 Flat Creek claim; that on August 10, 1908, the then owners of the Gold Belt Fraction, namely, C. A. Banghart and A. H. Dunham, leased the same to O. A. Margraf and J. A. McFarlane for a term of two years, and thereafter, on the 14th day of June, 1909, the defendant Pioneer Mining Company purchased an undivided three-fourths interest in said claim from Banghart and one J. K. Sewell; that prior thereto the lessees assigned and transferred the lease, by mesne assignments, to C. H. Marsh, George Marsh, G. H. Marsh, and Harry Ashland; that such assignees, about the time stated in the complaint, entered upon and mined the Gold Belt Fraction, and in doing so, in good faith and believing that they had a right so to do, but without the knowledge, instance, or authority of the defendants, entered upon and mined in part the overlap; that the Pioneer Mining Company received from said lessees as royalties $619.95, and Dunham $206.65; that as to what proportion of the gold dust mined by said lessees came from the claim of plaintiff defendants do not know, and therefore deny that they received any royalties or gold dust from said claim, and deny that plaintiff is damaged in any sum whatever.

The cause came on for trial before a jury, and verdict and judgment were for plaintiff in the sum of $826.60. The writ of error is from such judgment.

Metson, Drew & Mackenzie, E. H. Ryan, Ira D. Orton, and G. J. Lomen, for plaintiffs in error.

James W. Bell, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). Evidence was adduced tending to show that plaintiff had acquired title to claim No. 1 Flat Creek; that Gold Belt Fraction overlapped it, but that the former was first duly located; that the Marshes and Ashland mined upon the overlap, and extracted gold therefrom, the royalties on which amounted to the sum of $991.98, all of which was paid over to Dunham; that plaintiff notified the lessees that they were mining on his claim, also notified the defendants to the same purpose, thus showing knowledge on defendants' part that their lessees were working plaintiff's ground; that one clean-up of gold was mined, probably, before the Pioneer Mining Company purchased its interest, and before plaintiff notified the lessees that they were trespassing upon plaintiff's claim, but that the remaining clean-ups were all mined subsequent to notice to the defendants of such trespass. The jury evidently omitted the royalty on the first clean-up, amounting to $171.07, from their estimate, and gave a verdict for the remainder. It appears that Dunham paid over to the Pioneer Mining Company its full proportion of these royalties, reserving his own share.

It further appeared from plaintiff's admission that, at the time the gold was extracted by defendants' lessees, the plaintiff's claim was also under lease to another party from plaintiff. When, however, defendants' counsel offered the lease in evidence, it was not admitted, and an

exception was allowed. At the close of plaintiff's case, defendants moved for a nonsuit, and at the close of the entire evidence for an instructed verdict, both of which motions were denied. The principal assignments of error are based upon the court's ruling in refusing to admit the lease in evidence and in denying the motions for nonsuit and instructed verdict.

[1] The strong contention of counsel for plaintiffs in error is that the action is one of trespass quare clausum fregit, and, being such, the plaintiff must show actual or constructive possession, without which he cannot recover. If the action be technically such as is suggested, then it may well be conceded that counsel's conclusion should follow. Counsel for defendant in error contends, however, that the action is in the nature of a trespass de bonis asportatis, or trover, and is appropriate to recover the royalties that defendants received from the mine.

Under the Alaska statute, all forms of action are abolished. Section 1, c. 1, tit. 2, Civil Code of Procedure of Alaska, 1 Fed. St. Ann. 55. Under this procedure, it is simply necessary to state the facts out of which the cause of action arises. "And when," says the Supreme Court of Kansas, "the plaintiff has stated the facts of his case he will be entitled to recover thereon just what such facts will authorize." McGonigle v. Atchison, 33 Kan. 726, 736, 7 Pac. 550, 553. Continuing, the court further says:

"We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. If the facts stated would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election."

That was a case where a party had dug sand upon the plaintiff's land in Missouri and carried it away into Kansas, and the question arose whether damages could be recovered in Kansas for the trespass and appropriation of the sand. It turned upon the point whether the action was local or transitory. If it was trespass quare clausum fregit, it was local, and could not be prosecuted in Kansas. If de bonis asportatis, or trover, it was transitory, and could be so prosecuted. The court determined the matter from the allegations of fact contained in the plaintiff's complaint. While it was thought the complaint stated facts sufficient to constitute a cause quare clausum fregit, it also stated facts entitling to recovery upon the other cause, of de bonis asportatis, or trover.

So in the present case we think the statement of facts quite sufficient to entitle the plaintiff to recover as for gold taken from the mine of plaintiff and converted to the use of defendants. The complaint alleges that defendants entered upon the mine and extracted the gold, and appropriated and converted the same to their own use, and prays damages. And why should not the plaintiff be entitled to recover? The defendants admit receiving the royalties, but are without knowledge as to whether the gold came from the Gold Belt Fraction or No. 1 Flat Creek. The royalties are such, presumably, as plaintiff would

have received from his own lessee, had the lessees of defendants not mined the ground first, and in justice and equity the royalties belong to plaintiff, and not to the defendants. Under this construction of the complaint, the lease offered in evidence, and rejected, was not material to the issues. So, also, was there no error in denying the nonsuit and the motion for an instructed verdict.

[2] Another contention is that defendants, in any event, are not jointly liable. The testimony tends to show that defendants persisted in requiring the Marshes and Ashland to continue their mining operations, notwithstanding they were abundantly notified that the lessees were mining on the plaintiff's ground, and there is no doubt that the defendants jointly received and appropriated the royalties. The proportion of the division of such royalties between them does not alter the relation. So it follows that they incurred a joint liability.

The judgment of the District Court should be affirmed, and it is so ordered.

HOWARD v. SHINN et al. (DRAKE et al., Interveners).

(Circuit Court of Appeals, Ninth Circuit. October 9, 1911. On Petition for Rehearing, October 27, 1911.)

No. 1,915.

CORPORATIONS (§ 482*) — MORTGAGES — FORECLOSURE — REPRESENTATION OF BONDHOLDERS BY TRUSTEE.

Where the same trustee was named for different sets of bondholders of a corporation, and in a foreclosure suit consented to a decree which gave the junior bondholders priority of lien over the senior, it cannot be considered as representing the latter in such suit, and, if not otherwise represented, they are entitled to come in and be heard on such question of priority, even after decree; but an order, subsequently made, which permits them to raise the question on distribution of the proceeds of the sale of the property, is such a modification of the original decree as fully protects their rights.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.*]

Appeal from the Circuit Court of the United States for the District of Oregon.

Suit in equity by Frank R. Shinn and others against the Deschutes Irrigation & Power Company, Frederick S. Stanley, Roscoe Howard, and the Merchants' Savings & Trust Company, formerly the Merchants' Investment & Trust Company, in which Alexander M. Drake, the Pilot Butte Development Company, and R. S. Howard, Jr., receiver of the Title Guarantee & Trust Company, intervened. Decree for complainants, and Intervener Howard appeals. Affirmed.

William C. Bristol, for appellant.

Louis G. Addison, Jesse Stearns, John H. Hall, Carey & Kerr, Charles H. Carey, and James B. Kerr, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

---

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSS, Circuit Judge. We have given to the elaborate briefs of counsel in this cause careful consideration. Our views in respect to the case may be stated in a few words: The suit was brought for the foreclosure of a mortgage given to secure certain bonds—the appellee Merchants' Savings & Trust Company, formerly Merchants' Investment & Trust Company, a corporation of the state of Oregon, being therein named as trustee—and to procure the appointment of a receiver of the mortgaged property pendente lite. The mortgage executed to secure those bonds contained, among other things, this clause:

"Provided, further, that this deed shall not operate or be held to prohibit the party of the first part from selling or conveying, or otherwise disposing of, for the use and benefit and maintenance of the property of said company, or for the liquidation of said bonds, or any part thereof, and free from the incumbrances of this trust, any real or personal property now owned or hereafter to be acquired by this company."

Certain persons advanced money to the mortgagor under and by virtue of the latter clause of the mortgage, for which what are called in the record "collateral bonds" were issued to them; and, those persons being made parties to the suit by an amended bill filed in the cause, they set up their claims as preferred liens to that of the first mortgage bondholders, $25,000 in face value of which the appellant Howard held and still holds as receiver of the Title Guarantee & Trust Company.

In the matter of the collateral bonds the appellee Merchants' Savings & Trust Company was also named as trustee, and that company undertook to act as trustee in respect to both classes of the bonds. The record shows that a decree of foreclosure was entered in the cause on the 8th day of September, 1910, by consent of all of the then parties to the suit; the appellant, Receiver Howard, not being a party thereto, unless he can be held to have been represented by the appellee Merchants' Savings & Trust Company. That trustee not only consented to the entry of the decree of September 8th, which, among other things, established the priority of the lien of the collateral bonds over the first mortgage bonds, but by its pleadings filed in the cause expressly admitted and set up such priority. The antagonistic positions thus assumed by that trustee, therefore, precludes it, upon the most obvious principles of equity, from being considered as the representative of the appellant in the cause. And it is equally plain that the appellant, being the holder of some of the first mortgage bonds, was and is entitled to be heard upon the question of the priority of the respective liens. It was upon that question that he sought to be heard by means of proceedings subsequently taken by him in the cause, which culminated in the entry on the 3d day of October, 1910, of a decree which, among other things, provided as follows:

"That the said R. S. Howard, receiver, and A. M. Drake, as bondholders, are hereby decreed and granted the right to intervene and be heard on the question of the distribution of the proceeds of the sale of the mortgaged property to be sold under said decree [of September 8, 1910], for the purpose of having determined the priority of the first mortgage and the collateral trust mortgage to the right of lien upon the property held by the trustee to secure the collateral trust mortgage."

This was in effect a modification of the decree of September 8, 1910, and secures to the appellant the right to be heard upon the question of priority of the lien securing the bonds held by him. Nothing more being needed to secure his alleged rights in the premises, the decree of October 3, 1910, from which his appeal is taken, is affirmed.

On Petition for Rehearing.

The right accorded the appellant by the decree of October 3, 1910, from which the appeal is taken, to intervene and be heard on the question of the distribution of the proceeds of the sale of the mortgaged property, seems, upon further examination, to be limited thereby to the question of priority as between the first and collateral trust bondholders only; whereas, for the reasons stated in our opinion filed in the cause, the appellant, not having been either a party to the suit or represented therein, is entitled to be heard upon the question of the priority of the first mortgage lien over any and all other liens. The judgment of affirmance of the decree of October 3, 1910, directed by the opinion of this court filed herein, is therefore so modified as to direct that the above-mentioned limitation contained in the decree appealed from, to wit, that of October 3, 1910, be stricken out, and the said decree be so modified as to afford the appellant, on his intervention therein provided for, the right to be heard on the question of the priority of the lien of the first mortgage over any and all other liens; and, as so modified, the decree appealed from will stand affirmed.

The petition for rehearing is denied.

GOODRICH TRANSIT CO. v. INTERSTATE COMMERCE COMMISSION (UNITED STATES, Intervener).

WHITE STAR LINE v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(Commerce Court. October 5, 1911.)

Nos. 21–24.

1. STATUTES (§ 217*)—CONSTRUCTION—EXTRINSIC AIDS—HISTORY OF PASSAGE OF ACT.

It is proper for courts to review the proceedings connected with the passage of a law through the legislative houses, as bearing on the correct interpretation of the text used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*

History and passage of statutes and contemporaneous circumstances as aids to construction, see note to Morle v. Bidwell, 65 C. C. A. 535.]

2. COMMERCE (§ 85*)—JURISDICTION OF INTERSTATE COMMERCE COMMISSION—CARRIERS BY WATER.

It was not the purpose of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), either as originally passed or as since amended, to subject independent carriers by water to its provisions, and it does not vest the Interstate Commerce Commission with any control over the business of such carriers, except such interstate traffic as is carried on under a joint arrangement with rail carriers.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

3. COMMERCE (§ 85*)—JURISDICTION OF INTERSTATE COMMERCE COMMISSION—REGULATION OF CARRIERS BY WATER—REPORTS AND FORMS OF ACCOUNTING—"COMMON ARRANGEMENT."

A steamship company, which joins with a railroad carrier in making, filing, and publishing joint through rates for interstate traffic, is as to such traffic used under a "common arrangement" with the railroad company, within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1150), and subject to regulation and control by the Interstate Commerce Commission; but such power to regulate and control does not extend to the other port-to-port business of the company, whether interstate or intrastate. Under section 20 of the act as so amended, and as further amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 555, the Commission has power to require reports from such company, and to prescribe a system of bookkeeping and accounting with respect to such joint traffic and directly relating thereto, but it has no power to extend such requirements to include other matters or business of the company having no direct relation to such joint traffic.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

Two petitions by the Goodrich Transit Company against the Interstate Commerce Commission, the United States intervening, and two petitions by the White Star Line against the United States, the Interstate Commerce Commission intervening; the relief sought being injunctions to restrain enforcement of orders made by the Interstate Commerce Commission. On demurrers to petitions and motions to dismiss. Demurrers and motions overruled, and injunctions granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ralph M. Shaw, for petitioners.

J. A. Fowler, Asst. Atty. Gen., and Charles W. Needham, for respondents.

Before KNAPP, Presiding Judge, and ARCHBALD, CARLAND, HUNT, and MACK, Associate Judges.

No. 21.

HUNT, Judge. The Goodrich Transit Company, a corporation organized under the laws of Maine, filed this bill in equity on December 29, 1910, in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, to obtain an injunction against the enforcement of certain orders of the Interstate Commerce Commission. For the sake of brevity, we will hereafter refer to the Goodrich Transit Company as the Transit Company and to the Interstate Commerce Commission as the Commission.

It appears from the bill that the Transit Company has its principal operating office in Chicago, Ill., and since its organization in 1906 has been engaged in the transportation of passengers and freight on Lake Michigan, Lake Huron, and the rivers tributary thereto. It owns and operates steamers and dock properties in Illinois, Wisconsin, and Michigan; several of such dock properties being near the mouths of rivers. The docks are used as landing places, where freight and passengers are discharged and taken off. The steamers carry passengers and freight originating at ports of the states of Michigan, Wisconsin, and Illinois, and destined to ports in each of the said states. This transportation is entirely by water, and unconnected with any land transportation whatever, and is spoken of as "port-to-port interstate business." The Transit Company's steamers also carry passengers and freight originating at and destined to ports in the same state. and not passing out of said state en route, and this business is spoken of as "port-to-port intrastate business."

The bill alleges that the Transit Company had voluntarily agreed with some of the interstate railroad carriers of the United States to establish certain through routes over which passengers and freight were being carried under joint tariffs, and that for the purpose of establishing such through routes it had voluntarily filed with the Commission its joint tariffs or its concurrence in tariffs filed by such railroad carriers, and that the Transit Company's steamers carry for hire passengers and freight under said joint tariffs over the water portion of said through routes. It is alleged with some detail that the principal part of the business of the Transit Company is derived from its port-to-port and intrastate business, and that competition is active and open to any who may desire to engage in such business, which includes the privilege of the use of docking and terminal facilities. The bill alleges that on June 11, 1910, the Commission entered the following order:

"It is ordered, that Special Report Series Circular No. 10, prepared under the direction of this Commission by Henry C. Adams, in charge of statistics and accounts, be, and the same is hereby, approved; that a copy of the said Special Report Series Circular No. 10 be sent to each and every car-

rier by water within the jurisdiction of this Commission; that each and every of the said carriers by water be required to make full and true answers to the several inquiries contained in the said Special Report Series Circular No. 10, and to verify its said answers by the oath of the president or other principal officer of such company; and that the said oath be in the form provided in the said Special Report Series Circular No. 10."

Attached to the petitioner's bill is a copy of the Special Report Series Circular No. 10, referred to in the order of the Commission, dated June 11, 1910, to which said special report we shall have occasion hereafter to refer.

Service of the order is alleged to have been made, and notification was given that, unless answers to the questions propounded in the special report were made before December 31, 1910, the Transit Company would be liable to the penalties prescribed in section 20 of the act to regulate commerce, as amended by the act approved June 18, 1910.

The petitioner avers that the interrogatories contained in the special report just referred to made no distinction between the business transacted by the Transit Company, which was solely intrastate business, and that transacted which was wholly port-to-port business, and that which was the result of joint rail and water routes, to which the Transit Company became a voluntary party; and it is alleged that, inasmuch as the Transit Company had voluntarily become a party to the joint rail and water routes referred to, the Commission insisted that it had jurisdiction over all the business of the Transit Company, without regard to its nature or the places between which it was transacted. The bill sets up that since the creation of the Commission, in 1887, never, prior to the entry of the order above referred to, had the Commission required any reports from water carriers generally, or any report of any kind from this particular petitioner.

It is further alleged that the Commission, on January 7, 1909, construed the act to regulate commerce as subjecting carriers of interstate commerce by water to the provisions of the act only in respect to traffic transported under a common control, management, or arrangement with a rail carrier.

It is set forth that the inquiries made by the Commission were not for the purpose of exacting evidence under any complaint filed for violation of the act to regulate commerce, or for the purpose of making investigations that might have been made the object of a complaint, that a large number of the questions propounded in the special report called for pertained solely to the internal affairs of the company, and that it is impossible to answer them without reporting to the Commission details in connection with the internal management of the business of the Transit Company; and it is pleaded that the Commission has no constitutional authority to regulate or to inquire into the internal affairs of the Transit Company, and is without power to regulate commerce which is wholly intrastate or to make inquiries respecting commerce which is wholly intrastate.

The order of the Commission is alleged to be void because of lack of power in the Commission, and because to enforce the order would be a violation of the fourth amendment to the Constitution of the

United States, prohibiting unreasonable searches or seizures, and because the information sought by the inquiries is a property right, and because to enforce the order of the Commission would be to take the property of the Transit Company without compensation and without due process of law.

The relief prayed for is an interlocutory order suspending the order of the Commission and restraining that body from taking any steps to enforce the order, and that upon final hearing the order of the Commission should be annulled. There is a further prayer to the effect that if, however, it should be found that the Commission had authority to require an answer to any of the questions contained in the Report No. 10, referred to, upon final hearing the court would enter an order specifically designating such questions in said report as the Commission could lawfully require to be answered, and that the Commission be restrained from attempting to enforce answers to any questions not included in the designation made by the court.

The Commission interposed a demurrer, based upon the ground that the bill failed to state any equity. The Circuit Court for the Northern District of Illinois, Eastern Division, upon December 31, 1910, stayed the order of the Commission until the further order of the court.

After the opening of the United States Commerce Court, and pursuant to section 6 of the act to create the said court (Act June 18, 1910, c. 309, 36 Stat. 544), the case was transferred, and is now here to be proceeded with as may be proper.

By leave had the United States has intervened and filed an answer, admitting the allegations of fact contained in the bill, but setting forth that the requirements made by the orders of the Commission do not make distinction between the books which petitioner might keep and its method of accounting for its income and expenses in connection with its interstate business and its port-to-port business, as separate from its business as a result of its joint rail and water routes, because (1) while the income from each of the different kinds of business stated in the bill can be ascertained with reasonable accuracy, yet it is impossible to determine with any substantial degree of accuracy the expenses incurred in either of them, as separate and distinct from those incurred in the others, and (2) because it is essential that the Commission be informed as to the total income derived by the Transit Company, in order that the Commission may determine what are reasonable and just rates to be charged by petitioner in its joint rail and water business, and to determine whether it complies with the provisions of the law regulating interstate commerce.

The United States also sets up that the system of bookkeeping devised by the Commission is the result of long experience, and well adapted to the preservation of data for the information of the Commission, and that in the absence of a method prescribed by the Commission a carrier might manipulate its books and reports in a way to conceal rather than to reveal the true state of its business, and that it is of vital importance to the Commission to have the information called for in the order, in order that it may perform its duties as provided by the terms of the act to regulate commerce.

No. 22.

This suit was also brought in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

The Goodrich Transit Company, the same corporation referred to in case No. 21, after alleging substantially the same matters with respect to its incorporation and business as it had set forth in the averments in the the bill filed in case No. 21, alleges that on May 31, 1910, the Interstate Commerce Commission, acting under the authority claimed under section 20 of the act to regulate commerce, approved June 16, 1906, entered two certain orders relating to the subject of a uniform system of accounts to be prescribed for and kept by carriers by water. One of the orders prescribed that the classification of operating revenue of such carriers and the text pertaining thereto, prepared under the direction of the Commission, should govern in the keeping and recording of operating revenue accounts, and that the rules contained in what was known as the first issue of the classification of operating revenues of carriers by water should apply to the keeping and recording of such operating accounts, and that it should be unlawful for any such water carrier, or for any person directly in charge of the accounts of such carrier, to keep any account or record or memorandum of any operating revenue items, except in the manner and form as set forth and prescribed, and except as authorized by the Commission.

It was further ordered that any such carrier might subdivide any primary account in the first issue as might be required for the purposes of such carrier, or might make any assignment of the amount credited to any such primary account of operating divisions to its individual lines or estates, provided that a list of such subprimary accounts set up or such assignments made by any such carrier should be first filed in the office of the Commission. The order also provided that the carrier, in addition to the operating revenue accounts prescribed by the Commission, might keep any temporary or experimental accounts, the purpose of which should be to develop the efficiency of operation, but that such temporary or experimental accounts should not impair the integrity of any general or primary account prescribed by the order of the Commission. January 1, 1911, was the date upon which the order was to become effective.

The other order made was with respect to the classification of operating expenses of carriers by water. Classification was to be made pursuant to rules prescribed by the Commission and embodied in a printed form known as the first issue. It was ordered that the classification of operating expenses as prescribed should govern in keeping and recording operating expense accounts, and that the rules prescribed should be those according to which the operating expenses are defined; and the carriers were required to conform to the rules, and it was made unlawful for carriers to keep any accounts or records or memoranda of any operating expense item, except as set forth and prescribed in the manner and form laid down in the pamphlet called the "first issue." The carriers were authorized to subdivide any primary accounts as might be required for the purposes of such

carrier, or might make certain assignments of the amount charged to such primary account, provided that a list of such subprimary accounts or assignments should be first filed with the Commission. Authority was also given to the carrier to keep any temporary or experimental accounts, the purpose of which was to develop the efficiency of operation; but such temporary or experimental accounts were not to impair the integrity of any general or primary accounts as prescribed by the Commission, and such temporary or experimental accounts were required to be open for inspection by the Commission. The date upon which this order was to be effective was January 1, 1911.

The petitioner alleges that two pamphlets, one entitled "The Classification of Operating Revenues of Carriers by Water as Prescribed by the Interstate Commerce Commission," etc., and the other of which was entitled "The Classification of Operating Expenses of Carriers by Water, as Prescribed by the Interstate Commerce Commission," etc., were served upon it, and it is alleged that the bookkeeping methods prescribed by the order of the Commission differ widely from those used by petitioner, and that, in order to comply with the requirements of the Commission, petitioner will have to open a completely new set of books and change its methods of accounting, all of which would entail annoyance and expense.

It is averred that the Commission has notified the petitioner that, beginning with January 1, 1911, a new set of books must be opened, which must conform to the methods prescribed with respect to all of its business, including its intrastate business, its port-to-port interstate business, and its business as a part of joint routes with rail carriers, and that, in the event of a failure to conform its books and methods of accounting to the requirements prescribed, it will be subject to the penalties prescribed in section 20 of the act to regulate commerce.

Petitioner avers that the requirements make no distinction between the books which petitioner may keep and its method of accounting for its income and expenses in connection with its intrastate business, its port-to-port business, and the business which is transacted by petitioner as the result of the joint rail and water routes to which the petitioner has become voluntarily a party. It is averred that the act to regulate commerce, as amended in June, 1906, conferred upon the Commission the same authority that it now claims to exercise with respect to the books and accounts of water carriers generally, and that, though petitioner and other water carriers have voluntarily agreed with some interstate carriers by railroad to establish a limited number of through routes over which passengers or property have been transported by a continuous carriage, and have filed tariffs therefor with the Interstate Commerce Commission, yet the Commission never before has claimed that petitioner or other water carriers subjected themselves to all of the provisions of the act to regulate commerce or the provisions of section 20 thereof.

It is alleged that under the Constitution of the United States no power was conferred upon Congress to regulate in any method whatsoever the internal affairs of any corporation organized under the laws

of a state, and that no power was conferred upon Congress to delegate to the Commission the right to regulate in any method whatsoever the internal affairs of any corporation organized under the laws of a state, and that no power was conferred upon Congress to regulate any commerce which is wholly intrastate, and that Congress did not confer upon the Commission the right to regulate all or any part of the business of petitioner which was solely port-to-port business, either interstate or intrastate, and that the Commission is without power to prescribe the bookkeeping methods of petitioner with respect either to its intrastate business or its port-to-port business.

Petitioner, while denying that either the Congress or the Commission has any authority over the bookkeeping methods of petitioner with respect either to its income or its disbursements, avers that such jurisdiction, if any, as the Commission has over the bookkeeping methods of petitioner is limited solely to bookkeeping methods with respect to the income and disbursements of petitioner in connection with its joint rail and water business, and that the methods prescribed by the Commission are not reasonably adapted to the purpose of furnishing to the Commission any information with respect to the revenue or disbursements of petitioner relating to its joint rail and water business.

It is also alleged that the methods prescribed would not enable the Commission to pass upon the justness or fairness of any existing or proposed rate, classification, or practice of petitioner in connection with its joint rail and water business, or in connection with the existence or establishment of any through route, joint classification, or division of receipts upon such joint rail and water business.

It is further averred that it is possible to establish a method of bookkeeping by means of which the income and disbursements from the joint rail and water business of petitioner would be segregated, and that by the methods prescribed in the orders provision is not made for the segregation of the joint rail and water business from the petitioner's port-to-port business or intrastate business.

It is also averred that the right of the petitioner to keep its books in a way which shall seem to it appropriate is a property right, and that the deprivation of such right is a violation of the fifth amendment to the Constitution of the United States.

It is alleged that the orders as made are not regulations of interstate commerce, and that if section 20 of the act to regulate commerce is construed as it has been by the Commission it will be the taking of petitioner's property without compensation and without due process of law.

The prayer is that a temporary order may be entered, suspending the orders of the Commission, and restraining the Commission from taking any steps to enforce the orders, and that upon final hearing decree may be entered annulling and suspending the said orders and enjoining the Commission from taking any steps toward the enforcement of said orders. A further prayer is that if, in the judgment of the court, the orders of the Commission are lawful in any respect, the court shall say what requirements petitioner shall be obliged to live up to, and that injunction be issued restraining the Commission

from enforcing the order with respect to any matters not lawfully included within the order of the court.

The Commission demurred to the petition, the demurrer being based upon the ground that the bill failed to state any equity and that the allegations did not show that the legislative department of the government was without authority to grant the power exercised by the Commission in making the orders of May 31, 1910, and that the petition does not show that there is any violation of any constitutional or other right of the petitioner.

The United States filed an answer, admitting every allegation of fact contained in the petition, except as follows: It admits that, while no distinction has been made between petitioner's income and expenses in connection with its interstate business and intrastate business, such distinction was not made because while the income from the different kinds of business stated in the petition can with reasonable accuracy be ascertained, yet it is impossible to determine with any substantial degree of accuracy the expenses incurred in either of said kinds of business as separate and distinct from the others, and because it is essential that the Commission know the total income derived by petitioner from all it investments and sources, in order that the Commission may determine what are reasonable and just rates to be charged by petitioner in its joint rail and water business, and to determine whether it is complying with the provisions regulating interstate commerce. The answer, while expressly admitting allegations of fact contained in the petition, does not admit, but denies, inferences of fact from particular facts alleged and conclusions of law insisted upon in the petition.

The Circuit Court of the Northern District of Illinois stayed the order of the Commission, and the case, like No. 21, was thereafter transferred to this court.

No. 23 and No. 24.

These are petitions filed originally in this court by the White Star Line against the United States, wherein petitioner attacks the validity of the same orders specified in the two preceding cases, and seeks to restrain their enforcement. The allegations of the petitions are very similar to those already set forth in the petitions of the Goodrich Transit Company. It is averred herein, however, that the White Star Line, in addition to its transportation business, owns two amusement parks, both situated within the state of Michigan; that in connection with the said parks it owns, operates, and derives revenue from lunch stands, merry-go-rounds, bowling alleys, bathhouses, souvenir stands, photograph stands, boat liveries, and launch ferries, and that admission fees are collected from people who enter said amusement parks. The petitioner alleges that the Commission had no power to regulate the books or to demand the reports which were kept with respect to the conduct of its amusement parks, the business of keeping said parks being separate and distinct from the transportation business of the petitioner.

It appears that the White Star Line owns and operates steamers which run from Toledo, Ohio, through Lake Erie, Detroit river, Lake

St. Clair, and St. Clair river to Port Huron, in Michigan. The steamers stop to load and unload passengers and freight at many points in the state of Michigan and in the Dominion of Canada, between Toledo and Port Huron. The transportation is entirely by water and unconnected with any land transportation whatever; but it is alleged that the petitioner has voluntarily agreed with some of the interstate railroad carriers of the United States to establish certain through routes over which passengers and freight are carried under joint tariffs, and that for the purpose of establishing such through routes it has voluntarily filed with the Commission its joint tariffs or its concurrence in tariffs filed by said railroad carriers, and that the steamers of the petitioner carry for hire passengers and freight under said joint tariffs over the water portion of said through routes.

The orders of the Commission, as in the cases Nos. 21 and 22, relate to the making of reports to the Commission, and to the keeping of uniform accounts, as required by the rules laid down by the Commission, and to which reference has already been made in the statement of the two preceding cases.

The petitioner in these cases, as in the preceding ones, avers that the Commission caused to be served upon it two pamphlets, one entitled "The Classification of Operating Revenues by Carriers by Water" and the other entitled "The Classification of Operating Expenses of Carriers by Water." It is alleged that the bookkeeping methods prescribed by the Commission differ from those used by the petitioner, and that in order to comply with the order of the Commission petitioner would have to open a completely new set of books and change its methods of accounting.

It is also alleged that the requirements include the business of petitioner relating to its amusement parks, its intrastate business, its port-to-port intrastate and international business, and its business as a part of joint routes with rail carriers. Petitioner denies the authority of the Commission to make any such orders, and for reasons substantially similar to those relied upon in the bills filed by the Goodrich Transit Company, already referred to, pleads lack of power in the Commission, and assails the constitutionality of the orders.

The United States filed answers to the petitions, admitting the allegations of fact contained in the petitions, but alleging that the parks and things connected with the parks constitute a part of the petitioner's general property, and are operated in connection with and for the purpose of promoting its interstate business. The answers also set up that the method of bookkeeping prescribed by the Commission is reasonable and just, and that it is impossible to determine what are reasonable and just rates to be charged by petitioner in its joint rail and water business unless a method of bookkeeping such as is prescribed is put into use.

The Interstate Commerce Commission filed motions to dismiss the several petitions upon the ground that the facts stated therein do not entitle petitioner to any relief.

The four cases were argued together, upon an understanding between counsel for the respective parties that the essential questions were presented by the demurrers and motions to dismiss. The cases

were, therefore, heard as upon general demurrers and motions, and without regard to the answers filed by the United States.

This statement is sufficient to an understanding of the cases, and although there are separate records, we shall treat them as if they were but one proceeding before the court.

The Commission made its call for the reports and its orders prescribing uniformity of accounts, which are objected to by the carriers, under what it claims is authority conferred by section 20 of the act to regulate commerce. The section is appended.[1] Acting under its terms the Commission in detail has prescribed classification of operating expenses and revenue accounts for the use of carriers by water and has prescribed that the accounts for the entire operations of such carriers shall be kept according to a uniform system laid out by definite rules of the Commission.

In the classification as prescribed for the report, operating expenses are divided into certain general accounts, such as maintenance, traf-

[1] Sec. 20. (As amended June 29, 1906, February 25, 1909, and June 18, 1910.) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employés and the salaries paid each class; the accidents to passengers, employés, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file

fic expenses, operation of vessels and terminals, incidental transportation expenses, general expenses, and charter expenses. Under these several heads accounts of expenditures are required to be divided into groups and the groups in turn are divided into primary detailed accounts. For example, the report of traffic expenses calls for accounts of superintendence, advertising, fast freight lines, outside agencies, traffic associations, and other traffic expenses. Expenditures chargeable to transportation expenses are required to be divided into general groups under the headings: "Operation of Vessels," "Operation of Terminals," and "Incidental Transportation Expenses." Primary accounts which go to make up the items under the general heading are called for with specific detail, to the end that classifications of operating expenses for carriers by water may be presented by an account of the entire transactions of the carrier whose business is being inquired into. The classification of operating revenues is equally specific, requiring accounts of revenue from transportation, revenue from

monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the state in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic, as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers or carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any

operations other than transportation, and charter revenue. Primary accounts must be kept and made of passenger, baggage, mail, express revenue, and miscellaneous receipts, including, among many other things, wharf, demurrage, storage, and other receipts.

Interrogatories also call for exact information as to the amount of capital stock issued, dividends paid, surplus funds, if any, funded and floating debt, and interest thereon, cost and value of the carriers' property, franchises, and equipments, earnings and receipts from each branch of business and from all sources, operating and other expenses, complete exhibits of financial operations, as well as other complete statements necessary to exhibit the carriers' financial condition and results from operation of their entire business.

In the text of classification of operating revenues in the "first issue" pamphlet, particularly referred to in the petition filed in case No. 22, the carrier is called upon to keep an account of its freight revenue, passenger revenue, excess baggage, and other passenger rev-

court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, that the Commission may, in its discretion, issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission, or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the Circuit and District Courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts or any of them.

And to carry out and give effect to the provisions of said acts, or any of them, the Commission is hereby authorized to employ special agents or examiners, who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

enues, together with mail, express, special service, miscellaneous transportation revenues, freight operations other than transportation, rentals of buildings, and miscellaneous receipts. In the classification of operating expenses, the orders require accounts of superintendence, repairs of vessels, renewals, repairs of tugs and lighters, accounts of shop machinery and tools, maintenance of equipment, maintenance of terminals, expenses of docks, wharves, buildings, and fixtures, traffic expenses, transportation expenses, wages of crews, fuel, food supplies, operation of terminals, salaries of agents, clerks, and attendants, stevedore and wharf laborer accounts, freight losses and damages, accounts of damage to property, salaries and expenses of general officers, law expenses, insurance, charter expenses, including rent, maintenance, and operation accounts for hire or rent of vessels, and other matters.

No attempt is made, in the orders making classifications of accounts and laying down forms, to separate revenues or expenses of operations on traffic which is interstate from that which is intrastate; the object being to require a report of and to prescribe accounting rules for the entire business of any carrier that is subject with respect to any of its traffic to the provisions of the act.

So, without further particularization of the many items of information called for by the questions which are submitted to the carrier in the report, and without examining more closely into the precise methods of the system adopted to secure uniformity of accounts therein, we may put the fundamental question of law presented in this way: What authority, if any, has the Commission over water carriers situated as are these now before the court?

At the outset we recognize the force of the suggestion made by petitioners that for a great many years the regulation of commerce on the ocean and other navigable waters, including the regulation of water carriers, has been provided for by laws especially adapted to that particular subject. Thus it was enacted that the liability of owners of vessels for the loss or destruction of property, goods or merchandise, done, occasioned, or incurred without the privity or knowledge of the owner, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending (Rev. Stat. § 4283 [U. S. Comp. St. 1901, p. 2943]); and by Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1901, p. 2945), amending section 4283, the individual liability of a shipowner is limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. Again, by section 3 of the act of Congress approved February 13, 1893 (27 Stat. 445, c. 105 [U. S. Comp. St. 1901, p. 2946]), it is provided that:

"* * * If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel. * * *"

And in 1873 Congress passed an act which prohibited railways forming part of an interstate line and vessels transporting cattle and other animals from state to state from confining the same in cars, boats, or vessels for more than 28 hours consecutively without releasing the same for water, rest, and feeding for at least 5 consecutive hours. Rev. Stat. § 4386 (U. S. Comp. St. 1901, p. 2996).

But while these statutory provisions, in so far as they go, are a regulation of commerce and carriage by water and of the limitations upon vessel owners' liabilities passed by Congress under its general power to regulate commerce (Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; Lord v. Steamship Co., 102 U. S. 541, 26 L. Ed. 224), still they do not attempt to control rates, fares, or charges relating to such transportation. And, so far as we are advised, not until April, 1887, the time when the act to regulate commerce became effective, did Congress make reference to the regulation of rates. Upon this assumption we may refer briefly to the history and scope of the act to regulate commerce, to see whether Congress, in establishing a system by which interstate transportation should be regulated, included water carriers and charges for service and accounting by water carriers. It is well here to note that by the amendments of the act to regulate commerce passed June 18, 1910, the Interstate Commerce Commission was expressly denied the right to establish any route classification, rate, fare, or charge when the transportation is wholly by water, and that any transportation by water affected by the act to regulate commerce should be subject to the laws and regulations applicable to transportation by water.

[1] Although courts may not refer to the debates in Congress to enable them to discover the meaning of the language of an act of Congress, nevertheless it is proper for them to review the proceedings connected with the passage of a law through the legislative houses, in order to get at the correct interpretation of the text used. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

[2] The initial legislative step taken to secure a law regulating carriers was the adoption of a resolution on March 17, 1885, authorizing the President of the Senate to appoint a committee to investigate into and report upon the subject of "the regulation of transportation by railroad, and water routes in connection or competition with said railroads, of freight and passengers between the several states, etc." On January 18, 1886, the committee made an exhaustive report, wherein were pointed out the then existing evils in railroad operation, together with possible remedies therefor, and a bill was recommended for passage. In the report special emphasis was laid upon the influence of water routes as beneficially regulating charges made upon all other means of transit; the conclusion of the committee being that, in order "to secure the blessings of cheap transportation and to hold our place among the nations of the earth, we must develop our natural waterways to their fullest capacity, and give the benefits of lake, river, and canal communication to the people of all the states as far as prac-

ticable." The law as approved February 4, 1887, to be effective April 5, 1887, contained the following paragraph, numbered 1:

"* * * That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid."

Amendments to this section made in June, 1906, removed doubt as to what constituted the test of jurisdiction by changing the punctuation so as to make the provisions of the act apply to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory" etc. The effect of the parentheses was to make the words "common control, management, or arrangement" applicable only to transportation which is partly by railroad and partly by water. We do not regard the change as of special importance to this case further than that it shows that Congress consistently meant to keep within the transportation over which it would exercise a measure of control, not alone interstate traffic by all-rail route, but interstate traffic in part by water when used in connection with rail under a common control, management, or arrangement for a continuous carriage or shipment.

It is undoubtedly true that in the exercise of its power over interstate commerce the principal moving thought of Congress was to regulate railroad corporations. Commonly known practices of unjust discrimination in various forms by railroads had led to many evils, which, owing to the restricted powers of the states, could only be effectively dealt with through general law. The decision of the Supreme Court in Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, rendered in October, 1886, to the effect that a statute of a state attempting to regulate or to impose any restriction upon the transmission of persons or property from one state to another is not within the class of legislation which the states may enact in the absence of legislation by Congress, and that such a statute is void even as to that part of such transmission which may be within the state, reversing the decision of the Supreme Court of Illinois, helped to draw public attention to the situation and quickened the demand for congressional action.

Mentioning the causes which led to action by Congress, the Su-

preme Court, in Texas & Pacific Railway Co. v. Interstate Commerce Commission, 162 U. S. 197, 210, 16 Sup. Ct. 666, 672 (40 L. Ed. 940), said:

"* * * They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies and by general enactments by the several states, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers—particularly that one which requires uniformity of treatment in like conditions of service.

"As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

On the other hand, as has been pointed out by the Supreme Court, in referring to the act to regulate commerce, the purpose of Congress was to embrace the whole range of interstate commerce, and this is made apparent by the exclusion only of domestic commerce in the last clause of the first paragraph of section 1, and in the declaration of the scope and purpose of the act announced in the title. Armour Packing Co. v. United States, and other cases, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. Now, of course, steamers which undertake for hire to transport the goods of those who may choose to employ them from place to place are carriers (Niagara et al. v. Cordes, 21 How. 7, 16 L. Ed. 41); and undoubtedly whenever as carriers they enter upon the transportation of freight or passengers, and are used under a common arrangement with a railroad for a continuous carriage of passengers or property from one state to another state, they are brought within the purview of the first section of the act.

As there is involved in the opinion just expressed construction of the words "when both are used under a common control, management, or arrangement for a continuous carriage," etc., it is appropriate to consider them for a moment. It is apparent that, by failure in terms to include them, water carriers, doing business as are the steamers belonging to petitioners herein, are not directly in any way subject to the act, unless their connection with railroads and their uses under

certain arrangement with railroads make them so; that is to say, water carriers, situated as are these petitioners, are exempt from the provisions of the act in respect to their intrastate port-to-port business and their interstate port-to-port business. Indeed, there is no real contention otherwise, and it would therefore follow that the Commission has no control over any business done by these petitioners, except such interstate traffic as is carried on under a joint arrangement between them and rail carriers.

[3] But we were told upon the argument that through bills of lading covering part railroad and part water transportation under joint tariffs are issued by the petitioners. Moreover, under the pleadings we must take it as a fact that, for the purpose of establishing certain through routes, petitioners have filed with the Interstate Commerce Commission their joint tariffs, or their concurrence in tariffs filed by the railroad companies, and that the petitioners' steamers carry for hire passengers and freight under said joint tariffs over the water portion of the through routes. These things being true, we find it impossible to escape from the conclusion that there is engagement in transportation in so far as both water and rail are used to carry from one state to another, and there is a common arrangement made as described for a continuous shipment of passengers and freight, whereby petitioners have brought themselves within the terms of the act and are subject to such of its provisions as are applicable to carriers under such arrangement.

Let us see what the practical view of the Commission has been, where the subject of use and arrangement has been adverted to. In the Matter of Joint Water and Rail Lines, 2 Interst. Com. Com'n R. 645, 646–647, the Commission observed:

"* * * That carriers by water are not in terms brought under the regulation of the act to which carriers by rail are subject, except 'when both are used under a common control, management, or arrangement for a continuous carriage or shipment,' etc. If the carriers by water see fit to operate independently, no authority is conferred upon the Commission to compel them to do otherwise; and the understanding of the Commission is that by the act to regulate commerce the carriers by rail are also left at liberty to act independently. They cannot decline to receive from or deliver freight to connecting water lines; but at the same time they are not required by law to make with the water lines joint rates, though they should be expected to do so when they can thereby subserve the interest of the public without detriment to their own interest. * * *"

In the third annual report of the Commission the relation of lake and rail transportation received careful consideration. 3 Interst. Com. Com'n R. 289–381. It was commented upon that the act was only applicable to water transportation when used under a common control, management, or arrangement for a continuous carriage or shipment in connection with a railroad and as part of a line or route of which another part is a railroad, and that carriers engaged in transportation wholly by water were independent of regulation. The Commission deplored such a condition. Special reference was made to traffic upon railroads from the Lakes to the Atlantic coast, where the boats were used in connection with a rate under a common control or management, for continuous carriage from Chicago, Duluth, and other Western lake ports to tide water at New York, Philadel-

phia, and other Eastern cities. It was stated by the Commission that such carriers on lake and rail were made subject to the act, and were required to publish their rates and charges, together with proposed increases or reductions.

In the case of Railroad Commission of Florida v. Savannah, Florida & Western Railway Co. et al., 5 Interst. Com. Com'n R. 13, a question involved was whether some of the defendant steamship companies and a certain railroad company were common carriers engaged in interstate commerce and subject of the jurisdiction of the Commission. It was held that while the steamship companies constituted all-water lines, inasmuch as they were each engaged in connection with the railroads in the transportation of oranges from points in Florida to Northeastern cities under through bills of lading, and inasmuch as they joined in the action of the various railroads and steamship lines in advancing certain rates under investigation, under the act and the former decisions of the Commission the companies were carriers of interstate commerce and subject to the jurisdiction of the Commission in respect thereto.

In the Matter of Jurisdiction over Water Carriers, 15 Interst. Com. Com'n R. 205, the Commission again had occasion to give consideration to the question, which was stated in this way:

"* * * Does the fact that a water carrier joins with a rail carrier in forming a through route or establishing a joint rate for the transportation of certain traffic subject all the interstate traffic of such water carrier to the requirements of the act and the jurisdiction of the Commission; or, stated in a narrower form, does such action on the part of a water carrier subject its port-to-port traffic to all the provisions of the act, including the posting and observing of tariffs and similar requirements?"

The language of section 1 of the act, as we have heretofore quoted it, was carefully examined, and it was held that, while interstate commerce wholly by railroad was subject to the act, interstate commerce wholly by water was not; yet it was said:

"It is equally obvious that interstate commerce partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment, is subject to the act."

The Commission then proceeded to determine whether, under conditions where some of the commerce transported by a carrier is subject to the act, all the commerce transported by such carrier was also within the act; and the view taken was that the statute is only applicable to a common carrier or carriers engaged in transportation partly by rail and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment. Judge Knapp, then chairman of the Interstate Commerce Commission, said:

"The use of the word 'when' is significant, and its natural meaning seems to be that a water carrier is subject to the act 'in so far as' or 'to such extent as' it carries traffic under a common control, management, or arrangement with a railroad."

Regulation of charges exacted upon the port-to-port business of water carriers was held not to be authorized, and reasons were pointed out why any other construction was unreasonable. For example, it

was observed that if one water carrier, by becoming a party to a joint rate with a railroad, was thereby required to publish and adhere to its rates between ports, it could not hope to compete with a carrier not required to publish and maintain its rates, which would bring about a result whereby the law, instead of promoting and facilitating commerce, would tend rather to its injury, by making unprofitable the instrumentalities provided for the carriage of that commerce. It was shown that under such a construction of the law there might be two water carriers between the same ports attempting to secure the transportation of competitive traffic, one of which would be bound to observe and collect rates which it had published 30 days in advance, while the other could make any rate which would secure the traffic. Nevertheless water carriers were held to be subject to the law as to such interstate traffic as is transported under a common control, management, or arrangement with a rail carrier.

Judicial construction accords with these views. In Ex parte Koehler, Receiver, etc. (C. C.) 30 Fed. 867, decided in April, 1887, though the facts were unlike those before us, the court, in its discussion of the interstate commerce act, thought that it did not apply to all of the agencies or instrumentalities used or engaged in interstate commerce; that it did not include any water craft, unless used in connection with the railways under a common control, management, or arrangement for a continuous carriage or shipment, etc., and said:

"The mere fact that a railway wholly within a state and a vessel running between said state and another meet at a point within the railway state and thus form a continuous line of transportation between the two states by the one taking up the goods delivered by the other at its terminus and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a 'common control'—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

A fair implication from this language is that, where there is an arrangement and a use by both water and rail carrier under an arrangement by bill of lading given for carriage over both routes, the the carriers are within the act.

In United States v. Wood et al. (D. C.) 145 Fed. 405, the court held that the test of subjection to the act was through routing in interstate commerce, and that when one carrier united with one or more in making a rate for interstate traffic and issued a through bill therefor it became subject to the act, and that the successive receipt and forwarding in the ordinary course of business by two or more carriers in interstate traffic under through bills, or under any arrangement for continuous carriage over their lines, constituted assent to such common arrangement for the carriage within the meaning of the act. See, also, United States v. Camden Iron Works (D. C.) 150 Fed. 214.

In United States v. Colorado & N. W. R. Co., 157 Fed. 321, 85

C. C. A. 27, 15 L. R. A. (N. S.) 167, the Court of Appeals of the Eighth Circuit adverted to the applicability of the act to carriers partly by water and partly by railroad operating under a common control, management, or arrangement, and referred to the amendatory act of June 29, 1906, as governing common carriers engaged in interstate commerce wholly by railroad, even though they are exempt from any common control, management, or arrangement with other carriers.

Going to the highest authority, we find like general construction and definition of what will be looked upon as a common arrangement. In Cincinnati, New Orleans & Texas Pacific Railway Co. v. Interstate Commerce Commission, and Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Co., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, it was said:

"* * * But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the Commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the state of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points.

"* * * All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

The principle of this last case is to be invoked because the petitioning water carriers before us ship goods under through bills of lading from points in one state to points in another under traffic arrangements with railroads for continuous carriage or shipment. They have thus chosen to make an arrangement, presumably according to the usual method in use by connecting carrying companies, and so have subjected their boats in respect to such interstate carriage to the control vested in the Commission, and are carriers subject to the act.

The learned counsel for the petitioners admitted upon the argument that the two carriers, rail and water, could not disregard the long and short haul provision of section 4 of the act under circumstances where an all-rail carrier could not; but his suggestion was that a reasonable interpretation of the law might be that inasmuch as railroads are subject to the act, and inasmuch as a rail carrier can

do nothing by itself or with another railroad or with a water carrier which cannot be reached by act of Congress, the remedy for a violation of the law in respect to traffic carried by water carrier under common arrangement, except as to rebates, may be found by dealing with the rail carrier only, and which alone may be liable. This argument must needs find support in some construction of the text whereby water carriers are exempted, even though operating in interstate traffic under an arrangement with a railroad for a continuous shipment. It therefore involves limiting the term "common carrier" embraced in section 1 to railroads entering into arrangements with water carriers, and so confines authority conferred by section 20 to inquiry into the carriage concerns of the railroad only. The words of the statute, however, do not so restrict the common arrangements for use. They include any common carrier or carriers engaged in transportation of passengers or property partly by railroad and partly by water, and thus have that broader scope which the Commission has time and again regarded them as having, and which upon careful examination we believe to be in accord with the spirit as well as the letter of the law.

Regarding the petitioners, therefore, as subject to control, we nevertheless must not overlook limitations which are incidental to the subjection as well as to the regulating power.

As we have already seen, the subjection is at once restricted, for the reason that the intrastate port-to-port business and the interstate port-to-port business of the petitioners are outside the purview of the act of Congress; so we can advance to a consideration of whether or not the regulating power is limited by section 20.

The contention of the government here is that the Commission is authorized to call for full reports of the entire business of these petitioners, intrastate as well as interstate, while petitioners say that no such authority is given or could be given.

The broad object of section 20 evidently was to clothe the Commission with authority to call for any and all information which would enable the Commission to act intelligently in the lawful exercise of its delegated power of rate regulation. Of course, without some precise knowledge of traffic conditions and of interstate business, the reasonableness of rates and fares relating to such business would be impossible of determination. But Congress has expressly restricted the authority to call for reports and to prescribe the form of such reports to common carriers subject to the provisions of the act. It is impossible to read section 20 as independent of section 1 imposing this limitation. And inasmuch as the act has only to do with interstate commerce and carriers engaged in interstate commerce, only such carriers can be included within those which must respond to the calls for information and comply with the requirements of the Commission in matters of accounting. This being true, inasmuch as the reports of affairs, accounts, finances, and like things of the carriers are evidence for the ascertainment of facts relating to the interstate business, which alone is the proper subject of regulation, the scope of the right to call for the report is confined by the nature of the

business to be set forth within the report when made. As a correlative proposition, the obligation upon the carrier, subject to the provisions of the act, is to report such business as is interstate and not exempt, and under section 20 there is no obligation upon it to report other business.

Furthermore, the act only confers the right to prescribe how accounts of business properly the subject of regulation shall be kept, and no duty rests upon the carrier to obey orders prescribing methods or forms of accounting except for such business. It is said by the government, however, that, conceding lack of power to regulate any commerce, except that which is carried on under common arrangement, nevertheless the interstate and intrastate operations of these water carriers, petitioners, are so commingled that it is impractical to obtain information of the interstate traffic without full knowledge of the intrastate concerns. The answer to these suggestions is in the text of the law, which expresses the mind of Congress and limits all authority to the regulation of carriers subject to the provisions of the act, and which in this case are those engaged in transportation of a particular nature; that is to say, interstate, partly by rail and partly by water, used under a common arrangement as already defined.

We recognize that section 20 relates to reports by carriers rather than to the carriage itself, but the power to call for the information in the report is circumscribed by the relation of the report to the thing itself, interstate traffic. A like rule must govern with respect to bookkeeping and accounting methods. The Commission, in the exercise of the power to establish a uniform system of accounting, can only lay down forms and rules which relate to the subject itself, interstate traffic not exempt.

It may be that difficulties will arise which will make it hard for the Commission to confine its inquires into interstate business done under arrangement with the rail carrier and to prescribe systems of keeping books and accounts without impinging upon matters which are intrastate exclusively, and it may be a somewhat tedious work for the carrier to furnish this information and to follow the system of accounting; but, as Congress has seen fit to exercise its authority with respect to that which is interstate, mere perplexities of framing the interrogatories or of accounting, or recording the evidences of such transactions, cannot be urged as a reason for refusing to sustain the power conferred. Nor does it seem logical to say that if the business is so far separable as to furnish a basis for a common arrangement as to part of it that report and systematic account of such part cannot be had without report of the whole.

It is fitting at this point to repeat that the reports and the methods and forms contemplated under section 20 are for the information of the Commission and for the simplification of furnishing such information. But we must not confuse such reports with information sought under an investigation undertaken by the Commission upon complaint or of its own motion. In the one instance the Commission calls for facts necessary to the general performance of a duty impos-

ed upon it; in the other it exerts its power to obtain evidence necessary to enable it to decide a question involving something like an issue. The information by report being directly pertinent to the substantive subject of what is interstate commerce, and this being the proper subject of regulation, presumably will be furnished by the carrier in truthful and honest statement.

If, however, the report of the carrier is not accurate or truthful, or the information furnished is not sufficiently complete to enable the Commission to perform its duty, there are ways by which investigation can be had and which, if pursued, clearly may render it proper for the Commission, in its effort to get at the truth of the interstate business of the carrier, to inquire fully into its intrastate business—not with a view of exerting power over such intrastate business, but because inquiry into such business is essential in order to know the true condition of the interstate business. Such a contingency, however, is not presented upon first motion under section 20, nor does the right to obtain such necessary information carry with it the right of investigation into business not interstate and not directly connected therewith. For instance, it would seem to be relevant in the Goodrich cases to inquire into the amount of capital stock, debts, value of franchises, improvements, receipts, dividends, and such other matters pertinent to the business of the corporation as Congress evidently regarded to be foundation knowledge for the Commission to have; but, so far as appears in the record in cases 23 and 24, there is no necessity for going into the details of the amusement park business carried on by the White Star Lines, for it has no relation to interstate traffic.

It is a circumstance of slight force, but deserving of mention as in line with these observations, that nowhere in section 20 is there reference to "investigation" by the Commission. "Reports" containing "information" may be required, and forms of accounts, records, and memoranda may be prescribed—even inspection and examination of accounts, records, and memoranda may be had by examiners of the Commission—but they are always for purposes of information.

Information of interstate traffic business and power to make the carrier report it by a uniform system of accounting are the keynotes of section 20. "Investigation," on the other hand, is the word employed in parts of section 12, authorizing depositions in proceedings before the Commission; investigation is authorized where complaint is made or where questions arise as provided for by sections 13 and 15 of the act. Reports of "investigations" are to be made (section 14), and attorneys may be employed for proper representation of the public interests in "investigations" made by the Commission, or proceedings pending before it or in court.

These considerations make it reasonable to construe the power given by section 20 as one pertaining to first information, ample presumably to secure necessary facts to enable the Commission to go forward, yet not broad enough in initial proceeding to warrant inquisitorial investigation into collateral affairs, which of themselves do not constitute interstate commercial traffic or are not necessarily directly interwoven therewith.

Under this view of the power conferred upon the Commission by section 20, it is very clear that the authority to require the reports of interstate business where there is the use under a control as prescribed is granted. In Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. —, the Railroad Company brought a bill to annul an order of the Commission requiring the Railroad Company to make monthly reports showing the instances where employés subject to Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), had been on duty for a longer period than that allowed. The contention of the carrier was that the Commission had no authority to require the reports called for. The Supreme Court examined section 20 of the act to regulate commerce, and held that a grant of power extended to the Commission in the execution of the act whereby they could order carriers to file monthly reports of earnings and expenses and to file periodical or special, or both periodical and special, reports concerning any matter about which the Commission is authorized or required by law to inquire or keep itself informed, or which it is required to enforce, etc., clearly embraces the power which the Commission had there asserted, and authorized it "to promulgate an order requiring reports to be made." But it appears that the court limited its observations to interstate business and was careful not to construe the law as extending the power beyond the right to make the order requiring reports of such business.

From these expressions it follows that the theory of the Commission in the present cases was erroneous. It acted within its authority when it made an order calling for reports of all business done by the petitioners under through bills of lading where the transportation was partly by railroad from one state to another, or from one place in the United States to Canada, an adjacent foreign country; and it was within its power when it prescribed the system of accounts and the uniform method of keeping accounts for such interstate business, and so far as the orders call for information confined to such traffic, or directly related thereto, and so far as the orders prescribe uniform systems of bookkeeping and accounting for such traffic and such as is directly related thereto, they must be sustained. But, in so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the carriers, or include matters of intrastate traffic accounts and affairs and concerns exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful.

What we have said makes the conclusion of the case comparatively simple. Petitioners are amenable to the law with respect to all interstate business done by them in connection with railroads under arrangements such as have been discussed, and the Commission acted within its authority when it made orders for reports with respect to such business and prescribed forms of accounting for such business; but it went beyond its authority in calling for reports of transactions relating exclusively to port-to-port interstate business, or to intrastate traffic or affairs, and in propounding questions and prescribing

bookkeeping and accounting methods in respect thereto. A recast of the forms of reports should be made by the Commission, acting in conformity with the views herein expressed. We think it advisable that the Commission, rather than the court, should proceed to make the recast.

The demurrers are overruled, and the motions to dismiss are denied, and the prayers of the petitioners for orders of injunction are granted. The orders issued by the Commission are hereby set aside, and the matter is referred to the Commission, to be proceeded with as may be proper under the law as herein indicated. So ordered.

In re REYNOLDS.

(District Court, M. D. Alabama, N. D. October 18, 1911.)

BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT.

A court of bankruptcy has no jurisdiction to punish a bankrupt for contempt in failing to obey an order directing him to turn over to the trustee assets alleged to have been withheld, unless the evidence shows that the bankrupt has present possession of the property and ability to comply with the order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of C. W. Reynolds. On petition to review a referee's order requiring a bankrupt to turn over to the trustee goods and merchandise, or their alternative value, and at the same time to show cause why he should not be punished for refusal to obey the order. Reversed.

Tipton Mullins and Jones, Foster & Field, for bankrupt.

London & Fitts, for trustee and creditors.

JONES, District Judge. This cause comes on to be heard on the bankrupt's petition to review the findings and order of the referee, made on the 25th of January, 1911, and his certificate of the refusal of the bankrupt to obey the order. After several hearings of the bankrupt, and consideration of his answers to the rule to show cause why the order should not be made, the referee found that the bankrupt "has now in his possession or under his control certain goods, wares, merchandise, or money, the proceeds thereof, amounting to the sum of $19,772.96, or that he has in his possession or under his control goods, wares, and merchandise in part, and money in part, of the aggregate value of $19,772.96." Whereupon it was ordered by the referee that the bankrupt, on or before the 9th of February, 1911, turn over and deliver to his trustee in bankruptcy the said sum of money in goods, wares, and merchandise, or in money, or, upon failing to do so, show cause why the fact of his delinquency and refusal to obey the order should not be certified to the District Court, for such punishment or disposition as to the court may seem meet and proper.

Under the certificate of the referee and the petition for review, all the papers and the evidence in the case are before the court. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

books relative to the bankrupt's business were examined and audited by expert accountants, and the bankrupt himself was twice examined at length. On his examination he was asked: "Your schedules show, and your testimony thus far shows, that since the 1st day of January, 1910, you purchased some $22,000 worth of new goods, and that on the 1st day of January you had on hand $5,000 or $6,000 worth of goods, making in all some $27,000 worth of goods?" He answered: "Yes, sir." He was then asked: "Now, what became of the proceeds of the $18,000 worth of goods you have not accounted for?" He failed to give any satisfactory account whatever of the disposition made of his assets, after allowing him credit for every legitimate item shown in fact to exist. If the alleged pool and gambling losses, and the expenses in the contest for the Clanton postoffice, and the incidental expenses connected with it, amounting to about $2,400, be allowed him, still the bankrupt's shortage in his assets would be over $17,000, and he has given no satisfactory or creditable explanation as to what has become of this balance.

I cannot find, however, after a careful examination of the evidence, that it justified the finding of the referee that the bankrupt has *now* in his possession, or at the time the order was made, either the goods or the money proceeds, amounting to $19,772.96, or any other sum. While the evidence leaves no shadow of a doubt that the bankrupt had goods of that value for which he has not accounted, or has converted into money, and that at one time he had them under his control, I do not think the proof sustains the referee in the finding that at the time of the order, or at the time of his examination, the bankrupt still had in his possession or under his control either the goods or the money. After a very diligent investigation of his affairs, no proof is offered showing the disposition of any specific goods, or tracing to him the possession of any considerable sum of money, or other evidence offered of such conduct as indicates that he now has any of the goods, or money derived from their conversion, in his possession or under his control.

Under the decision in the case of Samel v. Dodd, 142 Fed. 71, 73 C. C. A. 254, rendered by our Circuit Court of Appeals, it is not within the power of the court, whatever view it may take of the bankrupt's version of affairs, to render a judgment for a surrender of goods or their alternative value, and attach the bankrupt for contempt for failing to turn over the goods or the money, although the proof may convince the court beyond all reasonable doubt that at one time the bankrupt had the goods or the money. The order must not be made, unless upon clear and convincing proof that the bankrupt has the goods or the property in his possession at the time of the making of the order and has the ability to comply with it. Under the influence of that decision the court is compelled to reverse the order, and must decline to commit the bankrupt for contempt in failing to obey the order. The following order will be entered:

Now, on this the 18th day of October, 1911, this cause came on for hearing and determination upon the petition for review filed herein by the bankrupt of the order made by the referee, and upon the evi-

dence taken before the referee, upon which said order was made, and the record of the case, and the court, being fully advised, for the reasons stated in the opinion this day rendered, doth order and decree that the order made by the referee in this cause on the 25th of January, 1911, requiring the bankrupt to pay over to his trustee in bankruptcy the sum of $19,772.96 in goods, wares, and merchandise, or in money, be reversed and held for naught, and that the rule upon the bankrupt to show cause why he should not be punished for a failure to comply with the order be discharged.

In re THATCHER.

(Circuit and District Courts, N. D. Ohio, W. D. November 11, 1911.)

No. 2,172.

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 38*)—OFFICE OF "ATTORNEY"—"PROPERTY RIGHT"—DISBARMENT.

The office of attorney at law is not a property right, but is an extraordinary privilege, which one is entitled to have conferred on him upon showing his possession of certain moral and educational qualifications, which he must reasonably retain in order to continue in that relation. Admitted, he thereafter stands as an officer of the court, with a duty thereto superior to every other demand upon him, called upon to use his honest judgment and effort to assist the court to a just determination of the issues affecting his client. His office is primarily indispensable to the administration of justice, and is intimate and peculiar in its relation to and vital to the well-being of the court. He may not be deprived of his office, except in the exercise of a sound judicial discretion, after a formal hearing, with due notice to him, and upon strict proof of professional unfitness.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 50–61; Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 1, pp. 630–632; vol. 8, p. 7586; vol. 6, p. 5729; vol. 8, p. 7770.]

2. ATTORNEY AND CLIENT (§ 38*)—DUTIES—OPPOSITION TO RE-ELECTION OF JUDGE.

One, being an attorney at law, has the undoubted right to oppose a judge for re-election, and may, in support of his opposition, refer to the official acts of such judge. His professional duty requires that he assist in keeping from the bench a person unworthy of that honor. This same duty, in even higher degree, demands, as a correlative, that in executing his opposition he refrain from scandalous and libelous attacks, alleged to be founded on court records, distorted and garbled for such purpose.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 50, 61; Dec. Dig. § 38.*]

3. ATTORNEY AND CLIENT (§ 37*)—DISBARMENT.

Disbarment of an attorney at law, when not adjudged for a contempt of court, is had for the primary purpose of protecting the court and public from the official ministrations of one who, because of disclosed moral unfitness, has forfeited a right to the court's confidence, and has lost thereby his usefulness as an officer of the court. That it may oper-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ate as a punishment of the delinquent for his misconduct is incidental only.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 50–63; Dec. Dig. § 37.*]

4. ATTORNEY AND CLIENT (§ 38*)—DISBARMENT—PROFESSIONAL MISCONDUCT.
Respondent, having an ill will against M., a judge of the state court in which respondent practiced, and moved by such ill will to defeat M. for re-election, personally published and circulated, in the district in which M. was then a candidate, certain pamphlets containing scurrilous and libelous statements and comments reflecting upon the conduct of M. as a judge, and impugning the purity and fairness of judicial proceedings conducted by M. supporting said charges by references to court records garbled and distorted by respondent to effect a libelous purpose. In the compilation and publication of these libels respondent employed his professional standing as a member of the local bar, conversant, therefore, with the proceedings in M.'s court, to give the scandalous and unjust statements readier acceptance. *Held*, these acts of respondent did not constitute contempt of court, but were professional misconduct involving moral turpitude, not because merely he libeled M., nor because M. as the object of his attack was a judge who was a candidate for re-election, but for the special reason that, from the nature of such libels and in the manner of their publication by him, he involved his professional standing therein.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 50–60; Dec. Dig. § 38.*]

5. ATTORNEY AND CLIENT (§ 38*)—DISBARMENT—PROFESSIONAL MISCONDUCT.
Three promissory notes, of which two were made by M. and H., the other bearing the indorsement of M. and H., were paid by M. and were each held by respondent as attorney for M. upon a written contract for fees, wherein it was provided that respondent was to have two-thirds of the amount of recovery upon these and other claims of M. in respondent's hands for collection up to the amount of $2,250, and in addition all recoveries over that amount; the right of action in M. as to each of said three notes being for contribution against H. M. was insolvent, and his right of contribution was subject to certain offsets belonging to H., as respondent well knew. Respondent, having vainly endeavored to obtain M.'s agreement that H. should be sued upon each of said first two notes as if the same had not been paid, but in the name of the original payee, one R., who was then a stranger to each of said notes, thereupon, without the knowledge of M. entered into a written contract with R., whereby R. was to pay respondent a fee contingent upon recovery in an action on said first notes, and, further, without the knowledge of M., and R. never having been a party to said third note, procured one D., an attorney at law, who was ignorant of the facts, to bring suit in the name of R., upon each of said three notes, against H., and as if neither of said three notes had been paid, and as if R. were the owner thereof, with intent thereby to deceive H. as to the status of each of said three notes, and to delude H. into refraining from making such defenses to either of said three notes as might be available to him, had he been sued in either cause of action upon contribution, in which way only, upon the facts, could he properly be sued. *Held*, respondent therein was guilty of professional misconduct involving moral turpitude.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 50–61; Dec. Dig. § 38.*]

6. ATTORNEY AND CLIENT (§ 41*)—DISBARMENT—PROFESSIONAL MISCONDUCT.
Respondent, having repeatedly attempted to persuade opposing counsel, M. & F., to permit a certain bill of exceptions to be filed in this court to contain matters referring to proceedings on motion for new trial, submitting to said M. & F. a certain "condensed statement of the substance"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of affidavits for insertion in said bill as a part thereof, and said M. & F. refusing to consent to the inclusion of said "condensed statement" in said bill, referred said bill to said M. & F. for approval without said "condensed statement," and, having procured thereby the approval of said bill by said M. & F. indorsed thereon, thereafter caused said "condensed statement" to be inserted in said approved bill at an obscure and out of the way place, and thereupon procured said bill, as so added to, and without the consent or knowledge of said M. & F., to be signed and sealed by the trial judge. *Held*, respondent was thereby guilty of professional misconduct involving moral turpitude.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 53; Dec. Dig. § 41.*]

7. ATTORNEY AND CLIENT (§ 53*)—"MALPRACTICE"—DECEIVING CLIENT.

One G., being unable to speak or understand any language but Polish, and to read or write even his name in any language, employed respondent, as his counsel, upon a contingent fee, to prosecute in this court a claim for personal injury. Nearly two years after the bringing of such suit, the same not having been tried, G. gained an erroneous impression that respondent's disbarment in the state court prevented his attention to the case, and thereupon engaged Mrs. S., a professional interpreter for Polish people, to help him settle his claim, and through a reputable attorney, introduced to him by Mrs. S., effected an adjustment for money then paid to him, all transactions relating thereto being in English, and all information thereof being given to G. through the translation of Mrs. S. Respondent, learning of the fact, sought and obtained G. to sign by mark a written repudiation to accompany a tender back of the amount of the settlement, the money therefor being furnished by respondent, who upon refusal of the tender prepared and caused G. to verify and sign a reply, which he filed to defendant's answer pleading the settlement, which reply alleged that the same was procured by fraud and deceit practiced upon G. Preliminary to and in preparation for the drafting of said reply, respondent caused a subpœna to issue in the case for Mrs. S. to appear for her deposition, although she was neither ill nor about to leave the jurisdiction, and examined her as to the transaction of the settlement. The testimony thus had from Mrs. S. showed no condition of fraud or deceit of G., and otherwise was radically at variance with material averments of said reply. Seven months later respondent had the case assigned for trial, whereupon it was adjudged that the averments of the reply were not supported by any evidence.

Contemporaneously with his inducement to G. to attempt impeachment of the settlement, respondent prepared and filed with a justice of the peace a suit in attachment against G. upon a claim of one-half the amount of the settlement for respondent's fees in the case and his expenses, and procured thereby a garnishment of the money. G. was served with process in this suit while in respondent's office in response to respondent's invitation to there appear and sign the aforesaid repudiation. The writs were wholly in English and unintelligible to G., who was allowed by respondent to remain in ignorance of their effect and of his rights in the action against him brought by his said counsel until after the appearance day, at which time judgment was entered against him in favor of respondent by default. After the termination of the trial in this court wherein this conduct of the respondent was revealed to the court, respondent released G.'s money, securing to himself only reimbursement for expenses incurred by him in the trial and the costs of his personal action against G.

Held, that it was unprofessional for respondent to prepare, and to cause an illiterate and grossly ignorant client to verify and file a pleading which the client could but imperfectly understand through the medium of translation, and in support of which respondent could have no reasonable expectation that competent testimony was procurable; that,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

because of the natural resentment inflaming respondent, his offense in this behalf might be condoned, were it not for other attendant circumstances, and that, after his anger cooled, he imposed this pleading upon the court; that respondent's suit against G. while acting as the latter's counsel, and, having knowledge of G.'s helpless ignorance of the proceedings and of his reliance upon respondent as respondent's client, without providing that G. should be duly apprised of his right as defendant to the action, whereby G. became in default, was unethical and unprofessional in high degree; that the conduct of respondent in these matters was "malpractice," as that term is used in the rule affecting the continuance of attorneys at the bar of this court, of which the court should take cognizance.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 53.*

For other definitions, see Words and Phrases, vol. 5, pp. 4313, 4314.]

8. ATTORNEY AND CLIENT (§ 43*)—DISBARMENT—EVIDENCE.

The right to take depositions is not general, but is limited to emergencies and occasions pointed out by statutes and judicial decisions. It is such an otherwise uncontrollable appropriation of power peculiar to courts, conferring for the time being upon an attorney of record, on his own initiative, a function of the court, namely, to compel attendance of witnesses, that to exceed the plain limits of its exercise is to abuse the right, to be reprehended as professional misconduct, when aggravated by persistence and scienter. Respondent in the cause at bar, after repeated advice from the court that the issues to which they were afterward addressed would not be allowed presentation in this case, and after urgent admonition that he should not ask the court to consider such questions for any purpose, took three depositions in three distant cities, upon notice under the title of the case, by him personally written and given, to produce, and thereby did produce, testimony not responding in any degree to any issue in this case, but which was in fact wholly impertinent and immaterial, and substantially scandalous and unfit either for the court's consideration or to be placed in the record. *Held*, that the use of the court's name and process to bring into the record such matters, having regard to the scienter and purpose which are clearly imputable to respondent, was professional misconduct, which the court should consider for the illumination it affords in determining the reflection upon respondent's professional character cast by the acts upon which formal charges are based herein.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.*]

9. ATTORNEY AND CLIENT (§ 60*)—PROFESSIONAL MISCONDUCT—FINDINGS OF STATE COURT—CONSIDERATION BY FEDERAL COURT.

Disbarment by a court of the state over which a federal court has jurisdiction does not ipso facto deprive the subject of his right to appear in the federal court, even upon the authentication of the fact upon the records of the latter court. Federal courts enjoy the right to determine for themselves the qualifications of members of their bars; but judgment of disbarment rendered by a state court in a proceeding over which it had jurisdiction, and in which the rights of the accused attorney have been duly safeguarded, and containing a finding of facts upon which judgment is rendered, may be accepted by the federal court as a prima facie establishment of facts upon which this court may determine the existence or otherwise of professional misconduct.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 83; Dec. Dig. § 60.*]

10. ATTORNEY AND CLIENT (§ 58*)—DISBARMENT—SENTENCE.

In determining the corrective to be applied for professional misconduct, the court should attempt a judgment commensurate with the character of respondent as suggested by the several instances in their aggre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gate effect. Accordingly, it is *held* that the offenses charged and established by the evidence against respondent, being matters engaging his attention at various times and upon different subjects, whereby variant phases of disregard for professional obligations are exhibited, demand nothing less of the court than an order of permanent disbarment, which is therefore entered.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76-78; Dec. Dig. § 58.*]

In the matter of Charles A. Thatcher. Application for disbarment. Order striking name from the rolls.

C. A. Seiders, George P. Kirby, and Harry B. Thompson, prosecuting committee.

John J. Sullivan and Rhea P. Cary, for respondent.

KILLITS, District Judge. We approach the consideration of the charges and of the testimony affecting the standing of Charles A. Thatcher at the bar of this court with the feeling that the case has an importance much beyond cases of this kind generally, in that it affects broader interests than those of the respondent, much as it means to him. From the disbarment of Mr. Thatcher by the Supreme Court of Ohio in June, 1909 (80 Ohio St. 492, 89 N. E. 39), has come a plain conflict between the legislative and judicial branches of the state government. and an assiduous propaganda has cultivated a widespread public feeling that that court in its judgment and proceedings went to the limits of judicial arbitrariness and arrogance and actually invaded the sacred right of free speech.

In these days, when railing at the courts is somewhat fashionable, and is found to be a convenient means for inflaming public sentiment, when the wisdom of the fathers in providing for an independent judiciary finds many to question, that case is indeed important which deals indirectly at least, and none the less surely, with the issue which respondent and his friends have raised against the highest judicial authority of Ohio, and in which they have arrayed in antagonism two of the three branches of the state government. That the records before us compel something of a review of the state court's judgment will plainly appear as this discussion proceeds. In the unique and unfortunate circumstances before us, we find demand for analysis of the case in greater length than would otherwise be necessary.

The attention of this court was first called to the respondent's alleged professional delinquencies through the presentation of a certified copy of the judgment disbarring him and the demand of the committee prosecuting him in the state court, which committee was composed of members also of the bar of this court, that Thatcher ipso facto be removed from our rolls. This the court declined to do, but did refer the matter for advice to a committee of three members of the bar of this district, who were without the local atmosphere and wholly beyond the possibility of any bias whatever. The committee's recommendation was that a committee of prosecution be appointed to bring respondent formally to the bar of this court. December 9, 1910,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the court acted upon the recommendation of this advisory committee, filing a memorandum in which the delay was explained, and in which these passages occur:

"This court entertains no opinion upon the merits of this matter save to honor the presumption that Mr. Thatcher, once having been found worthy of admission to its bar, continues in that happy state; but we do most strongly feel that the present anomalous and equivocal situation should be determined as soon as that consummation can be decently effected. It seems clear that the highest consideration toward this court, toward another court with which relations of comity must always exist, and toward Mr. Thatcher himself, demands action. The presence on the court files of the report of a committee whose advice the court sought challenges action. * * * If the Supreme Court of Ohio rightfully and justly characterized Mr. Thatcher in its judgment then the dignity of the federal court requires that it refuse Mr. Thatcher professional privileges after a proper inquiry; otherwise it must abdicate a claim that it is particular touching the moral qualifications of those who are permitted to plead at its bar. If the state court has perpetrated an injustice of which Mr. Thatcher is a victim, no better opportunity for vindication may be offered him than an investigation in this court. If he succeeds here, his rehabilitation in the state court would doubtless be but a matter of time. As the matter now stands, his partisans may refer to his ability to practice in this court as a ground for censure of the state court, and his enemies may also find in the same situation an occasion for cavil at this court. Each tribunal must therefore suffer in dignity and respect. That this very unsatisfactory and unpleasant situation may be ended, this court proposes now to follow the advice invoked of the body it designated last year, and appoint a committee to make a presentment upon which a hearing may be had."

In selecting these gentlemen special attention was given to avoid any one who might be said to be within the influence of that portion of the local bar assumed by respondent to be leagued against him. We feel that our judgment in the selection was fully justified, and deep obligation is felt by the court to each member of the committee for the manner in which this vexatious, thankless, and laborious task was performed.

In order that respondent might not be embarrassed in the trial of several cases on our docket, the committee was directed to make no report prior to January 25, 1911. The committee did not in fact report until March 6th. Respondent's demurrers having been overruled, on the 23d of May the case came on to be heard upon the charges and answer.

[1] Early in the case the court found itself at variance with the respondent and his counsel touching the nature of the office of attorney at this bar and of the proceedings in disbarment. We wholly disagree with respondent that the right to practice law is a property right, to be treated with all the incidents peculiar to property. On the other hand, we hold that it is merely an extraordinary privilege, valuable to the holder, it is true, and granted to him for life on certain conditions, upon the reasonable maintenance of which by him depends his continuance in office.

By approved practice and ex necessitate an attorney at law is clothed in some measure with the court's power. For instance, his engagement in a case gives him the right to command the court's processes of summons and subpœna, and the court's officers are at his call to

execute his will in behalf of his client for many purposes. His retainer gives him the ear of the court, and also affords him the court's protection against a refractory client. He is the only proper vehicle of communication between the court and his client, and upon him the court must rely for the performance of many intimate and responsible duties. These and other considerations suggest that to call him an officer of the court is by no means a figure of speech. The accepted code of legal ethics is clear that in the presentation of his client's cause it is his duty to help save the court from error and imposition and to aid the court to a proper determination of the law and the facts. Theoretically, at least, it is counsel's first duty to see that the issue is justly decided, however his client is affected. Every jurisdiction not controlled by constitutional limitations requires that a candidate for admission to the bar shall show himself to have those qualifications, mental, educational, and moral, which promise a capacity to faithfully represent a client and to earn and retain a court's confidence.

Such being, then, the office, intimate and peculiar in its relation to, and vital to the well-being of, the court, and indispensable to the administration of justice, to say that it occupies the plane of property is to say that a court may not by its own proper methods protect itself against its creatures. The right to be admitted to practice, when the proper qualifications are shown to be possessed, is conceded. A court may not arbitrarily refuse the privilege. Once admitted, the right to maintain his professional position against anything less than a judgment of exclusion, arrived at after a formal hearing upon notice and in the exercise of a sound and judicial discretion, likewise abides with an attorney at law. This is the tenor of all the authorities. This is the extent of his "estate" in his profession. No case cited to us or known to us says anything else, even in dictum, unless distorted from its context, or that the right to practice law has all the incidents of a property right. If Ex parte Garland, 4 Wall. (71 U. S.) 333, 18 L. Ed. 366, so frequently referred to by respondent's counsel, has any bearing at all on this question, it is in this line.

The language of Chief Justice Marshall in Ex parte Burr, 9 Wheat. (22 U. S.) 529, 6 L. Ed. 152, uttered 80 years ago, is the present law on the subject, and protects fully both attorney and court:

"On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend upon its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised, and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself."

The court uttering these words surely did not consider that it was dealing with a property right. Except where some constitutional or statutory provision intervenes, all reported attempts to review judgments of disbarment are found to have encountered this same theory

of the status of the practice of law as a privilege, in distinction to an absolute right.

[3] Nor do we agree with respondent and his counsel that punishment is the end sought in disbarment proceedings. That may be true where the ground is contempt of court; but where, as here, the charges involve moral unfitness, punishment is not at all the end. In the language of the Supreme Court in Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552:

"The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them."

It would seem necessary only to call attention to the fact that a court would be fully warranted in disbarring an attorney, convicted and already under punishment for a felony, to show that it is improper to generalize by saying that all proceedings in disbarment are to impose punishment. No one would say that disbarment in such a case was to inflict a second punishment.

The admission of one to practice law is a certificate from the court that such person possesses mental and moral qualifications for an office which has intimate and vital relation to the administration of justice, and, in the language of Chief Justice Lane, in State v. Hand, 9 Ohio, 42:

"Whenever the courts shall become persuaded that an attorney has lost these qualifications, essential to his usefulness, and necessary to the safety of his employers, they are wanting in their duties if they do not take away his means and destroy his opportunities for mischievous action."

As Justice Field said, in Ex parte Wall, supra:

"He is disbarred in such case for the protection of both the court and the public."

That it also punishes him is wholly incidental and beside the question.

We hear this case holding that we may be properly asked to deprive respondent of a privilege which this court in admitting him conferred upon him, and which it is alleged he has forfeited by a course of conduct showing him to be unworthy of the court's continued confidence, and in the exercise of this function we have afforded respondent the fullest opportunity for defense, even to the extent, in his behalf, of disregarding many well-known restrictions of procedure, and in the introduction of evidence, and in deciding it we act upon the principle that the action is so analogous to a criminal prosecution that strict proof of professional misconduct only is available to remove him.

Admission to and continuance at the bar of the federal courts are not the subjects of statutory regulation, but are governed wholly by rules which the several courts adopt and enforce in the exercise of powers inherent in their constitution. Early in the national jurisprudence it was held that the power to admit and remove was the exclusive province of a federal court. Ex parte Burr, 2 Cranch, C. C. 379, 4 Fed. Cas. 2186; mandamus refused by Supreme Court 9 Wheat. (22 U. S.) 529, 6 L. Ed. 152. And the principle was upheld directly by

the Supreme Court in Ex parte Secombe, 19 How. (60 U. S.) 13, 15 L. Ed. 565, in this language by the Chief Justice:

"It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."

This case has been repeatedly followed by federal courts, the Supreme Court cases being Ex parte Garland, 4 Wall. (71 U. S.) 333, 18 L. Ed. 366; Ex parte Bradley, 7 Wall. (74 U. S.) 373, 377, 19 L. Ed. 214; Bradley v. Fisher, 13 Wall. (80 U. S.) 335, 20 L. Ed. 646; Randall v. Brigham, 7 Wall. (74 U. S.) 523, 535, 19 L. Ed. 285; Ex parte Wall, 107 U. S. 265, 281, 285, 2 Sup. Ct. 569, 27 L. Ed. 552.

Undoubtedly, therefore, under this authority, which stands unquestioned in the federal practice, respondent's status is to be decided solely by the application of the facts to the rules of this court respecting admission and exclusion. They are:

"Attorneys at law, solicitors in chancery, and proctors and advocates in admiralty, who have been admitted to practice as such in the Supreme, or in the Circuit or District Court of the United States, or who have practiced for one year as such attorneys, counselors or solicitors in the highest court of a state or territory, shall be admitted to practice in this court upon producing evidence of such admission and practice, and upon certificate of some member of the bar of this court of good moral character and standing."

"Upon admission to practice the person so admitted shall take an oath to support the Constitution of the United States and of fidelity to his clients and to the court."

"For malpractice or other sufficient cause the court may direct the name of any attorney, counselor, solicitor, proctor or advocate to be stricken from the roll, and thereafter, unless restored, such person shall be incapable of appearing in any cause in this court."

The practice in the exercise of the power to exclude, that it may not be "arbitrary and despotic," but is the result of a "sound and just judicial discretion," whereby the rights and independence of the bar may enjoy the same scrupulous regard as the court's dignity, is controlled by federal decisions which, here briefly referred to, dispose of the respondent's many interlocutory and preliminary objections to the progress of his case. Thus:

Proceedings may be instituted by letter, affidavit, or motion. Randall v. Brigham, supra.

The judicial inquiry is not restricted to official acts. In re Dormenon, 2 Wheeler, Cr. Cas. (N. Y.) 344. See Ex parte Garland, supra; Ex parte Robinson, 19 Wall. (86 U. S.) 513, note, 22 L. Ed. 205.

The trial must be for the specific offense charged. Ex parte Bradley, supra.

It is discretionary with the court to determine what amounts to misconduct. Ex parte Secombe, supra; Ex parte Bradley, supra.

Disbarment in one court will not affect the right to appear before

an independent tribunal. Bradley v. Fisher, supra; Ex parte Tillinghast, 4 Pet. (29 U. S.) 108, 7 L. Ed. 798.

These authorities control us, and no authority from any state jurisdiction which depends upon constitutional or legislative provisions is of value.

[9] Early in the matter the court took the position, following Ex parte Tillinghast, supra, and Bradley v. Fisher, supra, that a formal showing in this court of respondent's disbarment in the state Supreme Court would not ipso facto remove him from our rolls, but that this court reserved the right to determine for itself whether the facts found against him by that court, although it was with competent jurisdiction and acted in a formal inquiry, constituted "malpractice or other sufficient cause" requiring that the court's confidence in him, as one of its officers, should be removed, and the committee was directed to present certain charges against him on the findings of fact in the Supreme Court of Ohio, that a proper inquiry might be had concerning the application of the court's rules to such facts.

Under these instructions, the committee brought to the attention of the court four charges; the first embodying the findings and judgment of the Supreme Court, and the remaining three dealing with conduct of the respondent imputed for malpractice in matters before this court and never heretofore examined into.

The character of these charges will be noted as each one is specially discussed. At the threshold of the hearing the respondent challenged the admissibility of the record of his case in the state court. Charge No. 1 is to the effect that a committee duly appointed to prepare and file charges and specifications against said Charles A. Thatcher, an attorney at law, in the state courts, filed with the Supreme Court of the state charges embracing 17 specifications, imputing to the said Thatcher guilt of unprofessional conduct involving moral turpitude and misconduct in his said office as attorney, and attaching as a part of this charge by way of exhibit a copy of said charges and specifications; that thereupon said Thatcher filed an answer to the said charges, and that thereafter said case duly came on to be heard, whereupon, after full consideration, said court adjudged respondent guilty of the charges of fact found in all the specifications save four, and because of such findings removed him from its roll of practitioners at its bar; that the facts of which said Thatcher was in said case found guilty are and constitute malpractice, and sufficient cause to strike the name of said Charles A. Thatcher from the rolls of this court as attorney at law, solicitor in chancery, and proctor and advocate in admiralty.

Notwithstanding the demurrer of the respondent, the court is clearly of the opinion, following Randall v. Brigham, supra, that this charge is couched in sufficient language and is so enframed as to apprise respondent and the court of the acts of which he has been found guilty by the Supreme Court of Ohio and to require him to defend here, and we can conceive of no function served by respondent's demurrer than to question whether an adjudication of the respondent's guilt of certain lines of conduct, by a court whose jurisdiction to try such a case is not open to question, may be accepted, not as conclusive, but

as establishing prima facie, that respondent did in fact commit the acts imputed to him for malpractice by the state court in its judgment upon its findings of fact.

On the hearing this court took that view of the record of the state court, and permitted the committee to rest its case on the first charge upon the facts, after the introduction of a certified record of the Supreme Court's findings.

The question, however, is not material now; for, upon respondent's claiming the right to attack the state court's finding of facts, he was permitted to introduce the entire record before the state court, and to follow with oral testimony of himself and others by way of attempting to explain, extenuate, or otherwise modify the findings against him. In the exercise of this privilege, he found himself admitting all the acts upon which the state court predicated its findings of fact, and which that court insisted disclosed his professional unworthiness, leaving the only matter open to be determined whether such conduct on his part warrants his disbarment here, and we are able, from such admissions, to pass upon the facts which underlie the findings of the state court, without reference to that court's conclusions at all.

This situation renders one vehement contention of the respondent almost academic, and we would not notice it for any purpose, if it did not seem necessary, in view of the history of the controversy of which respondent is the central figure. Wherefore briefly it will be discussed.

Against the court's position that the full faith and credit rule should be applied to the state court's finding of facts, inasmuch as it had jurisdiction and had acted judicially, while not accepting as controlling our judgment of the law, it was urged most strongly that the record made in the Supreme Court of Ohio discloses facts impeaching the court's judgment and so gravely reflecting on the fairness of the proceedings against Thatcher that we ought not accept against him any conclusion there reached.

The first 12 of the specifications in the charges in the state court deal with four campaign circulars put out by respondent in the preelection campaign of 1908. These four circulars seem to be different editions of an attack on Judge Morris, whose candidacy for re-election as common pleas judge respondent was violently opposing, with additions from time to time of campaign material against other candidates. As part of one of them (Exhibit C, State Court Record, 80 Ohio St. 581, 89 N. E. 39) was the bulletin of certain labor organizations advocating the defeat for re-election of Judges Shauck and Price for the Supreme bench. These men were re-elected, and their participation in the hearing and determination of Thatcher's case is the occasion for a violent attack upon the integrity of the Supreme Court and its judgment.

An issue is raised in the case before us in that behalf by respondent, requiring an examination for its justification. It is asserted in support of the respondent's contention that Judges Shauck and Price were disqualified in morals from sitting in judgment upon respondent's

conduct in that political campaign, and that for them to take part in the case was to sit in their own interest.

This proposition cannot be intelligently nor fairly discussed without a knowledge of the facts and the object and tone and character of the circulars. We have carefully read the bulletin of the labor people against these judges, and have as carefully studied it in its relation to Thatcher's pamphlet embodying it in Exhibit C, and we are unable to find in it from beginning to end a word or thought which, in our judgment, passes the point of fair criticism or legitimate argument against either of these judges as candidates for re-election. It is apparently a truthful "statement of the records of the candidates for the office of judge of the Supreme Court of Ohio," drawn from public sources and set forth with a moderation and absence of rancorous color that is entirely commendable.

That the courts, especially reviewing courts, who sit aloof from the human interest in the cases before them, lag behind in this progressive age and enforce hoary principles whose application to modern industrial conditions is unfortunate and provocative of injustice, is a tenet held by a large and growing element of society, but one need not be in entire sympathy with this faith to yet be ready to accord to those holding it every opportunity to utter it, nor to see that this action of the labor organizations was well within the bounds of legitimate criticism.

[2] That an elector, be he an attorney or not, has the right to refer to the record of a judge, who is a candidate, for argument against his re-election, and may publicly criticise such candidate's fitness for the position, is too plain to be disputed. The right to do so becomes a duty when, in the judgment of such elector, the unfitness of the candidate may be shown from his record. In the exercise of this privilege, the elector has the plain right to his own viewpoint, whereon he may stand with all the safeguards of free citizenship. This position is so palpably consonant with our institutions that to advance it would seem to be supererogation, were it not for the fact that it has been assiduously misrepresented, to the distress of many credulous souls all over the United States, that the Supreme Court of Ohio held to the contrary, and that judges were, in their view, immune from criticism.

The popular misinformation, as well as the absurd position in which stand many people who have discussed this case without knowing much about it, is typified by this extract from a deposition taken in this hearing; the deponent actually being a member of the bar of this state. In view of his naive admission of ignorance on the subject, this witness' lofty utterances furnish a touch of gaiety to this dreary case:

"We criticised them [judges, candidates for re-election] as freely as we did candidates for the Legislature, for mayoralty, or for the governorship, or the presidency. We did not then conceive that our right to do so as citizens was taken away by the fact that we were lawyers. No one ever imagined that such a doctrine would ever be laid down by any court until the Thatcher Case was decided by the Supreme Court of Ohio. I have not read the decision of the court in that case in full, but I am of the impression

that it lays down the rule that a citizen who becomes a lawyer thereby sacrifices some of the rights which he has as a citizen to criticise the judiciary and judicial candidates (sic). If it does, I want to go on record right here that I do not subscribe to or recognize the validity, the justice, the authority, or the policy of such a rule."

Of course, the premise of this witness has no foundation in fact. What the Supreme Court did decide was (syllabus, 80 Ohio St. 492, 89 N. E. 39):

"An elector who is an attorney has the right to criticise the judges and conduct of judges in a decent and respectful manner, but no man has a right to degrade and intimidate a public officer and bring his office into contempt by the publication of libelous matter at any time, and the fact that such officer is a candidate for re-election will not excuse such conduct."

And from the opinion (80 Ohio St. 673, 89 N. E. 90):

"Again we say that there is a broad distinction between fair and temperate criticism and abuse or slander of the courts or judges constituting them. Mr. Lincoln was not guilty of the latter offense, nor did Judge Taft approve it. And nobody knows better than a lawyer that, while judicious criticism is a necessary and effective means when used to keep judges mindful of their duties, and to prevent the selection of inefficient judges when judges are chosen by the people, yet when carried beyond the limit of truth and fairness nothing is more certain to destroy the judicial balance of timid judges and to effectually impair the impartial administration of justice."

The meat of the proposition, then, before us, is that two judges of the Supreme Court of Ohio joining in the foregoing enunciation of principles were still so little in mind that they would conceive themselves offended, to the destruction of their judicial balance, by the purely casual exhibit to them of this entirely unobjectionable bulletin of the labor organizations which formed an altogether immaterial part of the record.

In his answer in the state proceedings (80 Ohio St. 636, 89 N. E. 81) Mr. Thatcher said:

"That the defendant had nothing whatever to do with the preparation of that part of Exhibit C containing a report issued by the Ohio Federation of Labor and Brotherhood of Railroad Trainmen; that the same had been published and freely circulated throughout the state of Ohio a long time prior to October 24, 1908."

So far as the record discloses, this disclaimer was treated as a fact, and, as finally disposing of this matter, it is a fact that absolutely no charge against Thatcher was ever made at any time, formally or informally, directly or indirectly, because this bulletin was either incorporated in his circulars or circulated by him.

The argument which suggests the disqualification of these two judges might be offered with the same propriety against their sitting in a case where one of the parties was of another political faith; for instance, if the proprietor of some Democratic newspaper who opposed their re-election in the campaign of 1908 was before them as a party in litigation. It appears all the more impotent when we contrast the labor bulletin with the Thatcher Morris circulars as to wording and tone. These circulars occupy pages 561 to 614, inclusive, of the case reported in 80 Ohio St., and pages 59 to 75 of 89 N. E., and are too long to be reproduced here. If we are to assume that this temper-

ate criticism of the labor people founded a proper objection to the participation of such judges in a case to which the authors or publishers were parties, then we have opened a wide opportunity for disqualifying a whole bench. All a party need then do would be to exercise his plain right of critical comment of the several judges before whom the action in which he is a party might come, and, presto! he cannot be tried because of a disqualified bench. Somewhere we must indulge the presumption that those who are honored with judicial positions have some notion that they are to be reasonably impersonal in order to measure up to their official obligations.

The Supreme Court of Ohio said the Thatcher circulars were libelous of Judge Morris. In White v. Nicholls, 3 How. (44 U. S.) 266, 11 L. Ed. 591, the Supreme Court of the United States defined libel as follows:

"Every publication, either by writing, printing or pictures, which charges upon, or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is prima facie a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made."

Tested by the application of this statement, which is but the ordinary definition of libel, these circulars were libelous, and shockingly so. If the language of almost any page is to be accepted as truthfully reflecting Judge Morris' judicial career, he was infamous, a disgrace to the bench.

At the solicitation of respondent, he was allowed nearly a half day on the stand to justify what his publications said of Morris, with an outcome that was simply pitiful. Making every allowance possible for bombast, political heat, and merely lurid rhetoric, there remained gross libel, for which nothing approaching an excuse was offered. A few examples may be given; for instance:

"Innocence Not Protected.

"Judges have great and exclusive power in divorce cases, which they are expected to use for the benefit of the defenseless children of unhappy marriages. Judge Morris has disregarded the sanctity of the home relation and exposed youthful innocents to improper surroundings."

An examination of the case upon which the respondent depended for this generalization disclosed facts readily accessible to the respondent, which showed that this was a cruel and entirely unjustifiable aspersion.

"The Law is Against the Unfortunate.

" 'The law is against the unfortunate' said Judge Morris in one case where he directed a verdict. Why is the law against the unfortunate? Because judges make it so. In Judge Morris' court the law is against the unfortunate only because Judge Morris considers and declares it against the unfortunate. What good is a law or a judge that does not protect the unfortunate."

Nothing that the respondent offered remotely justified such a statement as the foregoing, nor this:

"Man v. $$$$.

"Judge Morris has for 14 years held for the defendant in the case of Man v. $$$$$."

Under the caption, "A 4-Flush Bluff," the respondent questions the sincerity of Judge Morris' action in inflicting jail sentences in trust prosecutions before him, and is unable, in his attempt at exculpation, to offer any respectable reason therefor. The attitude taken by him when on the stand shows that this paragraph was born of pure malice.

One of the most flagrant instances, and, concluding with this, we are not by any means exhausting the libels contained in these documents, is that published under the heading of "The Deadly Parallel" (see pages 561, 562, and 602 of 80 Ohio St., pages 60 and 71 of 89 N. E.). As part of the context there appears this comment (page 562 of 80 Ohio St., page 60 of 89 N. E.):

"Trial by jury is a constitutional right of every free citizen. We ordinary Americans are proud of our jury system. Judges once respected that institution. Of late many have tried in various ways to undermine it. One plan is to take cases away from the jury and direct verdicts for the corporations and trusts. This has been a favorite practice of Judge Morris."

Seventy-one cases on the docket of the Lucas county court of common pleas are there referred to by number, and the whole context suggests very plainly that each of these cases was an action for personal injury against a corporation, and that in each Judge Morris had directed a verdict for the defendant and against the injured party.

We are confident that no one could read this portion of the circular without reaching a conclusion that the reference to these cases is made to justify the charge in the text which we have quoted. The facts, however, which were as easily ascertainable by the respondent as to get the numbers of the cases, are that but 28 of these cases were for personal injury (4 against municipal corporations, 11 against private corporations, and 13 against private individuals). Of the balance, 29 were on contract, and 14 were of various kinds—slander, malpractice, fraud and deceit, injuries by dogs, assault and battery, sale of liquor, and the like. In 5 of them the direction was actually for the plaintiff, and, of the 23 of them which went to the reviewing court, Judge Morris' judgment was affirmed in 19. When it is considered that Judge Morris was 14 years on the bench, the atrocity of the deduction, upon such support as this, that it was a favorite practice with him to take cases away from the jury and direct verdicts for corporations, is apparent.

When this part of the circular was under consideration, respondent attempted on the stand a scheme of justification. When he could no longer avoid direct answers, he admitted that it was always the clear duty of a court to determine whether a case had been made to go to a jury, and that the mere fact that a verdict had been directed raised no other presumption, in a lawyer, than that the court had properly performed that duty, and then proceeded with five reasons why he should not be criticised for this particular offense: (1) That he but followed the precedent set by the labor organizations. (2) That to have referred to the 71 cases more in detail than to simply give the numbers by which they were entered would have made his circular "too voluminous." (3) That he invited the voters to examine the records for themselves. (4) That some people were extravagantly laud-

ing Morris, the effect of which he thought he should counteract. (5) That the fact that Morris was a candidate excused the quality of respondent's acts.

The utter inadequacy of these excuses for so gross a libel, a charge assumed to be supported by what is offered as record proof, that a judge, in the conduct of his office, habitually discriminated against the unfortunate, is no less apparent than the oblique moral vision disclosed in offering them. Take the third one, for instance. To invite voters to flock to the court records, instead of ameliorating the offense of libel, but aggravates it by emphasizing the false impression attempted to be conveyed that record proof did exist of the charge.

The distressing attitude of the respondent, who has not one word of regret for his conduct, appears in his statement:

"We asked the voters to verify what we said, and I now unequivocally say that every word that appears in that list is true, except that one typographical error."

Against such a state of mental and moral obtuseness reason appeals in vain. Every word true? It may be. But much less than all the truth is there, and his use of the partial truth in this context is designed to and does produce a wholly false impression. To have told just a little more truth about these cases—that but 11 of them were against the hated corporations, that but one-third of them were for personal injuries of all kinds, that in 5 of them the verdicts were for the plaintiffs, that 85 per cent. of those taken to the higher court resulted in the affirmance of Judge Morris' judgments, and that they covered a period of a dozen and more years' experience on the bench—would have been to have shown the baseness of the charge they were cited to support.

That this exploitation of half-truths in this connection and this utterance of so grave and baseless a charge was libel is so plain that the court must simply stand aghast at the position respondent still takes:

"I did not think I did, and I do not yet think I did, libel him. I agree with your honor that, if I did libel him, I had no right to do it; but I claim I did not do it. * * * There isn't a word of libel in this, to my knowledge, even now."

The Supreme Court was right in denouncing this circular as libelous. It is clearly such a libel as is made a crime under the law of Ohio. We would not say that an attorney guilty of libel should, under all circumstances, have his right to practice law questioned. If the offense had no relation to his profession, it might be ignored by the court in which he appeared. But this libel is one which distinctly relates to his profession, not because its object was a judge of the court in which he appeared only, but particularly because he uses his profcssional capacity to give point and effect to the charges which he makes. He is talking about things that the average layman can know nothing about. A charge that a judge is biased, unfair, the creature of certain interests, in the performance of his judicial duties, has point and acceptation, when made by a lawyer, much beyond that made by one not in the profession. His professional standing sharpens his weap-

ons. He is speaking from an elevation and with an authority peculiar to him.

Such conduct of the respondent in this behalf is surely unworthy of the profession of which he is a member. That it was exhibited toward a judge who was a candidate for re-election does not give it a character it would not have if displayed when no election were imminent. Libel is no less libel when published to affect an election.

Is it not easy to see that any assertion that a court is derelict in its duty to the whole people is bound to lessen in some degree that respect of the people for their courts which is essential to their usefulness and authority? A charge that a judge shows himself to be unfit for his exalted position involves in some measure loss of regard for the place he occupies. Undoubtedly, it is often necessary to make such a charge for the purpose of removing an unfaithful officer, and the risk that judicial authority might be weakened thereby must be taken; but no lawyer, it seems to us, who possesses sufficient appreciation of what it involves to be an officer of a court of justice to deserve the confidence of a court and be useful thereby to his clients would venture to deliberately deceive and mislead the public, as in this instance.

The right to criticise judicial candidates, whether upon their judicial record or not, is not involved in this situation. The right respondent is contending for is the right to employ his professional standing in deliberate libel, in order to work out personal feeling; and he claims the right, although to exercise it as he would involves a loss of respect for and a lowering of the proper influence of the very courts in which he undertakes to serve his clients. In our judgment, this conduct, and the indifference and unconcern still shown by respondent to its character, exhibit a fatal lack of appreciation of the functions and ethics of the office which he would hold at the bar.

We cannot sympathize with respondent's invocation of section 11, art. 1, of the Constitution of Ohio, which reads:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right."

He has exercised his right to freely speak, write, and publish under this section. The question before the court is: Did he abuse the right? Under this section, by the recognized law, one libels at his peril, and there is where respondent stands.

[4] In argument, respondent and his counsel affect to consider this matter as involving contempt of court, and we are treated to much learning on the now popular notion that a tendency toward judicial tyranny in haling unfortunates to the bar for contempt must be curbed. The Supreme Court of Ohio did not consider the offense of this circular contempt of court, nor do we so regard it. Respondent's conduct meets no definition of contempt of court of which we have knowledge. It is treated purely as a circumstance indicating a want of professional character, a lack of fidelity to the obligations he took upon himself as a condition prerequisite to his admission.

We have also indulged respondent's counsel in the consideration of the advance sheets of the opinion of the Supreme Court of Ohio in the

case of Cleveland Printing Company v. Nethersole, 84 Ohio St. 118, 95 N. E. 735, and are unable to see wherein that case helps him here. The syllabus but states the settled law as to libel in this language:

"To constitute a publication libelous per se, it must appear that the publication reflects upon the character of such person, by bringing him into ridicule, hatred, or contempt, or affects him injuriously in his trade or profession."

And the holding is simply that the language used by the newspaper of the actress is not of that kind.

We might say that some of the language of the circulars was not obnoxious to that definition, but certainly we could not make such an observation of the passages which we quote, or of many others. The object of the circulars was to bring Judge Morris into ridicule, hatred and contempt; and when, in executing that purpose, respondent was guilty of untruth, or uttered half-truths to create false impressions, he was guilty of libel. That his office in circulating these documents was tainted by malice toward their object is very marked in the testimony.

[5] Specification 17, which forms one of the serious charges against respondent in the state court, and of which he was adjudged guilty, is presented in full on pages 544–549, inclusive, of 80 Ohio St., and page 55 of 89 N. E.

Briefly, it is that on February 1, 1908, respondent was the custodian of three promissory notes, two signed by Charles F. Milburn and George R. Hudson, made payable to one Albert Reiter, dated January 7 and January 18, 1896, respectively, for the sums of $1,101.24 and $1,276.84, respectively, and one dated November 25, 1895, for the sum of $2,500, payable to the First National Bank of South Bend, Ind., and executed by the Toledo Road Cart Company, by C. F. Milburn, Manager, and indorsed by G. R. Hudson and C. F. Milburn; that each of these notes had been fully paid and satisfied by Charles F. Milburn, and had been surrendered to Milburn to the respondent's knowledge; that on or about this date respondent, with intent to deceive the court, and to deceive Hudson, and to obtain a judgment on each of said notes against Hudson, and to procure for him (Thatcher) a large portion of the moneys to be realized therefrom, and with the fraudulent intent to conceal from Hudson the fact that each of said notes had been paid by Milburn, and the connection of him (Thatcher) therewith, delivered each of said notes to Alonzo G. Duer, Esq., an attorney at law, practicing his profession in Toledo, Ohio, and instructed Duer to forthwith commence in the court of common pleas of Lucas county, Ohio, a civil action in the name of Reiter against Milburn and Hudson upon each of said notes, and to cause service of summons to be forthwith made on Hudson; and that such action was accordingly commenced by Duer, who was ignorant that each of said three notes had been paid by Milburn. The petition contained three causes of action, each in the short form, with copy, permitted by the Ohio practice in actions by payee or indorsee of a promissory note, and demanded judgment for the full amount of the three notes, with interest in favor of Reiter as "owner and holder thereof."

The evidence sufficient for a full consideration of this charge is

found altogether in the admissions of the respondent and in the correspondence between him and Mr. Milburn. The action of the Supreme Court in condemning him has provoked Thatcher's repeated and heated protests in communications to law journals, interviews, and testimony. This court in this hearing has, at his instance, thrown wide open every avenue to a clear knowledge of the facts, and the attempt has been made to illuminate every dark corner, without regard to technical rules of evidence.

These are the facts: In March, 1900, Thatcher and Milburn, who was insolvent, met in Chicago and there entered into the relation of attorney and client; Thatcher engaging to make certain collections for Milburn. The latter informed Thatcher of the Reiter notes, and, protesting that Reiter should get something out of him (Hudson being likewise insolvent), proposed that Thatcher should attempt with Reiter to exchange for them four notes held by Milburn against one Murray, to which was attached as collateral stock in the Tubular Axle Company. At the same time, Thatcher was engaged by Milburn to obtain from the First National Bank of South Bend, Ind., the $2,500 note above referred to, in payment or exchange for which he had already given the bank several paid-up life insurance policies. Mr. Thatcher testified that he had explicit instructions to take up the latter note uncanceled, that Milburn's right of contribution against Hudson might be preserved. The exchange of notes in each instance was effected by Thatcher; Reiter taking the Murray notes, on which he afterwards obtained a small amount.

These two questions are vital touching this specification: Did the exchange of the several notes amount, *in the judgment of the parties dealing with them,* to a payment of each by Milburn, thereby clothing him with a right of contribution against his co-maker and co-indorser, Hudson? Was Thatcher's continued custody of them in his capacity as Milburn's attorney? It is fortunate for the court that the most significant testimony is in the form of correspondence, whose terms are unequivocal, and which is persuasive evidence, because written unaffected by the pressure of a tremendous issue.

March 9, 1900, respondent, writing for the firm to which he then belonged, stated to Mr. Milburn the terms upon which he is professionally engaged, namely: That two-thirds of all collections for Milburn up to $2,250 and all over that amount are to be respondent's fees.

May 17, 1900, respondent, for his firm, writes Mr. Milburn:

"We have succeeded in procuring the Reiter notes, giving in exchange the Murray notes and stock."

June 23, 1902, he reminds Milburn that he has the Reiter and South Bend bank notes, and, speaking of Reiter's financial situation, and that the latter has been unable to get much on the Murray collateral, suggests that, if Milburn would turn the notes over to Reiter, some satisfaction possibly might be had out of Hudson, concluding:

"Would like to have you and Mr. Knapp [Milburn's father-in-law] instruct me in this matter."

This letter is important, because it manifests a full knowledge of Reiter's inability to realize substantially on the Murray paper, which

Thatcher, as Milburn's attorney, induced him to "accept in settlement," as respondent phrased it in a subsequent letter, and because, in asking for instructions, he acknowledges Milburn's control of the notes and that his custody of them is under the latter.

To this epistle Milburn replied, asking that the notes be sent him, when he would try to meet Thatcher's wishes. Instead of complying with Milburn's request to return the notes, respondent, July 1st, writes reminding his client for the second time of the terms of the fee contract, two-thirds of the first $2,250 collected, and all above that amount to Thatcher, and proceeds with this important statement:

"I recently made a trip to Mishawaka to look into the affairs of our friend. I believe with considerable effort something can be realized on the Reiter notes and on the note given to the South Bend bank. More can be done if the notes are sued on in the name of Reiter and the bank. In order to get Reiter and the bank to allow suits to be brought in their names, they will no doubt require a portion of the amount recovered to be paid to them. I am willing to give a portion of the amount to which I am entitled, provided you are also willing to do the same. I consider our agreement of March 9th still in force, but desire your co-operation as to the manner in which it shall be carried out."

It is conceded that "our friend" refers to Hudson. Aside from this first suggestion that suits be brought in the names of strangers to the paper in its then condition, and that these persons receive compensation for the use of their names, this letter is important for the fact that in it respondent includes these three notes in the business he has for Milburn under the fee contract, which the latter is not permitted to forget.

Milburn not answering this communication, Thatcher, October 18th, wrote again practically on the same lines. We quote it in full that the voice of respondent may be heard without editing:

"On July 1st I wrote you concerning the Reiter notes and also the note given to the South Bend bank. I stated that I thought there was a chance of collecting from Hudson, but that it would be better to make arrangements to bring suit in the name of the bank and Reiter. I also stated that I was willing to pay a portion of my compensation to Reiter and the bank in consideration for the use of their names. I do not suppose that the bank will require this, as its president expressed great regard for you, and seemed anxious to do all that he could to aid you. I do feel that Reiter should have some compensation, as I assured him a long time ago that you had written me to the effect that you would make payments to him as soon as you were able to, regardless of the fact that he had taken the Murray notes in exchange. My suggestion is that suits be brought in Indiana in the name of Reiter and the bank without further delay. I am on the track of evidence that should be valuable."

A week later Milburn answered both letters by simply inquiring how much Thatcher thought he could get by his plan, closing the letter:

"Give me the amount as nearly as you can, and I will then answer you promptly."

Thatcher answered to this that in his judgment it was possible to collect the face of the claim and possibly more. There appears to be no reply to this from Milburn.

November 13th, respondent deems it time to remind his client by letter, for the third time, of the terms of the fee contract, quoting it in

full, and concludes by making very plain the status of the Reiter notes in his hands, as follows:

"In this you will notice that the Reiter notes have been included with other claims which you may have placed in our hands."

Two letters are then exchanged, December 2d and December 20th, which need not be quoted, as they are preliminary only to a request from Milburn that Thatcher draw up papers for him to sign, transferring to Reiter the right to sue the notes. In reply, February 7, 1903, Thatcher writes:

"Inclosed find draft of agreement suggested in the Reiter matter. Mr. Reiter called a few days ago to learn whether there was a prospect of his getting anything more on his notes. I asked him if he would allow the use of his name, providing he got 15 or 20 per cent. of the amount realized. He seemed willing to do this, although it seemed hard for me to make him thoroughly understand what I desired to know, but I trust he did understand me. I think it will be much better to have the suit brought on the First National Bank note in the name of the bank if you can make satisfactory arrangements.

"Regarding your personal claim against Hudson, will say that he has bought a number of claims against both of you, so that I am unable to determine how your account with him stands. Let us have the Reiter matter disposed of at an early date."

The last paragraph is worthy of note, in connection with a line of argument employed by Thatcher in his letter of February 14th, below. No copy of the agreement tendered in this letter appears in evidence.

February 13th Milburn writes:

"I inclose herewith an assignment for the Reiter notes. The First National Bank of South Bend would not bring suit. Consequently I make no assignment."

The inclosed assignment is in these words, omitting for brevity that part which describes the two notes, the only notes affected thereby:

"Whereas, C. F. Milburn has paid Albert Reiter in full for two notes as described below; and whereas, said two notes were jointly signed by C. F. Milburn and George R. Hudson: For a consideration C. F. Milburn assigns to said Reiter the right to sue George R. Hudson as a signer of the notes, and hereby assigns to him any amount that he may collect on same, to be his entirely, under the following conditions: Said Milburn is to be held harmless by said Reiter for any expenses whatever arising out of said suit including attorney's fees."

We embody in full respondent's answer under date of February 14th, which, in our opinion, is one of the most significant documents in the entire correspondence:

"Yours of the 13th, containing an assignment of notes to Albert Reiter, received. The assignment recites the fact that you have paid Reiter in full for the two notes and assign your right to sue Hudson as a signer of the notes and assign anything he may collect. I fear this will cause complications, so that it would be claimed by Hudson that, if you have paid Reiter for the notes, his [Reiter's] interest in them has ceased. Hudson will then claim that anything to which you are entitled is offset by claims which he has against you, and therefore your assignment to Reiter of the right to sue on the notes will allow Hudson to bring in his set-offs. In other words, Hudson will have the same defense against Reiter that he would have if you brought the suit. Would not a better way be for you to sign a statement

to the effect that, whereas, you have made an exchange of certain notes given to you by one Murray for the notes held by Reiter, and at the time of exchange it was represented to Reiter that a considerable sum could be collected on said notes, but that it had afterwards been found that such was a mistake, and it being the desire of both parties to cancel such agreement of exchange, you therefore do by the instrument named reconvey to said Reiter all rights which you acquired by reason of such transfer, and he in turn conveys to you the Murray notes? It is possible that I will go through your city in about a week or ten days, and will wire you if I do so. My trip is not definitely planned."

Milburn promptly and briefly replied that he was not willing to sign such a paper as that indicated by respondent, or "to sign any paper that will make me liable again for notes that I have paid him for," but will sign any paper that would protect both him and Reiter, and the matter then rested for nearly two months, to be revived by a letter of Thatcher of April 4th, explaining his view that Reiter could not sue on the notes against a maker and accept an assignment to the effect that he had been paid, and including this paragraph, which we quote, in the view that, because it was not worded when a pregnant issue was pending, it is more weighty evidence of respondent's view of the situation than subsequent explanations:

"You wrote me some time ago to assure Mr. Reiter that you would pay the amount due him when able to do so, even if he did *accept the Murray notes in settlement.* If this is your intention, you ought not to hesitate in placing the thing in such shape as to make it possible for Reiter to realize something."

In reply, Milburn bluntly said:

"Draw up a transfer from me to some one else, assigning my claim against Hudson on these notes and protecting me, send to me to sign and return to you, and then let that party sue in his name for Reiter. Send me with this paper one signed by the party releasing me from any liability. I will sign no paper creating any new liability on my part."

Nothing further was done until September 21, 1903, when Thatcher wrote Milburn, inclosing a draft of a new agreement, to which Milburn promptly replied, emphatically refusing to sign the paper, saying, among other things:

"I should like very much indeed to know that Albert Reiter had been paid in full and would be willing to sign a paper assigning these claims to him, *if the assignment could and would be worded in such a way that I would not be again held liable to Reiter or any one else in case of failure to be satisfied with whatever was collected from Hudson.*" (Underscoring Milburn's.)

Except for one exchange of letters in November, which is not significant, the correspondence lagged until February 27, 1904, when Thatcher wrote Milburn, inclosing a new assignment to be signed, transferring the notes to Reiter, and a form of receipt for the notes to be given in return for the assignment. Milburn's reply to this was to say that a friend would call on Thatcher for a conference, and four subsequent letters passing between the parties make very plain that this last proposed form of assignment was unacceptable to Milburn. The correspondence comes to an end with this letter from Thatcher, September 9, 1904:

Your letter of August 12th came during my absence from the city. I think it best that you have your own attorney draft such papers as are necessary to be signed by Mr. Knapp transferring the Hudson notes to Mr. Reiter. In fact, I think the notes are already indorsed without recourse and can be transferred by delivery. If you will consent to my proceeding in Reiter's name, will do so and not ask for any papers at all. Would like to make some progress in this matter."

And Milburn's reply, dated September 12, 1904:

"Answering your favor of the 9th, will say that if a way can be devised for going to work on this matter which will absolutely hold Mr. Knapp and myself harmless, all right. We will then sign papers authorizing you to go on. If this cannot be done, the matter will have to be dropped."

We are unable to read this correspondence and arrive at any other conclusion than that both parties considered all along the ownership of these three notes to be in Milburn, and that Thatcher's custody was that of an attorney for him. With the full knowledge of a participant, Thatcher assumes all along that the "exchange" with Reiter extinguished the latter's interest in the two Milburn-Hudson notes. If none of the many other expressions in that behalf concludes him, certainly the letter of November 13, 1902, accomplishes that result, wherein, after quoting again the terms of the fee contract of 1900, he says:

"In this you will notice that the Reiter notes have been included with other claims which you may have placed in our hands."

This language also is conclusive that respondent was holding the notes as Milburn's attorney. The effect of this correspondence also is unquestionably to leave the notes at the conclusion in exactly the same status as they were all along. They were not assigned to Reiter, for Milburn's well-meant attempt of February 13, 1903, Thatcher did not accept, because in his judgment, as he baldly says in his reply of February 14th, it would not deceive anybody; it might cause "complications"; and thenceforth they were not able to agree upon a form of assignment which could be relied upon to impose on Hudson.

We agree, also, with the committee that the effect of the last two letters—Thatcher's request and Milburn's denial—amounts to a prohibition on the part of Milburn to his attorney (Thatcher) to proceed on these notes as matters then stood.

Nothing further took place for two years. The notes remained with Thatcher in precisely the same capacity. No new facts intervened. Then, without the slightest authority which respondent is able to show this court, unless it can be gathered from the foregoing correspondence—which is a proposition too abstruse to be readily grasped—Mr. Thatcher entered into this contract of December 6, 1906, with Reiter:

"Albert Reiter hereby employs C. A. Thatcher, who undertakes to collect from George R. Hudson and James Murray all that can be recovered on certain notes executed by said Hudson and said Murray and now owned by the said Reiter. Said Reiter agrees to pay to said Thatcher one-fourth of whatever sum may be realized on said notes, either by suit or settlement, and assigns to said Thatcher an interest in the subject-matter of said claim and notes as collateral security for any fees to which he may be entitled. It is understood that said Thatcher will make no charge for services rendered un-

less something is recovered, and will use diligent efforts in the prosecution of said claims."

It is conceded by respondent, who offers this contract, that the notes referred to therein as executed by "said Hudson" are the Milburn-Hudson notes which are the subject of the above correspondence. We agree with the committee that respondent is ungrateful in his complaint that the Supreme Court did not take this contract into account, and that it was a mercy to the respondent that that court did not notice it. We are forbidden by the respondent himself to be equally merciful, for he literally thrusts it upon us. To hold these notes as Milburn's, under the contract of 1900, that he should have at least two-thirds of the proceeds of collection, and at the same time contract to collect them as the property of another client, is a piece of professional acrobatism too unseemly to be considered patiently.

The rest of this sorry story is soon told. February 1, 1908, just before noon on a Saturday, the court offices closing for the afternoon, respondent took not only the Milburn-Hudson notes, but also the South Bend bank note, in which Reiter never did have any interest, and which at no time Milburn attempted to assign, to an attorney who was ignorant of all the circumstances, and procured him to sue the notes as though they were the property of an owner and unpaid. This is the act with which this specification deals, and it is precisely what respondent, from June, 1902, to September, 1904, tried in vain to induce Milburn to agree to.

The letters of July 1, 1902, and February 14, 1903, from Thatcher to Milburn, involve a distinctly immoral proposition. The notes are to be sued, as Thatcher proposes, in the name of a person who has no interest in them, and who is to sell the use of his name and to assume an apparent interest for the purpose of imposing upon Hudson. There is no need to multiply words in characterizing respondent's attitude shown therein. It was immoral and unprofessional, confessedly involving imposition and deceit. The manner in which the suit was brought but carried out the deceitful plan respondent proposed, and which Milburn rejected.

Shortly after his disbarment, Thatcher wrote a letter to the Ohio Law Bulletin in his defense, and there attempted to place himself, with respect to this transaction, in more favorable light. He has urged that communication upon this court as embodying his answer to his critics. He says:

"In the hearing at Columbus I offered to show that the original transfer of the Murray notes to Reiter was a fraud perpetrated by Milburn on Reiter, in that the Murray notes were past due and wholly without consideration between Murray and Milburn, though this was not known by me at the time of the transfer. This evidence was rejected by the court. My contention is that with this evidence in it clearly appears that Reiter parted with his notes without consideration and had the right to ignore the exchange for the Murray notes and bring his suit as he did bring it."

We find in the record before us, and in respondent's own statements, matters which provoke at least a guarded question of the veracity of his claim that he did not know at the time "that the original

transfer of the Murray notes to Reiter was a fraud perpetrated by Milburn on Reiter, in that the Murray notes were past due and wholly without consideration," and which also raise a suspicion that respondent is at least disingenuous in assuming now an attitude of virtuous indignation at Milburn for using him as a tool in the perpetration of a fraud, under influence of which commendable feeling he made the contract with Reiter of December 6, 1906. These matters are: First. That having the Murray notes in his possession, as Milburn's attorney, for the purpose of trade with Reiter, he must at least have known that they were past due. Second. From a letter from Thatcher to Milburn, dated March 14, 1900, this appears:

"Have seen Mr. Reiter, but have not been able to get him to accept the Murray paper. * * * Murray had told him that he would not pay a dollar on the notes, and he seems to be afraid to touch the Murray notes."

It seems hardly possible that this does not involve information then to both Thatcher and Reiter that these notes were accommodation paper. Third. That, in urging the Murray notes upon Reiter, respondent dwelt specially upon the collateral as being of some value, according to his own testimony. Fourth. Three years before the correspondence closed, and five years before his contract with Reiter, respondent had made the first and only collection on this paper for Reiter, and knew exactly how bad a bargain he had persuaded Reiter into. Fifth. In his letter of February 14, 1903, planning the imposition he had in mind for Hudson, he uses language which indicates a complete knowledge of all the circumstances of the transaction in which he acted for Milburn. Finally, and as conclusive in our mind that the wrongs of Reiter and his own alleged unconscious part in the perpetration of a fraud were not embittering him against his unworthy client, it appears that when he took these notes to Duer to be sued he said to the latter:

"We don't want to hold Milburn; he is helping us."

If he were then acting in repudiation of a base fraud, and treating that transaction as if it never had been, it does not seem likely that he would have been so considerate of Milburn, the author of the fraud and his own betrayer. It is a fair, almost necessary, presumption, at any rate, from the record, that respondent knew as much of this transaction when he was treating these notes as clearly Milburn's, in 1904, as he did two years afterwards, when he made the fee contract with Reiter. But, giving him the benefit of the doubt, when suspicion came to him that he had been used to defraud Reiter, his professional duty toward his client, Milburn, was to give the latter a chance to be heard before he rendered judgment that the notes were Reiter's. Again, assuming that this may be received in defense of his action with the Reiter-Hudson-Milburn notes, it has no office touching the South Bend bank note, in which Reiter never had an interest, and as to which Milburn's holding, in Thatcher's professional custody was without a flaw. No excuse is offered for suing that in Reiter's name.

Again, in this letter, Thatcher says:

"No one claims that he [Reiter] did not have the right to sue for contribution. If I mistook the remedy, I fear that many other lawyers in Ohio have made like mistakes in their professional lives, and are now liable to account for the same."

If Reiter had never parted with his title to the Milburn-Hudson notes, then, of course, his right to sue was not the right of contribution. If he had a right of contribution, it must have been through some assignment from some one who had paid the notes, namely, Milburn, and the last word had from Milburn was his refusal to assign generally to Reiter.

It is remarkable hardihood for respondent to now plead that Reiter had the right of contribution in face of the record he made for himself in the above correspondence in trying, for more than two years, to avoid that very thing. That is exactly what he refused to permit Milburn to convey to Reiter. It is also remarkable against the fact that the suit was not brought in the form of an action for contribution. Again, whatever may have been Reiter's right to sue for contribution on the Milburn-Hudson notes (and we are unable to find any in this record), he clearly had no such interest in the South Bend bank note.

The two excuses are inconsistent with each other, and neither can be reconciled with the record. It is unfortunately true that the more respondent attempts to explain the more deeply do the facts involve him. As in the letter from the respondent to the Law Bulletin, from which we quote, and as in many statements he has made to the court, and elsewhere, publicly or privately, he may take up one phase of the matter, handle a few of the incidents, and construct a plausible story of self-exoneration; but the whole record, patiently and honestly analyzed, presents a sordid attempt to plant a suit on a fictitious basis, with a view to deluding the defendant (Hudson) into a different defense than he would be entitled to in an action brought on a true state of facts, and respondent's purpose is so persistent that, unable to gain his client's consent, he calmly repudiates his professional obligations to Milburn and finds virtue in the act.

In face of the record he made himself, it is puerile for respondent to hint that he is being punished because possibly he "mistook the remedy." He made no mistake. Mr. Duer planted the suit exactly in the manner occupying Thatcher's mind when he wrote the letters of July 1, 1902, and February 14, 1903.

Respondent again finds credit for himself in the fact that his contract with Reiter called for a fee of but 25 per cent.; whereas, he was to have a much larger share in the arrangement he was seeking to make with Milburn. The amount which Thatcher, in his letter to Milburn, thought would be sufficient to buy the use of Reiter's name, was 10 per cent. In the contract which he proposed and sent for Milburn's signature September 21, 1903, when he had full knowledge of how badly Reiter fared with the Murray notes, occurs this passage:

"It being understood, out of any collection made on said notes, the said Reiter shall retain ten per cent. (10%), and shall pay to me forty-five per

cent. (45%), and to C. A. Thatcher forty-five per cent. (45%). Should the 45% to which I may be entitled amount to the sum of $2,250.00, then said Reiter shall pay to said Thatcher all over the sum of $2,250.00."

Milburn refused to sign this for reasons already given, but directed that, when a satisfactory form of assignment was reached, it should transfer to Reiter his (Milburn's) 45 per cent. At no time did respondent, when treating these notes as Milburn's, provide a larger compensation to Reiter than 10 per cent. It is difficult to see any virtue in the fact that when respondent found himself unable to prosecute this business on a basis of 45 per cent. and all over $2,250 when 45 per cent. reached that sum, he lowered his terms to 25 per cent. net. The circumstances rather indicate the persistence with which respondent pursued his intention to make something for himself, whatever the means required to carry that purpose into effect. He was dealing with paper which he certainly held as attorney for Milburn. To treat it, without notice to his client, as the property of a stranger, was without the slightest professional excuse. That in the ravishing of his client's interests he made better terms for the stranger than were originally in his mind does not relieve the viciousness of the transaction. The professional wrong conduct of which respondent stands convicted was conceived by him in 1902. The conception was fully set out in the letter of February 14, 1903, and found its logical and consistent execution in the planting of the suit. How much it cost in promises to buy Reiter into the consummation is not important. Besides, it is quite apparent that 25 per cent. of recovery in an action upon the notes as unpaid and in original payee's hands involved more money to respondent than to have sued upon a right of contribution in favor of Milburn.

The action brought by Duer is still pending on an amended petition signed and filed by an attorney in Mr. Thatcher's employ, and the issue is raised by reply to Hudson's answer (Milburn not being served) that the exchange with Reiter was fraudulent. While the case at bar was on hearing, this case of Reiter v. Hudson and Milburn was tried to a jury in the state common pleas court, with a verdict for Reiter on the Hudson-Milburn notes; the cause of action on the South Bend bank note being withdrawn. Thatcher was not a witness before the jury in this case, nor did that court have the enlightenment all this correspondence has furnished the Supreme Court, as well as this court. Nevertheless, this verdict has been offered to us as controlling the question of fact, and has been used as another text for violent attacks upon the Supreme Court. As it appeals to us, it is entirely immaterial whether or not Reiter was induced by fraud to part with the Hudson-Milburn notes. Respondent's conduct is to be tested by the view he is seen to be taking of that transaction. However that may be, on a motion for new trial, Judge Wannamaker, who tried the case, has set the verdict aside for want of evidence sufficient to support the claim of fraud.

We note here a bit of record which illustrates respondent's professional sinuosities and illuminates the character of his moral perceptions. Endeavoring to explain why he brought the action in the name

of another attorney, he testified that at the time he expected Hudson to permit a default judgment, with the main contest to be in collecting it, and that he had social relations with Hudson and his family which he feared the suit would interrupt if he appeared in it. Of course, it is an interesting sidelight, set aflame by this excuse, that he was willing under cover to impose a deceitful action on his friend. But we have reference especially to another matter. The record of this case as far as it had gone (to the verdict) was admitted in this hearing, upon respondent's insistence, although it seemed of doubtful materiality. In it appears the fact that, after an answer had been filed, and the hopeful expectation that no resistance would be offered by Hudson was at an end, respondent filed an affidavit of prejudice in the case, although not yet attorney of record, and never thereafter appearing as attorney of record, in which he swore that he was "one of counsel for the plaintiff in said case; * * * that the said judge has a bias and prejudice against affiant"—the judge referred to being Judge Morris.

Two reflections occur right here: First. That this was an unnecessary and uncalled-for attack upon Judge Morris, who but for the affidavit might not have known of respondent's secret professional interest in the case. Second. That friendship for Hudson, which he claimed was strong enough to impel him to hide behind Duer, that the friend might be deceived, was not equal to the strain imposed by the fact that his friend was offering a defense which respondent as a lawyer, with full knowledge of all the facts shown by the correspondence just considered, knew he was entitled to. On the whole, we incline to the opinion that this circumstance suggests that his excuse for suing Hudson through another law office was disingenuous, and that his real object was to aid the deception upon Hudson which he proposed in his letters to Milburn, and that, when he found this line unavailing to delude Hudson, his cupidity, which involved him in the fee contract with Reiter touching Milburn's paper, got the better of him and brought him into the open in the case. It appears to us as but another fact tending to prove that the action against Hudson in the form in which it was brought was not in good faith. Shortly after the filing of this affidavit he was disbarred from practice in the state court, and the subsequent amended petition was filed in the name of an employé of his office as attorney.

In fairness to the respondent, we ought not to finish the consideration of this matter without discussing the reason advanced by him to us for treating this paper as Reiter's after having so long held it as Milburn's. It is that he thought he might read Milburn's letter of September 12, 1904—the last word Milburn wrote, and which Thatcher never answered—in the light of Milburn's attempt to assign his right of contribution on February 13, 1903, which Thatcher rejected because, as stated in his reply of February 14th, it "might cause complications" in not giving a chance to deceive Hudson, and regard the two as affecting a relinquishment by Milburn of all his rights to these notes. That position, however, is hardly plausible even, first, because Milburn never had or claimed any rights in the notes save a

right of contribution, and in suing Hudson the action was not upon a right of contribution at all, all the correspondence showing that Thatcher never intended to sue on such a foundation; and, second, because Milburn in that last letter expressly cautioned Thatcher that nothing should be done, except that "which will absolutely hold Mr. Knapp and myself harmless," otherwise "the matter will have to be dropped," whereas the suit which was begun, and begun, too, precisely in the way in which Thatcher for six years persistently intended it should be begun, was framed in the one way in which Milburn would not have been held harmless, for a judgment as therein aimed at would have put him at the peril of a right of contribution in Hudson. It seems to us that in taking such a position, if respondent did in fact take it at the time the action was begun, he violated the plainest purport and caution of this last letter from his client, Milburn. Besides, what has this to do with treating the South Bend bank note as Reiter's? It was not included in the rejected assignment of February 12, 1903, and Reiter never had a color of right to sue it, even on respondent's construction of the correspondence.

Specification 14, of which the Supreme Court of Ohio found respondent guilty, is founded upon the admitted fact that on October 5, 1906, respondent caused to be prepared and delivered to the clerk of the Lucas county court of common pleas 11 affidavits of prejudice against Judge Morris, in which, as to their respective cases in which he was attorney, Thatcher stated under oath that Morris entertained a bias and prejudice against him. It is alleged that, having delivered these documents to the clerk, respondent requested the latter to inform Judge Morris that if he would transfer the cases to another judge the affidavits would not be filed, and that by this action the respondent undertook to intimidate and improperly influence Morris as a judge, and to obstruct justice, etc. Touching this specification, the Supreme Court said (page 663 of 80 Ohio St., page 87 of 89 N. E.):

"The facts stated in specification 14, standing alone, would probably not be regarded as sufficient to sustain the charges; but the respondent's own testimony, in the opinion of a majority of the court adds materially to the gravity of the situation."

Evidence before us warranted, in our judgment, a feeling in respondent at that time that Judge Morris was not personally friendly to him. Wherefore, considering the state practice regarding affidavits of prejudice, we feel that he should have the benefit of the doubt. At any rate, without in any way questioning the judgment of the state court respecting qualifications for its bar, we do not consider that the matter demands attention at our hands adversely to the respondent.

[6] Three charges of misconduct, charges Nos. 2, 3, and 4, are made in this case against respondent which were not before the state court. Charge 2, in effect, is that a case in this court, entitled Rucki v. Pennsylvania Company, having been tried to a jury, Knappen, Judge, respondent prepared and submitted a bill of exceptions to Marshall & Fraser, counsel for the railroad, for their approval before submission to the judge for signing and sealing, and that, after Marshall & Fraser had amended the bill and had approved it, respondent, will-

fully and with intent to deceive said attorneys and the trial judge, caused to be inserted in said bill a certain paper (Exhibit K in this hearing), to which said attorneys had objected, and thereupon imposed the bill as so added to upon the trial judge, who, without knowledge of respondent's act, signed the same as if it had been approved by all counsel.

The court, in considering this charge, is saved the necessity of passing fully upon an issue of veracity raised by the oral testimony of Fraser, who is the only witness for the committee, and respondent, because correspondence between Thatcher and Marshall & Fraser, and between both parties and Judge Knappen, introduced in evidence, and the admissions of respondent himself combine to an unmistakable conclusion.

The verdict in the case in question in its amount disappointed Mr. Thatcher, who represented the plaintiff. Wherefore he undertook to prosecute error. June 10, 1908, he submitted the bill of exceptions to Marshall & Fraser, who returned it immediately unapproved and unexamined, because of an inability to meet his request that they examine and return it by that evening. The fact that they had not approved or examined it was stated in a letter from them to Thatcher, a copy being sent to Judge Knappen, together with their protest against inclusion in the bill of matter referring to the motion for new trial and the affidavits in support thereof. Judge Knappen, June 13th, returned the bill to Thatcher without his approval, saying to respondent, among other things:

"It also contains the proceedings on the motion for new trial, the denial of which is not a proper matter of exception, nor can it be reviewed by writ of error in the federal courts. * * * The matters which I think should be eliminated are these. * * * (4) The proceedings upon motion for new trial and the affidavits in connection therewith."

It is respondent's persistence in keeping in the bill this matter touching the motion for new trial that got him into the difficulties out of which this charge arises. June 24th he sent the bill to Marshall & Fraser for the second time. On the 29th they returned it, accompanied by a letter in which they said:

"And we also object to the reference to the action of the trial court upon the motion for a new trial, and object to any reference to the evidence and affidavits on that hearing."

On the same day they wrote to Judge Knappen to the same effect. July 1st Thatcher sent the bill to opposite counsel for a third examination, with a letter; the part important for this consideration reading as follows:

"On the question of the affidavits, I cannot agree with you that they should not be in the bill, as I do not know of any other manner in which the substance of these affidavits can get into the record, unless it is agreed that the substance of these affidavits is correct. With that in view, I hand you herewith a condensed statement of the substance of these affidavits, and would suggest that you have it inserted directly after the charge of the court. If you consent to this, all of the affidavits may then be separated from the bill of exceptions."

The testimony is that this letter and bill were transmitted by messenger, and with these, in a separate envelope, was the "condensed statement of the substance of these affidavits," which figures in this case as Exhibit K.

On the same day Marshall & Fraser returned the bill, with a letter which we copy here in full, as showing the emphasis with which they repeat their objections to the inclusion of the matter which Judge Knappen, three weeks before, had directed respondent to omit. The letter from Marshall & Fraser to Thatcher reads:

"We have your favor of the 1st inst., again handing us the bill of exceptions in the case of Rucki against the Pennsylvania Company. We note that you have made all the changes we ask, except omitting reference to the hearing upon the motion for a new trial, and the reference to the affidavits.

"We are satisfied with the bill as you now have it, except that portion referring to the hearing of the motion for a new trial and the attaching to the bill of exceptions of the affidavits or the substance thereof.

"Our position is that there is no proper place in a bill of exceptions, in the federal court, for any reference to a motion for a new trial or any evidence used thereon, either oral or in the form of affidavits. We must therefore object to these affidavits or the substance thereof being attached to this bill of exceptions. In forwarding the bill to Judge Knappen, you may send him this letter, if you will."

July 2d the bill was sent to Marshall & Fraser for the fourth time, accompanied by this letter from Thatcher:

"I have removed the affidavits on motion for new trial in Rucki case from bill of exceptions, and think it now entirely accords with your views. If it does, will you please O. K. the same, and I will at once transmit it to Judge Knappen."

It then contained, on the last page, and immediately above the judge's certificate, this:

"Thereupon and within due time, the plaintiff filed his written motion to set aside said verdict and for a new trial, for the reasons set forth in said motion, and upon the hearing of said motion, and in support thereof, read to the court the affidavits hereto attached, of the following named persons [naming them]. The court thereafter overruled said motion of the plaintiff for a new trial, to which action of the court the plaintiff duly excepted."

This paragraph Mr. Fraser eliminated by cross-hatching, and, having satisfied himself that the bill conformed to his views, indorsed the "O. K." of his firm, and returned it to the respondent, who, July 6th, sent it to Judge Knappen with a letter of about 200 words, saying, among other things:

"You will notice that the bill has been completely rewritten, and approved by counsel for the defendant."

July 10th the judge signed it, and, in returning it, wrote to Thatcher, sending a copy to Marshall & Fraser, as follows:

"I have signed the bill of exceptions as prepared by you and as approved by Messrs. Marshall & Fraser, making, however, one slight correction upon the sheet inserted between pages 23 and 24. It does not occur to me that the matter on that page [which relates to the hearing of motion for new trial] is properly part of the bill of exceptions; but as Messrs. Marshall & Fraser have O.K.'d the bill, I will let it stand, with the addition which I have made."

The sheet referred to by the judge as being between pages 23 and 24 was Exhibit K, the "condensed statement of the substance" sent to

Marshall & Fraser July 1st by respondent with the letter quoted above, in which it is offered as an alternative to the affidavits, and which he suggests they have "inserted directly after the charge of the court." It is the same proposition which defendant's counsel rejected in their reply of that date, which we again quote in part:

"We must, therefore, object to these affidavits *or the substance thereof* being attached to this bill of exceptions."

It is for the alleged wrongful insertion of this sheet (Exhibit K) after approval of the bill by opposing counsel that respondent is facing this charge. When the bill reached and was signed by Judge Knappen, this sheet was permanently bound between the copy of plaintiff's refused requests to charge, which ended page 23, and the court's charge, which headed page 24.

Immediately after the receipt of Judge Knappen's letter apprising them of the condition of the bill, Marshall & Fraser voiced their objection, vehemently protesting that it was not approved by them in that form. It is apparent, then, that the issue is whether Exhibit K was before them as a proposed part of the bill when they indorsed the latter as satisfactory.

On the hearing, Fraser testified positively that when the bill was examined and approved by him there was no sign of Exhibit K; that, had it been there, it could not have escaped him. Thatcher, with equal positiveness, asserts that the sheet was sent to Fraser inserted loosely in the bill, and that it came back in that position. In this he is supported by his clerk, Gamble, whose apparent honesty and purpose to tell the facts as they were in his mind impressed the court. His loyalty to his employer was manifest. He was, in 1908, about 20 years old, and had been general utility boy, clerk, and stenographer for respondent for about two years, and at the hearing was still in that position. A close cross-examination developed a justification for the feeling that he might easily be honestly in the mental error, not at all uncommon with upright witnesses, who, when their partisan feelings are aroused, testify to things as having actually occurred because they believe that, in the usual course of matters, they must have happened. He said that his duties concerning the bill were purely routine. He gave no reason at all why this one fact, purely casual at the time, should have been so impressed upon him, while other details (he carried the bill to Fraser four times) should be so hazy in his memory, and finally said that matters touching the bill made no "extraordinary impression. nothing more than the rest of the office duties." His testimony now, three years afterward, is much more in respondent's favor, goes more into detail at vital points, than that of his affidavit prepared in 1908 for Judge Knappen's information, although that affidavit was dictated by respondent himself to meet Marshall & Fraser's motion to eliminate this sheet. There is an atmosphere about Gamble's testimony which makes easily possible a disregard of it without at all reflecting upon him.

On the whole, as the record stands at this point, it is very easy to decide the issue against respondent on the preponderance of the evidence. It is very improbable that Fraser, who from the very first,

and in two letters to Thatcher and two to Judge Knappen, had so strongly objected to anything of this kind, would have so suddenly and inexplicably yielded had he known of Exhibit K's presence in the bill. We have seen that only the day before, in the aptest and strongest language, he had rejected this very paper as a proper part of it, and had definitely refused to approve the bill when burdened by it.

It is equally improbable that, had the sheet been in the bill when delivered to Fraser July 2d, he would have overlooked it. According to Thatcher and Gambie, the bill on that day was bound together at the top by tape passed through holes about three-fourths of an inch from the top of the sheets, and Exhibit K was loosely placed between two of the leaves, in their opinion being fastened only by a clip. Under these circumstances the clip would advertise its presence almost on a casual handling of the document, and in addition the sheet would protrude nearly an inch beyond the other sheets at the loose end and literally obtrude itself upon the attention. We think, therefore, it is inconceivable that Mr. Fraser, who surely examined the bill, for he struck out the reference to the motion for new trial just before the certificate, should not have seen it at the time, if it were actually there.

Marshall & Fraser's prompt repudiation of this sheet as part of the bill they approved as soon as they learned of its incorporation is to be considered. Such conduct entirely harmonizes with their position prior to July 2d, and becomes wholly incomprehensible if, in fact, on that day they receded from that position.

Two words from the respondent himself incline the preponderance strongly against him. First is the letter of July 2d transmitting the bill to Marshall & Fraser for the fourth time. We cannot believe that, by the time he wrote this, Thatcher should not have comprehended Fraser's "views" involved elimination from the bill of all possible reference to anything pertaining to the motion for new trial. But the day before respondent had written to Marshall & Fraser that he handed them "a condensed statement of the substance of the affidavits," which "statement," all agree, was this Exhibit K, and which he suggested could be used as an alternative to the affidavits, and on the same day came back in reply, in each of three paragraphs of the letter which we have above reproduced in full, that all reference to the hearing of the motion for new trial was objected to. The language of this letter was unmistakable. They object, to quote it, to the "affidavits or the substance thereof." To assume that Thatcher wrote his last letter, on the next day, "and think that it now *entirely accords with your views,*" believing that to include Exhibit K would harmonize with Fraser's oft-taken position, is to reflect on the former's intelligence. To assume that he wrote these words and at the same time intended to make this sheet a part of the bill is to reflect upon his honesty, for then the statement would be false. There is no escape from one hypothesis or the other. The letter was written to express, honestly, a condition, or its purpose and language was to delude Fraser, which would, itself, be an unprofessional act. There is no reconciling his letter and respondent's action, as he now says it was, in sending this sheet then to Fraser, with professional ethics. Considering

the letter to have been in good faith, it is strong corroboration of Fraser's insistence that Exhibit K did not accompany the bill on this trip to his office.

Again, July 3d, Thatcher, from Detroit, wrote a letter to Judge Knappen:

"Mr. Frazer and I have practically agreed on bill of exceptions in Rucki case. Will you write me at Toledo, stating where you can be reached on and after July 6th?"

We incline to accept respondent's claim that he had gone to Detroit on the afternoon of July 2d, before the bill came back to his office, and that, therefore, this letter was written under the same inspiration which caused the indictment of his letter the day before to Marshall & Fraser. Assuming, as in the case of the other, that this letter was written by an intelligent man, in full possession of his faculties, able to remember the circumstances immediately underlying the business to which it refers, and intending to write upon such facts, it is subject to precisely the same considerations. The last word from Fraser known to Thatcher was so hostile to inclusion of Exhibit K that a practical agreement was decidedly not in sight unless respondent should abandon his persistent attempt to get that matter in. Unless, therefore, we should assume that this letter was written to deceive Judge Knappen, it must be taken as inconsistent altogether with the thought that its writer had just attempted to foist again upon Fraser the very thing which was making agreement impossible.

But we cannot find respondent guilty of misconduct here on a preponderance of the evidence alone. It should be clear and convincing. That strength is furnished by respondent's conduct subsequent to July 2d, shown in his own testimony and by his letters. He says, as does Gamble, that on his return, July 6th, he personally directed that Exhibit K be bound into the then approved bill, and caused this sheet to be inserted in the one place where it was least likely to be discovered. We have examined the bill, and, given a purpose to surreptitiously insert a page, if there was a better hiding place than between pages 23 and 24, we are unable to find it. No explanation whatever is vouchsafed for placing it in the illogical and altogether out of the way place in which it was put. Had it been bound in there when the bill was sent to Fraser, we could understand how the latter could have overlooked it.

As soon as Marshall & Fraser made the facts known to Judge Knappen, the latter wrote to them as follows:

"In view of your statement, unless Mr. Thatcher will consent to eliminating the matter complained of, I will entertain a motion—if you care to make it—for the withdrawal of the bill or the elimination of the matter referred to, upon your filing an affidavit covering the facts stated in the second paragraph of your letter, and upon your giving notice of the motion to Mr. Thatcher, to whom I am sending a copy of this letter."

Matters were allowed to rest until Thatcher returned from a vacation trip. On July 24th, respondent wrote the judge:

"I have just returned from a trip in the West, and see a copy of motion filed by Marshall & Fraser to strike out that part of the bill of exceptions in Rucki v. Penna. Co. which refers to the motion for a new trial.

"I have also read my letter, written to you on July 6th, in which I stated that the bill of exceptions had been approved by counsel for the defendant. This letter was written at the time when I was preparing to leave on a vacation, and I very much regret that I did not include a statement of the fact that counsel for the defendant was still objecting to the substance of the evidence received on motion for new trial being incorporated in the bill. I fear that my letter may therefore have been misleading to you.

"* * * However, I wish to except, provided you see fit to strike out the matter in question, as I think it is proper in the bill and should remain there."

Again, five days later, he wrote to Judge Knappen:

"I do not deem the matter of very much consequence, except that I do not wish to be put in the light of having in any way attempted to mislead you. Mr. Fraser knew that this page was in the bill of exceptions, and knew that I would insist on its remaining in the bill. * * *

"I wish, however, to again expressly waive any legal technicality that may exist, by reason of the fact that the bill has already been approved. I very much regret that I did not call your attention to the fact that Mr. Fraser still objected to the bill embracing the substance of the testimony taken on motion for new trial. I was hastening to get away on a vacation and this accounts for the oversight on my part."

We note two important features in these letters—one common to both, the other appearing only in the last. He hastens to apologize for and explain an omission to state "the fact that counsel for the defendant were still objecting," etc. This, repeated substantially in the second letter, is remarkable in view of Thatcher's testimony (and Gamble's) that the bill came back from Fraser's office, July 2d, approved, and with no other comment—certainly with no objection. If their testimony can be accepted as true, and Thatcher had, in fact, in his letter of July 6th to Judge Knappen, put the statement which he now apologizes for omitting, he would have written a falsehood. His whole defense depends upon acceptance of his claim that Fraser approved the bill without objection and with Exhibit K as a part of it.

Counsel for respondent found themselves at sea to account for this, whereupon, although this hearing was then on argument, Thatcher, at his request, was permitted to open up his defense to essay the task of explanation, and, in the act, we regret to be forced to say, made a bad matter decidedly worse. He testified that when he wrote these last letters to Judge Knappen he was so exceedingly occupied with business accumulated during his absence that his mind was not impressed with the fact of Fraser's approval on July 2d, and that the thing uppermost in his mind was the emphatic protest against Exhibit K in the latter's letter of July 1st. We are given to infer from his testimony by way of "explanation" that, had he remembered, in the writing of these letters, and had he been able to give to their writing undistracted attention, he would not have apologized for omitting to refer to Fraser's protest, but would have insisted, as he now insists, that Fraser approved the bill, Exhibit K and all. The good faith of the explanation is easily tested by the letters themselves. As instances: In the letter of July 24th, in the very same paragraph in which appears his apology for an omission, which apology he says he made in forgetfulness of Fraser's later approval, and immediately preceding, occurs this passage:

"I have also read my letter written to you on July 6th, in which I stated that the bill of exceptions had been approved by counsel for defendant."

Again, in the letter of July 29th, wherein is repeated his singular apology, which he now would have the court believe was penned in a moment of forgetfulness of his main defense to opposing counsel's attack on the approved bill, and which letter is, as shown by its terms, written for the express purpose of transmitting the affidavits, that day made by himself and Gamble, offered directly to prove that Fraser had approved the bill without objection, occurs this passage:

"Mr. Fraser knew that this page was in the bill of exceptions and knew that I would insist on its remaining in the bill."

To assert, against the plainest references to Fraser's alleged position on July 2d, to which, also, the inclosed affidavits were addressed, that the apologetic passages, which are so enigmatical against his present testimony that there was an unreserved approval by Fraser on July 2d, were written when the writer was temporarily forgetting this important matter, his only defense against the attack on the bill, and when only the memory dwelt on Fraser's attitude of the day before, is to attempt a burdensome task upon the court's credulity. That this equivocation (we try to employ a mild term) was not the result of sudden impulse, but was the fruit of deliberation, is shown by the fact that the embarrassing question was put to defendant's counsel by the court during argument just before evening adjournment, and the answer, which could not be made by counsel, was attempted by respondent on reconvening of court the next morning.

It will be noticed that in his first apologetic letter to Judge Knappen respondent insisted that Exhibit K was a proper part of the bill, and demanded that, if it were stricken out, his exception should be saved. Five days later, knowing that the judge was giving Marshall & Fraser's attack on the approved and signed bill serious consideration, he wrote that he did not "deem the matter of very much consequence"—a position he also took on the hearing before us. This, after nearly a month's effort to get it in the bill! This was the main thing he wanted in that document, else his correspondence with opposing counsel belied his purpose; after the judge pointed out its lack of materiality, he spent three weeks in endeavoring to retain it in some form; within the week he is seen contending that error for which he should except would intervene on its elimination; and now, facing an inquiry into his methods which, from his own statements, have an enigmatical phase, he backs down, saying that all this uproar, created entirely by him is of "no consequence." The conclusion seems irresistible that these two letters were written to avoid an inquiry which, should he hold to the position he had maintained up to the time, might provoke a drastic criticism of conduct which he could not defend.

It is but fair that two points made by respondent before the committee (he was heard in full before this charge was formulated), and likewise before the court in the hearing, should be considered. One is that Judge Knappen could not have regarded the matter as questionable, else he would have ordered an investigation into respond-

ent's conduct. What Judge Knappen did do was to take the offending sheet out of the bill, with a finding, in polite language, that it was neither part thereof when approved by opposing counsel nor at any time proper. He also took pains, as part of his formal order, and by special indorsement on the sheet itself, to insure that Exhibit K should remain on the court files. He was not judge of the Circuit Court of the United States for this district, and sat here only by special designation. Under these circumstances, in preserving the situation, he did about all he could do. He might very properly leave initiative to those locally more interested.

The other point is that, although Fraser furnished information against the respondent upon which the state court's committee acted, and although this episode happened before the charges were filed in the state court, it was not used there. But that committee seems to have limited its consideration altogether to matters involving respondent's position at the state bar. Whether or not it passed judgment on this matter is not very controlling on this court.

Our judgment is that the record well sustains charge No. 2, and that respondent is guilty of the professional misconduct therein alleged.

[7] Charge 3 against the respondent is to the effect (its details will transpire in the subsequent consideration, for there is little in dispute about the facts) that, in the case of Guszik v. Toledo, St. Louis & Western Railroad Company, in this court, Thatcher prepared and caused his client, who was unable to read or write in any language, and who could neither speak nor understand in any degree any other language than his native Polish, to verify a reply containing important and material allegations of fact which he (Thatcher) then, and when he filed the same, knew could not be sustained on a trial of the issues raised thereby, and "yet, notwithstanding such knowledge of each and all of the facts, said Charles A. Thatcher violated his oath, as an attorney and officer of this court, of fidelity to his said client and fidelity to this court, by causing and permitting said Albert Guszik to sign and make oath to said reply, and causing and permitting the same to be filed in said case in this court."

The case was brought in April, 1908, with Thatcher as plaintiff's attorney, under a contract in writing whereby the attorney fees should be one-third of the amount of the recovery, if had without trial, and one-half in case of trial. Some time prior to October 21, 1909, Guszik enlisted in his case the services of Mrs. Spychalski, a professional interpreter for Polish people, who took him to Mr. Hartmann, a reputable attorney of Toledo, and engaged the latter to effect a settlement of the litigation. The case had dragged in this court, and that fact and the matter of Thatcher's disbarment, which had sifted into Guszik's mind in some way, gave the latter an impression that Thatcher was unable to give the business proper attention, and on the date last named the case was settled for $400; the parties negotiating being Hartmann, as counsel for Guszik, counsel for defendant, and Guszik, with Mrs. Spychalski as his spokesman. Neither of counsel present understood or spoke a word of Polish, wherefore

Guszik's complete ignorance of the English language brought Mrs. Spychalski into so vital a relation to the transaction as that Guszik could not be heard thereafter to give a reliable account of the transaction except through her. Guszik, in witness of the settlement, upon payment to him of the sum named, then made, signed by his mark, a written release to the defendant, which Mrs. Spychalski translated. This court not being then in session, the settlement was not made effective on the records. A few days later Thatcher learned of the affair, and, getting Guszik into his office, had him sign up a written repudiation in his behalf, and caused a tender of the amount paid to be made accompanying the repudiation; respondent furnishing the money therefor.

This was October 26th. The next day, respondent, still being the attorney of record for Guszik, served notice upon defendant's counsel of the taking of depositions in the case on the 29th, and caused a subpœna to be served on Mrs. Spychalski to appear at his office as a witness for such deposition. The only purpose of this, manifestly, was to put Mrs. Spychalski on oath for Thatcher's benefit; for there was no legal excuse for taking the deposition, as the witness was a resident, in good health, and not about to depart from the city. It is clear that all the facts upon which Thatcher could rely to impeach the settlement were to be had from the testimony of the woman, for Guszik knew nothing of what any one said in English, except as she told him. Her testimony as to how the settlement was effected was vital and controlling.

Having taken the deposition, respondent, about three weeks afterwards, had Guszik verify a reply, which was promptly filed in an attempt to set aside the settlement, which had been pleaded in an amended answer. We have examined this reply, upon which is predicated respondent's misconduct in causing its verification by an illiterate man, who could not possibly read or understand it, unless translated, and in filing it as purporting to set up facts capable of proof, and we have carefully compared its allegations with the disclosures of Mrs. Spychalski, as shown by her deposition, and we are justified in saying that there are differences in material allegations between the two so radical as to warrant some criticism of respondent's agency in its preparation and filing. However, if matters had ended here, we would not consider the circumstance to demand much of the court. Some allowance must be given to the respondent's state of mind, and strict judgment ought not to be visited upon an attorney who performs such an act when smarting under the affront of having a case in which he had confidence and a financial interest settled surreptitiously. But respondent, seven months afterwards, insisted in demanding a trial of the case, when he should have known that first would come to the court's attention, necessarily, the issue raised by this reply, which he could not have hoped to support with testimony. At the trial, it appeared that there was no ground to think that the settlement was the result of fraud and deceit practiced on Guszik, as alleged in the reply, a fact which was plainly apparent by Mrs. Spychalski's deposition. The court directed a verdict against the reply;

Judge Tayler, sitting in the next to last case tried by him in Toledo, saying:

"There is not, in my opinion, a shred—not even a shred—of testimony that tends to discredit the settlement."

In the light of his conduct in pressing this ill-founded pleading upon the court in a moment when his judgment should have been stable, may we look at the act of having an ignorant client verify and file it. Still we would not accord to the matter more attention than to let respondent know that such practice deserved strong reproof, were it not for the intimate connection of this transaction with the circumstances underlying charge 4, which we now proceed to consider, and which emphasizes the gravity of respondent's action relative to the pleading.

Charge 4 is based upon these facts: When respondent heard of the settlement, he immediately sought Guszik at the house of the latter's landlady, Mrs. Kubielak. There he learned of the fact that the money had been deposited in the name of Mrs. Kubielak in a savings bank, and also obtained the number of the bank book. At the same time he successfully obtained Guszik's consent to attempt impeachment of the settlement, as above stated. He was still the latter's attorney of record, and there is no question but that his relation to Guszik for this last purpose was professional. October 26th was the day when he had Guszik in his office for the purpose of executing a written repudiation to accompany the tender back of the money. Meanwhile, and on the same day, he had prepared an affidavit in attachment and a statement of account against Guszik, and had filed them in a suit before a country justice of the peace against his client as principal debtor and Mrs. Kubielak and the bank as garnishees, alleging an indebtedness of $200 for services in the case and $9.54 expenses. He would have us infer, from the light manner in which he testifies of this transaction, that the principal part was borne by a collector; but the original papers before us and the testimony of the justice of the peace show that he personally prepared the papers and looked after the suit. For some reason unknown to us, the writs were put into the hands of a special officer, and by a remarkable coincidence that officer appeared on the scene in Thatcher's office, where Guszik was to execute the written repudiation of settlement, and there served them. It is fair to say that the respondent denies that he had any knowledge that Guszik was served in his office, and also insists that he had no part in bringing the special officer there on that occasion. It is a fact, however, that no one undertook to enlighten Guszik as to the nature of the paper which was then handed to him by the special officer, nor was he by any person put in possession of the fact that he was sued by his own attorney, and that unless he appeared before the squire on the 3d of November judgment would be taken against him. On that date judgment by default was entered for the full sum. We ought, however, to say that a Polish witness for the respondent testified that Guszik and Mrs. Kubielak told him before the return day of the summons and writ that the money had been tied up in the bank. It does not appear, however, that this conversation involved knowledge by

either of these people that they had an opportunity to appear before the court on the return day and there make defense against the claim of the respondent. Some time afterwards the respondent directed the squire to withhold execution, and, after the main case was concluded in this court seven months later, resulting in a vindication of the settlement, Guszik's money having been tied up all the time through this garnishment proceeding, respondent released the writ except as to $47, which he claimed for expenses, and the costs.

The point of the charge based upon these facts is that, having entered into the professional relation with Guszik as Guszik's attorney, and having Guszik in the office in furtherance of the business pertaining to that relation, it was unethical and unprofessional for him to permit himself to get into the adversary relation to Guszik involved in the attachment proceedings, without seeing to it that Guszik was fully aware that this relation was being assumed; and the more ignorant and helpless Guszik is seen to be the stronger appears the obligation upon respondent, as his counsel, on the one hand, to see that the poor fellow knew that Thatcher was his adversary in another relation. The committee charge that such conduct is a violation of respondent's oath of office of "fidelity to his client and to the court."

The court does not assume to criticise respondent for the mere fact that he sued Guszik for his fees. That was his right, other circumstances not considered. The criticism that does arise, in the court's judgment, is indicated above. The relation that this charge sustains to charge No. 3 is that the position in which respondent placed himself by suing Guszik under these circumstances is antithetic to the position he would have us believe he occupied in attempting to impeach the settlement. The more it is insisted that respondent should not be held for his action in preparing the reply made the subject of charge No. 3, because his heart was wrung over the imposition practiced upon poor Guszik, the more unpleasant does his action appear in becoming Guszik's adversary, and in permitting the helplessly ignorant fellow to remain unaware of that fact.

The Pole appeared before us as a witness, and was seen to be ignorant and simple almost to vacuity. His limitations appealed to sympathy. Yet we must indulge to him, even, the right to decide whether he would continue as the client of a lawyer who was suing him, and it appears palpable that every instinct which respondent would have us believe impelled him to strike at the settlement should also have suggested to him the high propriety of assuring the fact that Guszik knew he was sued by respondent before he left the latter's office.

Respondent's attempt on the stand to justify his conduct here but aggravates, by making the unethical inconsistency of these actions all the more apparent. It is that he brought the suit to tie up the money; "to hold the fund"; "to maintain the status quo" is the language. Interpreted, it seems to mean that he did this so that, if his adventure with the reply should come to a bad end, he would still have the personal benefit of the settlement; that his advance by way of the reply should be on the safe foundation of half the amount of the settlement. Something would be his whatever the event.

Reading the facts underlying charges 3 and 4 together, we are forced to the conclusion that respondent's handling of this matter after the settlement was effected was moved more by the financial interest he had in it than by any sympathy for this ignorant fellow, and that the language of the Supreme Court of Ohio applied to the Reiter-Milburn-Hudson matter (80 Ohio St. 663, 89 N. E. 87) is applicable here:

"The whole affair is a striking example of the peril to his integrity which a lawyer invites when he speculates in a lawsuit upon a large contingent fee, and of the strain which, under the circumstances, he puts upon himself while struggling with his honor upon the one side and cupidity upon the other."

Nor do we see that the fact that respondent abandoned his contention for fees, after the settlement was upheld in the final trial, changed the matter. We do not feel a call to apply this belated virtue retroactively; besides, it appears in evidence that a project was on foot to assault his judgment against Guszik, and that, on the trial in this court, he was criticised by Judge Tayler for his conduct generally.

One more thing shown in evidence in this case may be noticed. In the trial of the Guszik Case in this court before a jury, allusion was made to the fact that respondent, attempting to impeach the settlement by the trial, had brought this suit based upon the settlement in his own behalf against Guszik. Thereupon respondent made this statement:

"Inasmuch as counsel has gone into a personal matter of a suit against Mr. Guszik by his attorney, I feel I am entitled to say to the court in the presence of the jury that such a suit was brought before his attorney knew of the fraud which had been perpetrated."

Then later on he repeats:

"The suit was brought before we knew of the fraud that had been perpetrated."

This is another one of respondent's attempts to extricate himself from an embarrassing position by an equivocal statement. The facts were, as we have seen, that the suit was brought on the same day when Guszik was in Thatcher's office, pursuant to Thatcher's invitation, for the purpose of signing a repudiation of the settlement on the ground that the Pole had been defrauded. It is not possible to conceive that this professional statement, made in the presence of the jury to Judge Tayler, was true; for the record before us shows that all the information upon which Thatcher acted on the 26th of October, 1909, in drawing up what is before us as Exhibit FF, the repudiation of settlement to accompany the tender, he had prior to the preparation and filing of his papers in the suit against Guszik.

Again, in argument by respondent himself, as in another instance, we are asked to consider that the judge before whom these matters came in some sort of review did not deem them worthy of attention, and when respondent was upon the stand the offer was made to prove that:

"Judge Tayler did not criticise the respondent in any particular for having filed the reply."

Passing the question whether Judge Tayler's alleged lapse in any way affects the respondent's guilt of the matters charged, we may be pardoned, in the interest of a thorough consideration of the case, if we suggest that subsequently, all the proceedings upon trial of the Guszik case having come into this hearing by transcript because of respondent's insistence that he passed scathless through it before another judge of this court, we find that Judge Tayler, in directing a verdict against the reply did caustically criticise respondent, and reminded him that his continuance as a member of the bar of this court was not assured. Why, in June, 1910, Judge Tayler did not assume additional burdens in this division, with the appointment of a colleague to be located here the expectation of every recurring day, is well understood by every lawyer at this bar.

Respondent's act of imposing the reply in question upon the court and that of suing his unsuspecting client are so dependent upon each other for proper characterization as that each taints the other. Considered separately, something may be said in mitigation, perhaps defense; considered together, and this is the only treatment possible, the ameliorating facts pertinent to each lose efficacy, and nothing consistent with professional honor is left. We conclude that respondent's conduct was unethical and unprofessional, and was malpractice as that term is used in the rules respecting continuance at the bar of this court, of which the court should take cognizance.

[10] Removal from the bar, a position of honor, influence, and emolument, which has been attained only through much effort, is so severe a stroke that, even when the purity of legal proceedings is involved, a court confronting the unpleasant duty looks first to see if a corrective less drastic may not suffice. When the prosecution is based upon an isolated offense, unless the proved commission of a felony, it may be well to inquire whether circumstances not likely to recur, and for which, doubtless, repentance is manifested, may have been the occasion, in which case suspension, or perhaps direct reproof, only, may be a proper judgment. We are easily within bounds in the observation that hesitancy of courts and bar associations to apply the corrective of disbarment has interfered with the maintenance of the proper standard of professional ethics.

When. as in this case, there are several independent breaches, each of which is of a nature not to be lightly considered, we have a situation in which each may intensify the power of the others to reflect a character in the offender so wanting in appreciation of the honor of his profession and so likely to fail the court's confidence that it is not safe to apply any other judgment than permanent removal.

Respondent's handling of the Milburn-Hudson notes affords a criterion by which to regard the libel of Judge Morris. The two establish a standard by which proper conclusions in the Rucki Case may be assisted. These three combine to characterize the Guszik transaction, whose dual features taint each other. All these matters move in harmony to an inevitable conclusion unfavorable to respondent.

We feel a call to make great allowance for one with his back to the wall, fighting for his professional existence. It was this natural sym-

pathy which induced the court to suffer the record to be opened to testimony and exhibits which would render grotesque an ordinary lawsuit. As the charges were addressed to the sound discretion of the court, we felt that rules limiting the presentation of an ordinary cause ought not be adhered to very strictly. Anything offered which tended, even remotely or indirectly, to aid a just solution, we admitted, and the record shows very plainly that respondent availed himself of the disposition of the court to the point of abuse.

Early we were at pains to privately instruct him, with repetitions on several occasions, that there were plain and reasonable limitations to the court's indulgence in this respect. He was told with emphasis that but one issue was on trial, his alleged guilt, and that he would not be permitted to distract attention from that question by attacking other people upon collateral and immaterial matters. He was compelled to withdraw an answer which grossly offended in this regard, and which in its objectionable portions could have served no other function than to stand as a public file upon which to base an appeal to prejudice, and which was actually used in his behalf for that purpose; a copy at the time of filing having been given to the press out of his office. This episode caused an order to be entered withholding from file every paper in the cause until after submission to, and permission had of, the court—a power of censorship undoubtedly inherent in the court. Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14. We cannot too strongly affirm the court's earnest and, for a long time, kindly, demands upon respondent for his assistance in keeping this case out of the gutter, and for adherence to the single issue involved. Nevertheless, exercising one of the most responsible functions of his office, he commanded. in the name of this court, the attendance of witnesses in Los Angeles, Ft. Leavenworth, and Columbus, for deposition upon subjects which were so far removed from the issue on trial that no other conclusion seems possible but that the testimony was taken in defiance of the court, and to be used for the same purpose for which the suppressed answer was employed.

[8] The power to take testimony out of court is important, involving possible inconvenience to both the proposed witness, who dares not disobey the subpœna, and to opposing counsel, who remains away at the risk of his client. It is one of the rights of a member of the bar, which clearly indicates the confidential relation he sustains to the court. in that he is permitted to assume a function of the court whose process he commands upon his unsupported precipe. It is a delegation to him of the power of the court involved in his office, which is manifestly not to be used except on occasion and for purposes susceptible to justification on challenge. Statutes, as well as the common law, delimit its exercise to clearly marked emergencies and situations beyond which it may not be lawfully employed. These limitations are not infrequently overlooked, in most instances, we prefer to believe, through bad judgment or lack of reflection. To use the power for "fishing" purposes, as in the case of Mrs. Spychalski's deposition in the Guszik Case, or to serve a purely impertinent and immaterial end, as in the instances last referred to, is clearly unprofessional, to be reprehended as malpractice when indulged under circumstances in-

dicating contempt for the well-understood limitations of the right and for the honor of a profession called upon to obey as well as to administer the law. The malpractice of the respondent in this regard, as the cumulative effect of the instances cited, is so pronounced that a formal expression of the court's disapproval is demanded. We are glad to note that respondent's counsel had no office in these offenses. We do not, of course, base any final judgment against respondent because of them, for no charge is predicated thereon; but the phenomenally persistent insistence of respondent, who was beyond his counsel's control, that this wholly impertinent, and in large measure scandalous, testimony should get into the record, against repeated adverse rulings of the court, permits us to, and we should, employ the illumination such conduct affords, to see even more clearly the want in respondent of necessary professional character, which the formal and established charges so conclusively prove.

Mr. Thatcher, by his repeated protests to the world and in this hearing, that he was unfairly and unjudicially treated in his disbarment by the Supreme Court of Ohio, forced upon us an imperative and peculiar duty, requiring in its exercise, and in the interest of a clear exposition, a somewhat extended analysis of the case in the state court, whose judgment, through the unique development of circumstances, we were compelled to review. This extensive consideration we have applied also to the facts shown against respondent for the first time in this hearing. Five months have intervened since the case was heard, and we treat it with values justified by perspective. In the mass of record before us, much of it of minute materiality, it is not impossible that some transaction may be set forth which, taken out of its context, appears to relieve respondent; but we are formulating a judgment in a faithful endeavor to give every circumstance its logical and necessary bearing, omitting nothing which aids in any reasonable degree an understanding of his attitude in any situation fundamental to the charges.

We meet the unpleasant responsibility, however, without hope that we may escape the criticism of those who will not look into the record, but persist in a blind belief that respondent is a martyr to free speech and judicial tyranny. Concluding, we disclaim any general reflection on the practice of taking causes upon contingent fees, which does not deserve indiscriminate condemnation. In too many instances, otherwise, would justice be denied to the poor and friendless, in which cases the retainer becomes a sacred duty, calling for a high sense of professional honor. Guszik's Case, in its inception, may be in point. The danger, out of which grows great embarrassment to courts, and much criticism of the practice, lies in the difficulty experienced by the attorney in keeping his personal interest out of the case, which he must do or abdicate his function as an officer of the court. Too often it seems that this contingent interest affects him to regard the case as his personal litigation, the subject-matter his personal property, and then he seems to lose the sense of proportion which should be the counsel's, and to entertain the selfishly distorted views of the client. The Reiter-Hudson, Rucki, and Guszik Cases are clear instances of what we have in mind. It seems a necessary deduction

from the facts that in each case a contingent fee blunted respondent's moral perception and dulled his ear to the call of professional honor.

We cannot end without extending the thanks of the court to counsel for respondent, that they performed a singularly arduous and unpleasant task with uniform courtesy and professional decorum, and apparently with sincere willingness to be of help to the court. That theirs was a position of embarrassment through what one, in argument, apologetically called the "temperament" of respondent, was evident at every sitting. We venture a doubt, however, that any canon of loyalty to a client required such surrenders to his will as were at times manifested. The record would be in a more favorable condition for him, had he had a more restrained part in its making. We cannot accept, as valid exculpation for respondent's offenses, that they were due to "temperament." But if it is that which framed the proposition in the Milburn letter of February 14, 1903, and which carried the improper purpose to its logical sequence in the suit; if that was what discovered license to support libels with half truths because innocuous whole truths were too "voluminous," and inspired the abortive attempt to hide in the Rucki bill the "condensed statement," and furnished the equilibrium for antagonistic positions in the Guszik Case, and found professional justification in the taking of the scandalous depositions; if respondent's professional embarrassments are due to nothing more than temperamental idiosyncrasy, we are still, in sheer judicial self-defense, forced to rule that such an affliction is at least a "sufficient cause," as phrased in our rules, to separate its possessor from the bar of this court. A condition producing such fruits is too embarrassing to and incompatible with due administration of the law to be endured.

That the respondent's infirmity, whatever it is, of which the charges have developed conclusive objective symptoms, is not temporary, is shown by not only the diversity of the outbreaks and their persistence (he maintained from July 1, 1902, to February 1, 1908, a purpose to sue Hudson in a deceiving manner), but also because of the lamentable fact that, upon the disclosure of all the questionable transactions herein, he manifests no regret, but rather defiantly assumes to ignore the significance of the most sinister acts and aggravates their effect by equivocation and by offering sheer impertinences as justifications. For more than two years he has apparently permitted, if not in fact openly encouraged, the national scandalizing of his state, through persistent misrepresentation of its highest court, and in this hearing, by a gross abuse of the court's process and of his rights either as a litigant or an attorney, he has attempted to provide for further outrage on the court which admitted him to practice, and whose confidence it has been judicially determined he has forfeited. Since that fact was so disclosed, and when it would seem that, at least, he should have reflected whether professional ethics should not be worthy of some solicitude on his part, he dealt most unprofessionally with the helpless Guszik, one of the very class of whom he poses as the special champion. Throughout this hearing he has taxed to the limit the patience of the court, even for a man in a desperate position, by tactics which transcend all professional propriety, and which were persistently indulged after the court's repeated endeavors to show him their gross impropriety. Whether

all this has been inspired by a desire to invite disbarment, that he might henceforth pose as a martyr and be the future beneficiary of a public sentiment inflamed by plausible misstatements of the attitude of the courts, or because of sheer mental and moral inability to appreciate ethical conduct, the result is the same. He permits the court no other course than to order his name stricken from its rolls.

Before this opinion was completed to be filed, and before the tenor of it was announced, an enterprising local newspaper had in type an article for publication contemporaneously with the filing of the opinion, containing the information, derived from respondent, that he had filed for the court's attention photographic copies of an ephemeral publication known as the "Independent Citizen," which circulated in the local election campaign of 1906, with the advice that he (respondent) was able to prove that the same was published by certain lawyers of the Toledo bar. We deem this information coming to the court sufficient to warrant us in stating in this opinion that upon the 4th day of February, 1911, we sent these papers to Elmer E. Davis, Esq., as president of the Lucas County Bar Association, with a communication as follows:

"I send with this a communication to me from Charles A. Thatcher, of date December 9, 1910, which, with its exhibits, is self-explanatory. This matter has been marked as filed in this court, but, not being a document entitled to filing, is not properly on the files, and that feature may be disregarded. I send it to you for presentation to the grievance committee of the Lucas County Bar Association, for such action in the premises as the Committee deems proper. I would not think of taking a matter of this kind up originally, believing that it is a matter first for the consideration of the local bar organization and of the state courts. I have notified Mr. Thatcher of my disposition of the papers."

On the same date we notified Mr. Thatcher of our action in the following communication:

"Acknowledging receipt of your communication of December 9th, preferring charges of unprofessional conduct against certain members of the Lucas county bar, who are also members of the bar of this court, therein named, I beg to say that I have referred it to the Lucas County Bar Association for the consideration of its grievance committee, and inclose herewith a copy of the letter in that behalf written by me to Prest. Davis."

To which, by special delivery letter, under date of February 6, 1911, respondent replied as follows:

"I am in receipt of your letter of February 4th, containing copy of your letter to Mr. Elmer E. Davis, president of the Toledo Bar Association, referring to my communication to you of December 9, 1910.

"*This communication was not intended to contain charges as being preferred by me, but simply to call the attention of the court to certain facts, for such action by the court, if any, as the court might deem necessary in the premises.*"

Inasmuch as the grievance committee of the Toledo Bar Association, to which it is suggested by Your Honor that the matter be referred, is without either the means or the authority to require the attendance of witnesses, and to administer an oath, and for other valid reasons, I respectfully request that you will kindly instruct Mr. Davis to return the papers and exhibits to me."

Pursuant to the request contained in this letter (the underscoring in its reproduction being ours), Mr. Davis was requested to turn these papers back into Mr. Thatcher's hands. Upon the 29th of April, Mr.

Thatcher having persisted in bringing this immaterial matter to the court's attention by way of deposition, the judge of this court wrote him as follows:

"Frankly, I am surprised that you should undertake to offer this sort of testimony in this case, after I have attempted so carefully to direct your attention to the fact that we could only try in this case the question of your responsibility for the things which are urged upon the court as warranting the striking of your name from the court rolls.

"It seems to me you ought to be in sympathy with the court's position that misconduct, if any there was, on the part of any other member of the bar, to which you were not a party, is not in any way a subject of inquiry in this case, and that no precedent of misconduct on the part of any other member of the bar could be offered by you as a defense for any misconduct of your own."

We anticipate that the purpose of the statement in the article referred to, which undoubtedly has its inspiration in the devious practices of the respondent so well exemplified by his conduct in this case, is to create the impression that the court is discriminating against him. Very likely, with respect to this court, as in regard to the state court's decision, he would like to direct attention from the enormity of his other offenses against professional propriety by asserting that his principal derelictions were the Morris circulars. Wherefore we justify this lengthening of this long opinion. We are sure that candid persons will find, in the tenor of the correspondence above given, not only that the court is no respecter of persons who offend against professional ethics, but that respondent, in disclaiming any intention to present charges against any other attorneys and in requesting this court to cause to be returned to him the papers which the court had placed in the custody of the organization which is supposed to safeguard the honor of the local bar, has deprived himself of the least opportunity to cavil at the court in this particular.

An order will be entered, directing that the name of Charles A. Thatcher be stricken from the rolls of the Circuit and District Courts of the United States for the Northern District of Ohio, as attorney, counselor, solicitor in chancery, proctor, and advocate in admiralty, and that he henceforth be debarred from appearing at the bar of either of said courts in either of these capacities.

DENNING v. ROBINSON et al.

(Circuit Court, D. Oregon. February 20, 1911.)

No. 3,637.

EXCHANGE OF PROPERTY (§ 3*)—FRAUDULENT REPRESENTATIONS—LANDS.

A statement in letters written by defendant's agent to complainant's agent, in negotiations for an exchange of lands, that defendant's land consisted of an orange grove of 12½ acres, containing 750 trees, giving the varieties, did not constitute a fraudulent representation, which entitles complainant to rescind, because the trees did not cover the entire tract, but something over 10 acres only, where the number of trees was truthfully stated, and they were planted the usual distance apart.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by C. E. Denning against Sylvia S. Robinson and others. Decree for defendants.

Gus Newbury, for plaintiff.

E. A. Meserve, Wm. M. Colvig, and C. L. Reames, for defendant Robinson.

BEAN, District Judge. The charge of fraud relied upon for the relief sought is that the defendant, through her agent, falsely and fraudulently represented to the plaintiff that the land in California conveyed by her to him in exchange for Oregon lands consisted of 12½ acres of orange trees. The exchange was made without either party seeing the land of the other. The entire negotiations were conducted by correspondence between P. W. Cheney, residing in California, the agent of the defendant, and C. W. Sharpe, residing at Medford in this state, agent for the plaintiff. All the representations made by Cheney concerning the area of the land or the extent of the orange grove are to be found in his letters to Sharpe of dates September 16, October 25, and October 29, 1909. The first letter was written in answer to an inquiry from Sharpe, suggested by an advertisement in a Medford paper, and before the plaintiff had any interest in the matter whatever. In this letter, Cheney says:

"That orange grove is located one mile from business center and four blocks from $30,000 high school at Corona, Riverside county, which is about 30 miles southeast from Covina—12½ acres—280 Valencia buds, six years old; balance, 12-year navels."

This letter was shown to the plaintiff, who had previously placed his land in Oregon with Sharpe for sale or exchange, and at his suggestion or by his consent negotiations were opened between Sharpe and Cheney for the exchange of lands; but in their correspondence no further statements are made by Cheney as to the area of the California lands, or the extent of the orange grove thereon, until October 25th, when he writes:

"It seems to me, Mr. Sharpe, that you asked me in one of your letters regarding the varieties of oranges in the grove, and I think I forgot to state to you what they are. There are 750 trees, two-thirds of which are Washington navels (which is the best variety of navel orange) and one-third late Valencias, which have been making orange growers rich the last few years."

After the terms of the exchange had been agreed upon, and on October 29th, Cheney wrote Sharpe, saying:

"Description of grove is lots 1, 2, 3, and 4, block 55, South Riverside Colony Lands, containing 12½ acres."

These are all the statements from Cheney to be found in the correspondence in reference to the area of the California lands or the orange trees growing thereon, and the statements as so made are shown by the testimony to be true. There was in fact 12½ acres in the tract, and 750 orange trees growing thereon, of the kinds and varieties mentioned by Cheney.

It is claimed by the plaintiff that the representations referred to amount to a statement that the entire 12½ acres was in oranges, when in truth and in fact but 10.22 acres were planted to trees. But I do

not think that the statement can be so construed, or that Cheney represented or intended to represent that the entire 12½ acres were in oranges, but that there were 750 orange trees thereon, and this was true. The plaintiff was not injured, but rather benefited, by the fact that the trees were planted the usual and ordinary distance apart, and not scattered all over the entire tract of land.

The charge of fraud has not been made out by the proof, and the bill is dismissed.

MEMORANDUM DECISIONS

ARAUJO v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 5, 1911.) No. 2,067. In Error to the District Court of the United States for the Western District of Texas. Joseph E. Cockrell and Edward Gray, for plaintiff in error. Charles A. Boynton, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. This case having been regularly set down for hearing, and on call no counsel appearing for the plaintiff in error and no brief having been filed, on motion of the defendant in error the writ is dismissed, with costs, for want of prosecution. See rule 22 (150 Fed. xxxii, 79 C. C. A. xxxii).

BREWSTER et al. v. YORK MFG. CO. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,154. Appeal from the District Court of the United States for the Southern District of Texas. Hiram M. Garwood, for appellants. Newton C. Abbott, for appellee. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The decree appealed from seems to be in accordance with the opinion and decree in York Manufacturing Company v. Brewster (rendered December 7, 1909) 174 Fed. 566, 98 C. C. A. 348, and it is affirmed.

CITY OF SANTA CRUZ v. WYKES. (Circuit Court of Appeals, Ninth Circuit. September 5, 1911.) No. 2,004. Appeal from the Circuit Court of the United States for the Northern District of California. See, also, 184 Fed. 752. Curtis H. Lindley, Henry Eickhoff, and Emili Pohli, for appellant.

PER CURIAM. Motion for order dismissing appeal without prejudice, etc., granted.

COLGAN v. MEADE. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,146. In Error to the Circuit Court of the United States for the Northern District of Texas. George E. Miller and James T. Montgomery, for plaintiff in error. Charles K. Bell, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. Under the evidence in the case, the question whether the survey under which plaintiff in error claimed was actually made on the ground was properly submitted to the jury. The record shows no reversible error, and the judgment of the Circuit Court is affirmed.

EL PASO ELECTRIC RY. CO. v. HEATH.† (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,166. In Error to the Circuit Court of the United States for the Western District of Texas. T. M. Miller and Leigh Clark, for plaintiff in error. S. Engelking and C. P. Johnson, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. On the evidence the case was necessarily submitted to a jury, and in the charges and refusals to charge of the trial judge we find no reversible error. Judgment affirmed.

FINK et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,195. In Error to the District Court of the United States for the Western District of Texas. M. W. Stanton, for plaintiffs in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. None of the assignments of error in this case are well taken. The judgment of the Circuit Court is affirmed.

In re FISKE et al. (Circuit Court of Appeals, Second Circuit. November 13, 1911.) No. 79. Appeal from the District Court of the United States for the Southern District of New York. This cause comes here upon appeal from an order granting the bankrupt's discharge. B. N. Cardoza, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The specifications relied on are that bankrupts while insolvent transferred to the Mechanics' & Metal Bank property and other securities, for the purpose of hindering, delaying, and defrauding creditors; also that the bankrupts knowingly and fraudulently failed to schedule a certain debt due them on open account by one Dittmar. As to the first ground we fully concur with the District Judge that, although the transaction may or may not have constituted a voidable preference, the evidence does not tend to show a transfer with intent to hinder, delay, or defraud creditors. We do not think it necessary to add anything to what is said in his opinion. As to the second ground there is no finding by the referee, either way. The District Judge says that it was not asserted by creditors that it had been sustained by evidence. Examination of the record shows that there was no misstatement in the schedule. Instructions by Dittmar to transfer the amount named from another account to his own were given on the day of the bankruptcy, but the change had not been made in the books before petition was filed. Bankrupts were advised by counsel not to make any change in their books after such filing; but when the schedules were prepared the proper changes were made in them and affidavits submitted to the receiver explaining the transaction. This assignment of error is without merit. The order is affirmed.

FREEHOLD SHOP CO., Limited, v. STITT. (Circuit Court of Appeals, Fifth Circuit. December 5, 1911.) No. 2,238. Appeal from the District Court of the United States for the Northern District of Texas. W. H. Slay, for appellant. H. O. Ledgerwood, for appellee. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. A majority of the judges being of opinion that this case was correctly ruled in the court below, the decree appealed from is affirmed.

In re HARRIS. (Circuit Court of Appeals, Second Circuit. October 16, 1911.) No. 188. Petition to Revise Order of the District Court of the United

† Rehearing denied December 26, 1911.

States for the Southern District of New York. Fischer & Rosenbaum, for petitioner. James, Schell & Elkus, for respondent. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The Supreme Court having answered the question certified in the affirmative (221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732), the order of the District Court (164 Fed. 292) is affirmed.

HARRIS v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 3, 1911.) No. 2,145. In Error to the District Court of the United States for the Northern District of Alabama. Z. T. Rudulph and Ray Rushton, for plaintiff in error. Oliver D. Street, for the United States. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The motion of the United States Attorney to dismiss this writ of error for want of prosecution is granted, and it is ordered accordingly.

ILLINOIS STEEL CO. v. AIGLER et al. (Circuit Court of Appeals, Eighth Circuit. October 9, 1911.) No. 3,343. Appeal from the Circuit Court of the United States, for the Eastern District of Oklahoma. See, also, 176 Fed. 853, 100 C. C. A. 323. Kemper K. Knapp, Robert W. Campbell, William D. McKenzie, D. M. Tibbetts, and Fred W. Green, for appellant. J. F. Sharp, N. A. Gibson, Charles H. Hamill, and Lessing Rosenthal, for appellees.

PER CURIAM. Dismissed per stipulation, without costs to either party in this court.

JENKINS et al. v. ATLANTIC COAST LINE R. CO. (Circuit Court of Appeals, Fourth Circuit. November 8, 1911.) No. 1,024. In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston. See, also, 179 Fed. 535. J. J. McSwain, for plaintiffs in error. Lucian W. McLemore, for defendant in error.

PER CURIAM. Writ of error dismissed by consent. Order of court and consent filed.

KEEBLE v. JOHN DEERE PLOW CO. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,239. Petition to Superintend and Revise Order of the District Court for the Northern District of Texas. J. M. Wagstaff, for petitioner. Joseph Manson McCormick, for respondent. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The conditional sale was recorded before the petition in bankruptcy was filed, and therefore is prior in time to any lien the trustee may have growing out of the adjudication in bankruptcy. The petition is denied, with costs.

MAXWELL v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 3, 1911.) No. 2,149. In Error to the Circuit Court of the United States for the Northern District of Alabama. J. J. Willett, for plaintiff in error. Oliver D. Street, for the United States. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. We find no reversible error in this case, and the judgment of the Circuit Court is affirmed.

MOY CHUNG v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,043. Appeal from the District Court of the United States for the Western District of Texas. Volney M. Brown, for ap-

pellant. Charles A. Boynton, for the United States. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. We reach the same conclusion on the facts as the court below, and the decree of the District Court is affirmed.

MUN HOY v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,150. Appeal from the District Court of the United States for the Western District of Texas. Volney M. Brown, for appellant. Charles A. Boynton and S. Engelking, for the United States. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. On the evidence we reach the same conclusion as the court below, and the judgment appealed from is therefore affirmed.

NG BOW v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 27, 1911.) No. 2,170. Appeal from the District Court of the United States for the Western District of Texas. Volney M. Brown, for appellant. Charles A. Boynton, for the United States. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. On the evidence in this case it is clear that the appellant is not a late arrival in this country, but has been in the country many years, and we find nothing in the record to dispute the uncontradicted evidence that he was born in this country at the time and place claimed. See Gee Cus Beng v. United States, 184 Fed. 383, 106 C. C. A. 493. The decree of the District Court is therefore reversed, and the cause is remanded, with instructions to discharge the appellant.

OLIVER v. AMERICAN LOCOMOTIVE CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 3, 1911.) No. 2,285. Appeal from the Circuit Court of the United States for the Southern District of Georgia. E. H. Callaway and C. Henry Cohen, for appellant. William Garrard, for appellees. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The equity in this case is with the appellee. The decree of the Circuit Court was correct, and is affirmed.

OLIVER v. GEORGIA CAR CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 3, 1911.) No. 2,284. Appeal from the Circuit Court of the United States for the Southern District of Georgia. E. H. Callaway and C. Henry Cohen, for appellant. George W. Owens, for appellees. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The equity in this case is with the appellee. The decree of the Circuit Court was correct, and is affirmed.

PAINE LUMBER CO. et al. v. NEAL et al. (Circuit Court of Appeals, Second Circuit. November 20, 1911.) No. 80. Appeal from the Circuit Court of the United States for the Southern District of New York. This cause comes here upon appeal from an order granting a preliminary injunction. C. M. Beattie, W. P. Maloney, and F. Hulse, for appellants. Walter G. Merritt (Daniel Davenport, of counsel), for appellees. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The Circuit Judge sought to preserve the status quo by granting temporary injunction and by protecting defendants from loss or

damage by requiring a large bond from complainants. It is usually desirable that a status quo be preserved, until the rights of all parties may be determined upon a fuller and more satisfactory presentation of the facts than can possibly be obtained from ex parte affidavits; and the method adopted here, viz., injunction and bond to respond for damages is not infrequently used to accomplish that purpose. Such a disposition of the case is within the discretion of the trial judge, and in this case it does not seem that such discretion was abused. The questions presented are important, not only to the parties, but to the public as well. It would seem wiser that there should be no judicial discussion of them until all the facts are fully presented. For these reasons, without expressing any opinion as to the propositions of law discussed in Judge Coxe's opinion, his order is affirmed, without costs. It is proper for us to add, however, that we take this action with the expectation that the complainants will use every endeavor to bring on speedily the case for final hearing and that any delay on their part would be good ground for the dissolution of the injunction.

THE RAVN. (Circuit Court of Appeals. Second Circuit. November 13, 1911.) No. 113. Appeal from the District Court of the United States for the Eastern District of New York. Appeal from a decree awarding $12,500 to the libelant for salvage services rendered to the steamship Ravn. The libelant appeals, claiming the award to be inadequate. Edward G. Benedict (Everett, Clarke & Benedict, of counsel), for appellant. Haight, Sanford & Smith (Charles S. Haight and Clarence B. Smith, of counsel), for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. While the salvage award in this case is moderate, we cannot find any violation of correct legal principles upon the part of the District Court, or any failure to exercise the discretion vested in it as the court of the first instance "in the spirit of those decisions which high judicial tribunals have recognized and enforced." The Bay of Naples, 48 Fed. 737, 1 C. C. A. 81. The facts appearing in the record are wholly insufficient to justify an appellate court in disturbing a salvage award. The decree of the District Court is affirmed, without interest, and with the costs of this appeal to the appellee.

SOUTHERN OIL CO. v. BALLARD.† (Circuit Court of Appeals, Fifth Circuit. November 3, 1911.) No. 2,227. In Error to the Circuit Court of the United States for the Southern District of Georgia. Wm. W. Osborne and A. A. Lawrence, for plaintiff in error. H. D. D. Twiggs and Simon N. Gazan, for defendant in error. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. On the facts, the fellow servant doctrine was not involved, nor did the case turn upon the proposition that a master employer must furnish a safe place to work, but rather on the question how far the plaintiff below assumed the risk in the place he was called to work. Where a carpenter is called to work in and about moving machinery, by adding to or repairing the same, he assumes the risk as to all apparent dangers, but not as to undiscovered hidden dangers, of which the master is or should be aware and does not warn him. Under the evidence, the case was necessarily submitted to the jury, and the instructions given by the court show no reversible error. The judgment of the Circuit Court is affirmed.

STALEY et al. v. DERDEN. (Circuit Court of Appeals, Fifth Circuit. December 5, 1911.) No. 2,199. Appeal from the Circuit Court of the United States for the Northern District of Texas. R. S. Neblett, for appellants. W. J. McKie and Horace Chilton, for appellee. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. This is an appeal from an interlocutory order granting an injunction regulating the delivery pendente lite of the reserved share or

† Rehearing denied December 5, 1911.

royalty conceded to belong to the complainant below of the one-eighth part of all oil produced and saved upon certain premises. The said order seems to be a proper conservative order necessary to protect the complainant's conceded interest, and as such it should not be set aside for any of the objections set forth in the assignment of errors. The order appealed from is affirmed.

STANDARD BREWERY v. CROWN CORK & SEAL CO. (Circuit Court of Appeals, Seventh Circuit. April 11, 1911.) No. 1,721. Appeal from the Circuit Court of the United States for the Northern District of Illinois. See, also, 174 Fed. 252. Louis C. Raegener and William O. Belt, for appellant. R. H. Parkinson, Edwin G. Baetjer, and James Q. Rice, for respondent.

PER CURIAM. Appeal dismissed, on motion of counsel for appellant.

TEXAS & P. RY. CO. v. AMERICAN TIE & TIMBER CO.† (Circuit Court of Appeals, Fifth Circuit. December 5, 1911.) No. 2,163. In Error to the Circuit Court of the United States for the Northern District of Texas. T. B. McCormick and Hiram Glass, for plaintiff in error. R. W. Rodgers and R. P. Dorough, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. This action is one brought to recover damages under section 8 of the act to regulate commerce. Act Feb. 4, 1887, c. 104, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159). The questions involved are whether there was a joint rate lawfully established between certain points on the Texas & Pacific Railway and certain other points on the Union Pacific Railway on cross-ties, and, if so, whether the plaintiff in error disregarded and refused to comply with the same, and therein and thereby unlawfully discriminated against the defendant in error. On this state of the case we have no doubt as to the jurisdiction of the court. Under section 8 reasonable counsel fees are authorized to be fixed by the court in every case of recovery. The amount allowed for counsel fees in this case appears to be reasonable, in the light of the record and our judicial knowledge of the services rendered. Upon an inspection of the whole record, we find no reversible error in any of the rulings below. The judgment of the Circuit Court is affirmed.

UNION CASTLE MAIL S. S. CO., Limited, et al., v. THOMSEN et al. (Circuit Court of Appeals, Second Circuit. October 23, 1911.) No. 189. In Error to the Circuit Court of the United States for the Southern District of New York. See, also, 190 Fed. 536. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We understand from the petition of the plaintiffs below that they do not desire to present additional testimony and do not wish a new trial of this action. We understand, also, that they are willing to stand on the record as made, and that they prefer, instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint, in order that they may carry the case to the Supreme Court without further delay. If we are correct in this supposition, we are prepared to recall the mandate, order a rehearing, reverse the judgment, and direct the Circuit Court to dismiss the complaint.

UTE COPPER CO., Appellant, v. BINGHAM AMALGAMATED COPPER CO. (Circuit Court of Appeals, Eighth Circuit. August 21, 1911.) No. 3,564. Appeal from the Circuit Court of the United States for the District of Utah.

†Rehearing denied December 26, 1911.

For opinion below, see 181 748. Charles C. Dey and A. L. Hoppaugh, for appellant. Young & Snow appellee.

PER CURIAM. Dismissed without costs to either party in this court, per stipulation.

VICTOR TALKING MACHINE CO. v. AMERICAN GRAPHOPHONE CO. (Circuit Court of Appeals, Second Circuit. November 13, 1911.) No. 94. Appeal from the Circuit Court of the United States for the Southern District of New York. Philip M. C. A. L. Massie, and Ralph L. Scott, for appellant. Horace Pettit, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree (189 Fed. 359) affirmed, on consent.

WHITNEY v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. September 18, 19 No. 1,992. Appeal from the Circuit Court of the United States for the rict of Idaho. See, also, 176 Fed. 593. Carey & Kerr and Hardy & Sa for appellant. C. H. Lingenfelter, U. S. Atty.

PER CURIAM. Pu nt to telegraphic consent of counsel for appellee, motion to dismiss ap granted.

WILSON, Appellan PLUTUS MINING CO. et al. (Circuit Court of Appeals, Eighth Circ September 19, 1911.) No. 3,504. Appeal from the Circuit Court of the ited States for the District of Utah. See, also, 174 Fed. 317, 98 C. C. A 9. Alfred L. Booth, for appellant. A. L. Hoppaugh and Charles C. Dey, appellees.

PER CURIAM. Dissed, with costs, for want of prosecution, on motion of appellee.

LEHIGH VALLE R. CO. v. UNITED STATES et al. (Commerce Court.) No. 49. Suit by th Lehigh Valley Railroad Company against the United States; Interstate mmerce Commission and Henry E. Meeker, intervening. On motion for prelinary injunction. Denied. Frank H. Platt (E. H. Boles, John G. Johnson, a Everett Warren, on the brief), for petitioner. Blackburn Esterline, Sp. sst. Atty. Gen. (James A. Fowler, Asst. Atty. Gen., on the brief), for the ited States. Charles W. Needham, for Interstate Commerce Commission. William A. Glasgow, Jr., for intervening shipper. Before KNAPP, Presidingudge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

PER CURIAM. Without expressing any opinion as to whether the petition and supportir affidavits disclose a state of facts which, if established on the trial of thcase, would entitle the petitioner to the relief prayed for, it is the judgmen of the court, in view of the matters set forth in the report of the Commissio which is made a part of its order, and the presumptions of the validity o the order, that the motion for a preliminary injunction should be denied, nd it will be so ordered.

END OF CASES IN VOL. 190.